GAUTENG DIVISION, PRETORIA

CASE NO: CC 82/2017

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

6 September 2024

[redacted]

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 Odwa Masiza)	

JUDGMENT – SENTENCE

(Uzani (3))

SPILG, J:

6 September 2024

INTRODUCTION

1. BP Southern Africa (Pty) Ltd ("*BP*") was found guilty under s 29(4) of the Environmental Conservation Act 73 of 1989 *("ECA")* for failing to obtain the required written environmental authorisation to construct filling stations, including associated structures and infrastructure, or other facilities for the underground storage of petrol and diesel. Petrol and diesel fall within the definition of dangerous goods and their storage is a controlled activities which required such authorisation under s 22(1) of ECA.

   The judgment is reported as *Uzani Environmental Advocacy CC v BP Southern Africa (Pty) Ltd* [2019] ZAGPPHC 86 (see also 2019 (5) SA 275 (GP); [2019] 2 All SA 881 (GP)). The judgment will be referred to as *Uzani (1)*.

2. The convictions arose because BP was found to have contravened s 22(1) read with ss 21(1) and 29(4) of ECA, together with item 1 (c) of Schedule 1 and Schedule 2 of Government Notice R.1182 of 5 September 1997.

   The convictions were in respect of counts 1, 2, 5, 6, 8, 9 and 11 to 21.[1]

   Each count represents one of the filling stations constructed by or on behalf of BP.

3. In terms of s 29(4) of ECA any person who contravenes s 22(1) is guilty of an offence and liable on conviction to a fine or to imprisonment.

   Aside from the imposition of a sentence under s 29(4), in terms of s 34(3) of the National Environmental Management Act 107 of 1998 ("*NEMA*"), a person who is convicted of an offence under any provision listed in Schedule 3 of that Act, and in addition to any other punishment imposed, is subject to pay damages, or compensation or a fine equal to the amount which the court must assess is *"the monetary value of any advantage gained or likely to be gained by such person in*

[1] BP was acquitted on four other counts

consequence of that offence", or alternatively require the offender to take remedial measures. This is the current wording of the section.

The assessment is made pursuant to a summary enquiry which is expressly provided for at the commencement of the section.

4. When the prosecution applied for an order to hold a post-conviction s 34(3) enquiry, the first question this court had to answer was whether a contravention of s 22(1) read with s 29(4) of ECA was a listed Schedule 3 offence under NEMA.

5. In a judgment delivered during May 2020 and cited as *Uzani Environmental Advocacy CC v BP Southern Africa* [2020] ZAGPPHC 222 (" *Uzani 2*") I held that it was.

   This was by reason of applying s 12(1) of the Interpretation Act 33 of 1957 read with s 11 of the same Act, and if needs be by considering the purpose of NEMA and its impact on ECA as set out in *Minister of Water and Environmental Affairs and another v Really Useful Investments 219 (Pty) Ltd and another* 2017 (1) SA 505 (SCA) at paras 29 and 30.[2]

6. I also held in *Uzani 2* that the purpose of s 34(3) in imposing sanctions over and above an ordinary sentence was to require a disgorgement of profits if there either had been a degradation of the environment at one of the filling stations in respect of which BP has been convicted or that, had BP applied when it should have, it would not have obtained authorisation prior to undertaking the construction or upgrading of the filling station in question and one other aspect which I will come to later.[3]

   It was however first necessary to determine if the requirements to hold an enquiry had been triggered. The reason is that the case made out at the trial did not have to rely on an actual degradation of the environment, but only that there had been

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[2] See *Uzani (2)* at paras 95 to 106

[3] See *Uzani (1)* at paras

a contravention of the prohibition against constructing or upgrading a facility without prior authorisation which BP had admitted when it made an application under s 24G of NEMA that it had " *commenced with a listed or specified activity without an environmental authorisation and contravention of section 24F (1).*"[4]

7. I therefore decided that a s 34 (3) enquiry should proceed, initially to determine whether there has been any incident of degradation of the environment in respect of the filling stations to which counts 12 to 21 related and also whether environmental authorisation would have been given if a proper application complying with all the requirements of ECA at the time had been complied with or if the NEMA requirements are less onerous in respect of environmental authorisation then, in addition, from the date when the NEMA requirements became effective in relation to obtaining prior approval for the development in question.

8. If the conclusion of this first leg of the enquiry found that there was no degradation or that environmental authorisation would have been given if applied for at the time or the one other aspect which I will come to applied, then that would end the enquiry.

9. However it was also necessary to consider whether NEMA could apply at all having regard to the dates when the offences were committed. Uzani conceded that the convictions under all the counts preceding count 12 were committed prior to 29 January 1999, being the date when NEMA came into effect. The date of the offences under counts 12 to 21 occurred after May 1999 and up to March 2002. [5]

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[4] *Uzani (1)* at para 117

[5] See Appendix to the Order of 3 October 2022. See also Uzani (2) at paras 12, 13 and 20. Although count 12 is mentioned in para 13 it was erroneously omitted in para 20).

10. In *Uzani (2)* it was found that s 34 (3) of NEMA was amended by Act 14 of 2009 with effect from 18 September 2009 which was well after the offences were found to have been committed[6]. I held that:

> "*The distinction between s 34(3) pre- and post- the September 2009 amendment is that instead of awarding damages or compensation for past infractions a court can, instead, require that the person convicted takes sufficient remedial measures (by which I understand to include rehabilitative steps) to restore the situation to the status quo preceding the degradation and ensure that it is not repeated.*"[7]

11. Later in that judgment I noted that it may become necessary to hear argument on whether the amendment to s 34(3) by the introduction of sub section (b) could apply, bearing in mind that it was introduced after the offences were committed.[8]

12. The prosecution did not pursue an order for the imposition of remedial measures. As much as this court's *prima facie* view is that rehabilitation of the environment to remedy or prevent possible degradation is an objective of the legislation which should be given effect to, in cases where s 34 (3) is applicable (and precisely because the remedies under subsections (a) and (b) are not mutually exclusive)

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[6] Prior to the 2009 amendment s34(3)(a) provided:

> *" Whenever any person is convicted of an offence under any provision listed in Schedule 3 the court convicting such person may summarily enquire into and assess the monetary value of any advantage gained or likely to be gained by such person in consequence of that offence, and, in addition to any other punishment imposed in respect of that offence, the court may order the award of damages or compensation or a fine equal to the amount so assessed."*

Since the 2009 amendment, the subsection reads:

> *"Whenever any person is convicted of an offence under any provision listed in Schedule 3 the court convicting such person may summarily enquire into and assess the monetary value of any advantage gained or likely to be gained by such person in consequence of that offence, and, in addition to any other punishment imposed in respect of that offence, the court may order—*
>
> *(a) the award of damages or compensation or a fine equal to the amount so assessed; or*
>
> *(b) <u>that such remedial measures as the court may determine must be undertaken by the convicted person.</u>"*

The underlined portion represents the only material change to s 34(3)

[7] *Uzani (2)* at para 105

[8] *Uzani (2)* at para 148

the alteration to the section in September 2009 cannot be imposed retrospectively to offences committed prior to the amendment.[9]

Although s 29(7) of ECA permits a court to order rehabilitation, this appears to be limited to the specific order of conviction under s 29(4) of that Act. In any event the prosecution has not submitted that the court should invoke its power to do so- possibly because such an order requires the oversight of the relevant Minister, Administrator or local authority concerned.[10]

13. After hearing evidence I was satisfied that the summary enquiry should continue in respect of count 21 which concerned the BP Rabie Ridge filling station and counts 12 onwards.

14. The reason for continuing with the summary enquiry in relation to count 21 differed in some respects from those in relation to the other counts.[11]

15. In amplification: I was satisfied that there had been environmental degradation at the BP Rabie Ridge filling station (count 21) after BP applied for a s24G rectification under NEMA and up until April 2016 had failed to disclose such degradation at any relevant time during the s 24 G rectification process.

The effect was that as from December 2010 the s 24G application did not equate with the s 22 (1) report under ECA, thereby exposing risk to either people or the environment, such as the groundwater and soil. Moreover the authorisation that BP since obtained was not adequate to give the necessary comfort that there was compliance with environmental assessment requirements.

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[9] The word *"or"* in an enactment and having regard to its context may mean *"and"* or *"and/or"*. See Miller J (at the time) in *Barclays National Bank Ltd v Love* 1975 (2) SA 514 (D) at 515A to D and *Bouwer v Stadsraad van Johannesburg* 1978 (1) SA 624 (W) at 631H to 632B and *Minister of Agriculture v Federal Theological Seminary* 1979 (4) SA 162 (E) at 177D

[10] Section 29(7) of ECA provides:

> *"In the event of a conviction in terms of this Act the court may order that any damage to the environment resulting from the offence be repaired by the person so convicted, to the satisfaction of the Minister, the Administrator concerned, or the local authority concerned."*

Section 29(7) is also referred to later in the context of the legislative intent to give effect to the s 24 environmental protection rights under the Constitution

[11] The filling stations in respect of counts 12 to 21 are identified in an appendix to the order made on 3 October 2022.

16. In relation to count 21, the court exercised its discretion to continue with the s 34(3) summary enquiry and assess the monetary value of any advantage gained or likely to be gained by BP to consider, in addition to any other punishment imposed in respect of that offence, a fine equal to the amount so assessed or such other amount having regard *inter alia* to any relevant factor including whether the spill in December 2010 had been contained within the perimeter of the filling station by April 2016 and whether BP intended establishing independently if the December 2010 spill has affected the groundwater or the environment (such as soil conditions or other pollution) for the inhabitants of Rabie Ridge who live downstream from the filling station.

    The court then required an affidavit dealing with the financial records of BP Rabie Ridge with supporting documents to be provided to the court and to the prosecution relating to the period from December 2010 to April 2016.

17. That then dealt with count 21. In relation to counts 12 to 20 and also in relation to count 21 I was satisfied that the s 24G reports were not compliant with the legislation at the time and furthermore that BP had failed to either make a full disclosure or comply with the requirements in respect of monitoring the groundwater.

18. Here again I found that the s 24G NEMA reports did not equate with a s 22(1) ECA report and the authorisations that BP since obtained were not adequate to give the necessary comfort that there was compliance with environmental assessment requirements. Moreover, BP's failure to obtain, at the time that the s 24G rectification and authorisations were applied for during about June 2005, the type of environmental impact report required under s 22 of ECA exposed either people or the environment to risk in respect of the groundwater and soil.

19. In relation to these counts the court also exercised a discretion to continue with the enquiry and to assess the monetary value of any advantage gained or likely to be gained by BP in consequence of these offences and consider, in addition to any other punishment imposed in respect of these offences, a fine equal to the

amount so assessed or such other amount having regard *inter alia* to any relevant factor.

20. In the exercise of its discretion, the court found that there was a risk of a disconnect between the profits which may have been derived from the continued operation of the filling stations and the failure to comply with environmental assessment requirements but that s 34 (3) of NEMA does not only contemplate profits derived by an accused directly or indirectly from the unlawful operating of a filling station by its own management or by another from which it derives profits. I considered that s 34 (3) was broadly worded and a court convicting under a schedule 3 offence is enjoined, in its discretion, to assess the monetary value of *any advantage gained or likely to be gained by such person in consequence of that offence and ... in addition to any other punishment, may order ... a fine equal to the amount so assessed."*

21. I considered that an advantage" *likely to be gained*" in consequence of such an offence is the maintenance in this country of the perception that BP is an environmentally conscious, responsible and compliant citizen, thereby encouraging members of the public to purchase products from its outlets. I also considered that such perception is created or maintained by BP's advertising campaigns promoting such an image and BP itself appearing to recognize such a correlation for otherwise it would not incur the advertising costs involved in promoting such an image

22. At that time, I therefore considered that the extent to which a correlation can be assessed between the advertising expenditure incurred in promoting BP as an environmentally conscious, responsible and compliant citizen on the one hand and the advantage likely to be gained in consequence of the offence in respect of which it has been convicted was a matter for discovery and possibly subpoena.

23. However the fact that there are such advertising campaigns to promote the accused's image in the eyes of the consumer was sufficient at that stage to warrant the supply of such information. I therefore directed that in order to determine the amount of the fine in respect of these other counts, BP was to

provide detailed financial records of its annual advertising spend, its audited annual financial statements and other documents relevant to its advertising campaigns.

24. This judgment therefore concerns both the sentence to be imposed on the accused under s 29 (4) of ECA and whether in addition an award should be made under s 34(3) of NEMA of damages or compensation or a fine equal to the monetary value of any advantage gained or likely to be gained in consequence of the offence, and if so in what amount.

25. The balance of this judgment will be divided between a recital of the relevant sanctioning provisions in NEMA and ECA and a consideration of some general sentencing principles which appear to apply.

I will then consider the evidence produced and make findings in respect of the s 34 (3) NEMA award sought by the prosecution followed by a similar process in respect of s 29(4) of ECA.

Finally it will be necessary to consider the costs sought by the prosecution from BP both under s 34B, under NEMA generally and Uzani's request for advanced cost of an appeal.

At this stage it is necessary to indicate that I have reconsidered costs and that I will be dealing with it in a separate judgment to be delivered later.

SANCTIONS FOR OFFENCES UNDER S34(3) OF NEMA AND S 29 (4) OF ECA

Section 34(3) of NEMA

26. Earlier I dealt with the applicable provisions of s 34(3) at the time of the offences being those in force prior to the September 2009 amendment.

Accordingly the court is only concerned with whether it should award damages, compensation or a fine equal to the monetary value of any advantage gained or

likely to be gained as a consequence of the commission of the offence by an accused as provided for in that section prior to the 2009 amendment.[12]

It is also only concerned with the convictions in respect of counts 12 to 21. The reason for this has already been explained.

27. Two aspects concerning this section can be conveniently dealt with now.

The first is that the prosecution did not persist with claiming damages or compensation for any individual who may have been affected as a consequence of the commission of the offences.

The court is therefore left only to consider an appropriate fine in respect of the convictions under counts 12 to 21.

28. The second aspect is the contention advanced by the prosecution that the court has no discretion but is obliged to impose a fine of not less than the full monetary value of the advantage gained or likely to be gained in consequence of the offence.

29. *Mr Roux* on behalf of BP, raised a number of compelling arguments to challenge Uzani's submissions. The first is that the section gives the court a discretion and if the legislature intended to impose a mandatory fine it would have prefaced the amount of the sanction which could be imposed with the word "*shall*".

30. In my view the section as it stood prior to the 2009 amendment couched with two discretionary provisos in a single sentence leaves no room for debate. The court enjoys a discretion both in relation to holding an enquiry and, if it does so, whether it should impose any fine. This is because the word "*may*" qualifies both stages and is therefore to be understood in its second iteration to mean "*up to*". [13]

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[12] Although BPs heads of argument cited the current wording of s34(3) it did not include subsection (b). There is therefore no substantive issue raised by its reference to parts of the present Act and not as it was prior to 2009.

[13] The post-2009 amended section is no different. The word "*may*" similarly prefaces the subsection (a) entitlement to make the award or impose a fine

Moreover, if the sentence range , once the court elects to hold an enquiry, can be either nil or the full value of the benefit derived from the commission of the offence, then it follows that the court can impose a fine of any amount in between.

Section 29(4) of ECA

31. Unlike the limited application of NEMA's s 34(3) to only counts 12 to 21, s 29(4) applies to all the counts on which BP has been convicted.

The parties are agreed as to the applicable provisions of s 29(4) at the time of the commission of the offences.

32. Since the amendments to the section only came about in 2008 (by Acts 44 of 2008 and 59 of 2008) which was well after the commission of all the offences, the following wording of s 29(4) applies to all the counts:

> *"Any person who contravenes a provision of section 22 (1) or 23 (2) or fails to comply with an authorisation issued under the said provisions shall be guilty of an offence and liable on conviction to a fine not exceeding R100 000 or to imprisonment for a period not exceeding 10 years or to both such fine and such imprisonment, and to a fine not exceeding three times the commercial value of anything in respect of which the offence was committed."*[14]

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[14] Since the 2008 amendments the court's sentencing powers under s29(4) have not only broadened to convictions under other provisions of ECA but has also materially increased. The section now reads:

> *Any person who contravenes a provision of section 20 3 (1), 20 (9), 22 (1) or 23 (2) or a direction issued under section 20 (5) or fails to comply with a condition of a permit, permission, authorisation or direction issued or granted under the said provisions shall be guilty of an offence and liable on conviction to a fine not exceeding R5 million or to imprisonment for a period not exceeding five years and in the case of second or subsequent conviction, to a fine not exceeding R10 million or imprisonment for a period not exceeding 10 years or in both instances to both such fine and such imprisonment, and in addition to a fine not exceeding three times the commercial value of anything in respect of which the offence was committed.*

However the Adjustment of Fines Act 101 of 1991 has relevance. In its terms the maximum fine of R100 000 was increased to R400 000.

33. The first aspect to be observed in the wording of s29(4) is that two sets of fines are contemplated. The first is a fine not exceeding the prescribed amount per count (which both parties agree is now R400 000[15]) which is then followed by an additional fine that a court can impose that does not exceed three times the commercial value of anything in respect of which the offence was committed.

    The intention is clear. A fine of R100 000 may be a slap on the wrist and worth the transgression to a large corporate. An additional fine which bears some correlation to the commercial value of what was at stake may have the desired deterrent effect

34. Mr Roux argues that *"the commercial value of anything in respect of which the offence was committed"* is limited to a consideration of the fuel related assets only and not inclusive of non-fuel related assets. He also contends that a cost approach in relation to the assets, rather than an income based approach is intended by the legislature.

35. BP therefore submits that the commercial value is limited to the historic asset value of the filling stations, but only for fuel-related assets, adjusted for inflation. It is agreed that this would amount to R47 112 970 based on the determination by Mr Greg Harman who BP had called[16]. All his other valuations based on other possible approaches to interpreting the section were also accepted.

36. Mr Erasmus submitted that the commercial value in terms of s 29(4) is a reference to both fuel and non-fuel related assets at each filling station. If Mr Erasmus is correct then, if the court applied the historic asset value adjusted for inflation in respect of both, the amount would be R 184 998 275.[17]

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[15] See BP's HOA at para 11

[16] Uzani did not call Mr Riley who was its witness and indicated that it would rely on BP's expert

[17] See BP's HOA at para 38.1

37. But Uzani goes further. It submits that not a cost approach, but an income approach is intended to be the yardstick under s 29(4).

The income approach determines the value of BP's business activities carried out at each of the filling stations to which the offences relate. In respect of both fuel and non-fuel operations this would total R 354 531 520 of which R 235 721 807 accounted for the fuel related business only.

38. I agree with BP's submission that regard must be had to the nature of the offence for which it was convicted , and indeed could be convicted, at the time it was committed.

At the time of the commission of the offences for which BP was convicted under s 22(1) of ECA the listed activity which could not be undertaken without written authorisation was limited to the construction or upgrading of structures or storage for any dangerous or hazardous substance as defined.

It did not then include the development and related operation of facilities or infrastructure for the storage and handling of such substances (now referred to as a dangerous good). This only occurred when activity 14 in the 2014 listing notice 1 was published under NEMA and activity 10 was published in the 2014 listing notice 3.

39. Accordingly, at the time of the commission of the offences, BP could only be convicted in respect of its constructions or upgrades but not in relation to the operation of its facilities or infrastructure.

40. It seems to me that prior to 2014 the legislature could only have contemplated a fine in relation to what may be termed the bricks and mortar because that is the subject matter of the offence. If it had intended to go further than one would have expected different wording at that time.

Mr Erasmus' argument on behalf of Uzani that the 1998 Guidelines expressly included the activity (ie operation) of service stations and the like, as attractive as

it is, does not take into account that Guidelines are not primary or delegated legislation. The court is confined to consider the will and intention of the legislature through its official instruments. Guidelines are not such instruments.

Mr Erasmus also refers to the Constitutional Court judgment of *Fuel Retailers.* and the Supreme Court of Appeal ("*SCA*") case of *MEC for Agriculture* 2006 (5) SA 483 regarding the purpose of the legislation. I do not read these cases to deal with the narrow issue of interpreting a penal provision which is guided by its own considerations precisely because it is penal in nature.

41. The introduction of activity 10 and 14 in 2014 to the list of offences if authorisation was not obtained colours the interpretation which s 29(4) may now have to be given. This does not create an inconsistency; the constant remains the words "*the commercial value of anything in respect of which the offence was committed*" which can only relate back to the subject matter of the offence. Prior to 2014 the subject matter of the offence was the construction or upgrading of a facility for any dangerous or hazardous substance or the like, whereas in 2014 the subject matter of the offence related to the development and related operation of such a facility.

42. The issue of whether non-fuel assets are to be included is also answered by the activity identified as activity 1(c) which requires a direct relationship between the existence of the dangerous or hazardous substance to either transportation routes and structures or to manufacturing, storage or handling facilities. Once again a penal provision must be narrowly construed and it appears to me that the intention was not to extend the determination of the commercial value to beyond that directly related to the existence of the substance at a location without proper authorisation, at least prior to the 2014 introduction of the other activities.

43. It suffices at this stage to determine that a cost approach and not an income approach in respect of only fuel related assets applied at the time the offences were committed.

44. The appropriate cost approach method will be considered in more detail later.

GENERAL CONSIDERATIONS

45. This court has already found that the award which s 34(3) contemplates Is concerned with providing redress occasioned by the degradation for which the accused has been found guilty in the form of damages, compensation or a fine or requiring it to undertake and bear the cost of remedial measures, by which I understand to mean both rehabilitative and removing the source of the risk or taking adequate steps to prevent it from occurring or reoccurring,

46. Understood in this way, and provided it is so applied to achieve that objective, s 34(3) cannot amount to double punishment

47. The difficulty which this court dealt with in an earlier judgment was whether it could require BP to undertake remedial measures which is an option provided under s 34(3)(b) where this was not a competent sanction prior to its introduction in 2009

    I was of the view that it should not be applied retrospectively and therefore only a s 34(3)(a) award of damages or compensation or a fine could be imposed in the circumstances of the present case

48. The next issue is the sentencing sequence. In my view this court should consider an award under s 34 (3) prior to sentencing under s 29(4). The reasons are twofold. Firstly, s 34(3) seeks to achieve a fundamental redress of the damage caused or which might be caused by the legislative breaches. Accordingly any award should not have to take into account any other penal considerations which may dilute a primary objective of the legislation; the preservation of the environment and the other aspect which I will address later.

49. The other reason is that while s 34(3)(a) seeks to match the cost of the degradation or its repair to a calculable sum of money that can be awarded by way of damages, compensation or a fine, considerations which apply to sentencing must take into account any factor which ought to be considered in the interest of justice. These would include taking into account any other adverse consequences suffered by an accused in consequence of his or her actions and

questions of affordability if there have already been adverse financial consequences. [18]

50. There still remained the question of whether the administrative fines, which were relatively no more than a slap on the wrist, should be taken into account And deducted from any amount awarded under s34(3) of NEMA or the fine imposed under s 29(4) of ECA.

The nature of orders the court can make under s 34(3) appear to bear a direct correlation with the monetary value of any advantage gained or likely to be gained or the cost of rehabilitation but with a maximum cap in relation to any monetary award. Therefore the considerations that ordinarily come into contention when considering an appropriate sentence do not necessarily apply.

51. The considerations which a court must take into account when imposing a sentence under s 29(4) are those which are normally taken into account by a sentencing court. They would require a court to take into account mitigating and aggravating features within the context of the triad of factors.

52. The general purpose of imposing a sentence is said to be fourfold; retributive and preventative, rehabilitative (reformative) and to act as a general deterrent. See *S v Rabie* 1975 (4) SA 855 (A). The retributive aspect has a tendency to dominate (*S v Karg* 1961 (1) SA 231(A)) although courts are enjoined to temper the punishment with some degree of mercy. In *Rabie* at 862G-H Holmes JA concluded that: "*Punishment should fit the criminal as well as the crime, be fair to society, and be blended with a measure of mercy according to the circumstances*".

53. The extract from *Rabie* recognises that the imposition of a suitable sentence must have regard to the nature of the crime, must individualise the offender by having regard to his or her personal circumstances and must take into account the interests of society. In the present case the interests of society is the right to

[18] By way of illustration, the payment back of money appropriated in a case of theft or fraud is a factior to be weighed

environmental protection under s 24 of the Constitution subject to the limitations imposed by a law of general application to the extent that such limitation is reasonable and justifiable in an open and democratic society based on the considerations set out in s 36 of the Constitution. I will return to this.

54. Courts regularly place more emphasis on the deterrent and general retributive factors with a commensurate reduced concern for individualising the punishment. This is done when a court considers it necessary to make an example of the offender. Nonetheless one should be conscious of the fact that giving more weight to these factors will result in less weight being given to the individual circumstances of the offender.

    Provided the basis can be supported factually and provided the societal objective is rational, the imposition of a severer sentence to set an example does not appear to be objectionable. It occurs regularly.

55. In order to determine an appropriate sentence under s 29(4) it is advisable to deal with the facts under the three broad classifications mentioned in *Rabie* and *Zinn*.

56. Finally; subject to recognising that the maximum sentence is reserved for the most egregious cases a court will weigh all mitigating and aggravating factors before deciding on an appropriate sentence. Since s 29 (6) deals with a serial offender in respect of the same offence, by providing for additional fines and periods of imprisonment, the fact that the accused may be a first offender does not result in an automatic lowering of the amount which a court can impose as the maximum sentence.

SECTION 34(3) LIABILITY AND SANCTION

General

57. After finding that a contravention of s22(1) of ECA could still attract an enquiry under s34(3) of NEMA it became necessary to consider whether it should. This

is because the way Uzani presented its case, did not require it to prove that there was an actual degradation of the environment, only that that there had been a contravention of the prohibition against constructing or upgrading a facility without prior authorisation.

58. Also of relevance is that on an analyses of s 34(3) I concluded that[19];

a. it is not a penal but a restorative provision

b. it is not limited to providing for the rehabilitation of the environment but has always been directed to the disgorgement of benefits which the offender obtained "*during the period in which in which it conducted its activities without lawful authorisation at the expense of either those who, as a consequence, sustained damage or incurred losses for which they should be compensated or that a fine should be imposed*" but that *"the sum total of all these amounts whether in the form of an award or a fine cannot exceed the monetary value of the advantage gained or likely to be gained as a consequence of the contravention".* [20]

This also prefaces the additional factor I had mentioned earlier.

c. there is no requirement that the offender intends to cause harm to others by reason of the failure to obtain authorisation. In other words, fault or a culpable act directed at a specific person is not a requirement for either the triggering of a s 34(3) enquiry, the determination of the person entitled to receive the award or compensation, or for the determination of the quantum. It suffices that the activity itself was not authorised.

The limit of liability is that the sum total of all the amounts whether in the form of an award or a fine cannot exceed the monetary value of the advantage gained or likely to be gained as a consequence of the contravention;

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[19] see generally paras 116 to 149
[20] see para 124

d. the amount of damages or compensation under s34(3) may be in the form of actual pecuniary loss or non-pecuniary loss such as general damages;

e. s 34(3) is intended to cover;

i. awards to individuals adversely affected during the time the offender engaged in its unauthorised activity, which does not make this element part of a fine but part of the proceeds of the unlawful activity which were to be paid over to those who had sustained damage or loss;

ii. a fine which may accrue to the State up to value of the benefit gained.

iii. and since the 2009 amendment, s 34(3) enables the court to grant a mandatory order requiring the offender to effect remedial measures;

59. Moreover the court also considered that s 34(3) did not expressly require a causal link between the failure to obtain authorisation and any degradation, it being sufficient if the degradation occurred during the period when the activity remained unauthorised. Nor did the section appear to provide a defence that degradation would have occurred even if proper environmental authorisation had been obtained

60. Nonetheless, at a substantive level and in order to enable a court to exercise its judicial discretion, rather than provide what would amount to a forfeiture order simply because the offended failed to obtain authorisation, the court considered that s 34(3) required "*some link between the failure to obtain authorisation and either an event during that period which resulted in environmental degradation (or still can), or that authorisation could never have been obtained prior to the activity in question being undertaken. Once that link is established then anyone who has suffered damage or is entitled to compensation is entitled to claim for actual loss*

sustained up to the value of the benefits derived by the offender during the period in question. [21]

61. A number of other factors were raised in paras 138 to 141 of the *Uzani (2)* judgment which I believe reinforced the conclusion reached that a s 34(3) enquiry can only be triggered if either there was environmental degradation or that the structure or facility as constructed would not have qualified for environmental authorisation [22]. I again will refer to a further factor. In my view:

> *" The former event would enable those whose health may have been compromised or who suffered financial loss as a consequence of actual degradation or pollution to claim. The latter situation would enable competitors who were entitled to a level playing field of compliant structures and facilities to claim an amount equal to the benefit accruing to the offender as a consequence of it operating a facility that did not meet environmental authorisation requirements."*[23]

62. I therefore concluded that s 34(3) was only triggered if a causal link (taking into account both causation and remoteness) is established between the consequences of the failure to obtain authorisation and the purpose of the environmental legislation which regulates potentially environmental sensitive activities and which occurred during the period when the activity remained unauthorised.

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[21] At para 137. This was expanded on as follows in the same para:

> *"In other words, for the purposes of criminal proceeding, the failure to obtain authorisation per se is a matter between the State and the offender. Where however during the period when proper authorisation had not been obtained and some degradation occurred which can be linked to the offender then those who sustained damages or loss during the period of want of authorisation will be entitled to claim; so too in situations where authorisation could never have been obtained even if it had been sought prior to the construction in question. This also indicates that loss or damage can take a myriad forms, from actual physical harm caused by inflammatory chemicals, to loss of profits occasioned by contaminated water arising from a chemical seepage and to unfair competition by a person who could never have obtained authorisation for the facility from which it derived."*

[22] See para 142

[23] Id

63. As a consequence I considered it premature to exercise a discretion to investigate or enquire into the monetary value of any advantage BP may have gained without first determining;

    a. whether there had been environmental degradation at one of the filling station in respect of which BP was convicted; or

    b. whether BP would have been unsuccessful if it had sought authorisation prior to undertaking the construction or upgrading of the filling stations in question. [24]

64. The issue was also raised as to whether, absent such evidence, it was nonetheless competent to still embark on an enquiry. At para 144 of the judgment I concluded that an enquiry is intended to be conducted if the court is concerned that there may have been a degradation, that the facility would not have been in operation if authorisation had been sought prior to construction, or that the facility still poses a risk and said that:

    The court would be shirking its responsibilities if, in exercising its discretion, it did not weigh whether the authorisation that BP has since obtained is adequate to give the necessary comfort that there has been compliance with environmental assessment requirements and that the failure to obtain the type at*of environmental impact report required under s22 of ECA will not expose either people or the environment, such as groundwater, to risk.*[25]

65. A concern which engaged the court was essentially the environmental impact reports which would have been required when authorisation is sought prior to construction and which may have been by-passed, or that the s 24G rectification reports were inadequate. I concluded that if that was so, then the enquiry would be justified if only to remedy the situation by imposing a fine equal to the cost of

[24] at para 143
[25] see para 144

obviating the environmental risk or to direct remedial action if s 34(3)(b) applied, a matter on which I indicated at the time required argument.

66. The judgement in *Uzani (2)* proceeded to identify the evidence that was required to determine whether there had been any incident of degradation of the environment in respect of the filling stations to which the convictions under counts 12 to 21 related and also whether environmental authorisation would have been given if a proper application complying with all the requirements of ECA had been made at the time.

67. The court considered that the evidence ought to be available from the environmental impact assessment reports which had been compiled by Tholoane Sustainable Development and Environmental Consultants in respect of the s 24G of NEMA rectification reports BP had submitted in 2011.

68. There were also documents which BP had provided, including written information to other environmental consultants for the same purpose, namely Mills & Otten and Geomeasure Group Groundwater Environmental Consultants. The consultants in turn would have had regard to other documentation in compiling the report or assessments in question. In turn the reports and assessments would have been signed by individuals who could deal with the issues regarding whether there was any environmental degradation at the facilities by the time they were engaged and whether environmental authorisation would have been given if there had been compliance with the regulations prior to the construction or upgrade in question.

69. I however found that it would be premature to require the extensive disclosure sought by Uzani before undertaking the first leg of the enquiry under s 34(3).

70. These considerations resulted in the following substantive order being made in *Uzani (2):*

1. *An enquiry in terms of s 34(3) of the National Environmental Management Act 107 of 1998 will be held*

2. *The enquiry will initially determine whether there has been any incident of degradation of the environment in respect of the filling stations which are the subject matter of the convictions in respect of counts 12 to 21 and also whether environmental authorisation yeahwould have been given if a proper application complying with all the requirements of ECA at the time had been complied with or if the NEMA requirements are less onerous in respect of environmental authorisation then, in addition, from the date when the NEMA requirements became effective in relation to obtaining prior approval for the developments in question.*

3. *This matter is remanded to a date to be arranged*

71. The balance of the order dealt with the production by BP of relevant documents and the issuing of subpoenas. The full terms of this part of the order appear in *Uzani (2).*

72. Both parties prepared for the summary enquiry on the basis of the decision by the court that s 34(3) would be triggered if any one of the following events could be demonstrated:

    a. If there was environmental degradation at one of the filling stations in respect of which BP had been convicted; or

    b. if BP had properly applied when it should have, it would not have obtained authorisation prior to undertaking the construction of the filling stations in question; or

c. if the authorisations, which BP since obtained, were not adequate to give the necessary comfort that there had been compliance with environmental assessment requirements; or

d. if the failure to obtain the type of environmental impact report required under s 22 of the ECA exposed risk to either people or the environment, such as groundwater.

73. By this time, Mr Erasmus had informed the court that Uzani was not seeking damages or compensation but solely the imposition of a fine and that in order to determine the appropriate fine BP was obliged to disclose the monetary value of any advantage gained.

THE EVIDENCE LED BY UZANI RELEVANT TO THE ENQUIRY

74. This section will include evidence given during the main trial.

During the main trial Uzani called Prof van der Walt as an expert. I accept his evidence that filling stations pose significant threats to the environment which require proper specialist assessment by a multidisciplinary team before a considered decision can be made on whether the construction of a filling station should be authorised.

75. I am also satisfied that having regard to the evidence as a whole, the s 24G assessment process undertaken by BP was far from the more rigorous EIA that would have been undertaken if authorisation had been sought from inception. It did not help BP's cause that it failed to provide the s 24G reports during the initial hearings but when it was required to do so for the s 34(3) enquiry and the s 24G reports were produced, none of them were supported by either an expert or a specialist report. In my view, this was a fundamental failure on BP's part.

76. Uzani also called Mr.O'Beirne to consider the s 24G reports in order to determine whether on acceptance they could give sufficient comfort that there had been compliance with the environmental assessment requirements so as not to expose either people or the environment to risk.

77. It will also be recalled that the authors of the s 24G reports had all confirmed that their reports were based on what BP had told them and what they had observed during cursory site visits.

78. According to O'Beirne's testimony the s 24G reports were totally inadequate since they failed to assess whether there had been instances of degradation noted.

79. Subsequently BP provided a set of groundwater monitoring reports. However these were not historic reports but were compiled in 2021 for the filling stations in respect of which BP had been convicted. All the reports showed a low level of contamination.

80. The real concern was their report for Rabie Ridge (count 21).

81. It for the first time revealed that sometime before January 2011there had been a large fuel spill. At that stage it was said to be limited to 4000 litres.

THE EVIDENCE LED BY BP AT THE ENQUIRY

82. The important witnesses called on behalf of BP were Mr R, who provided an environmental context report, and Mr van der Westhuizen who provided a report on Filling Station Description and Standards

83. Mr R gave evidence as BP's expert on environmental assessment applications in connection with property developments in the building development, petro-chemical, mining, waste and industrial sectors. Because of my findings I am reluctant to divulge his full name.

84. Before dealing with his evidence it is necessary to say something about the purpose of expert testimony and the requirements which must be met before it can pass muster as expert testimony. Naturally factual evidence which the witness may relate remains on the record and is to be weighed with the totality of factual evidence.

85. Irrespective of the technical skill and expertise a person has, if he or she demonstrates partisanship then one of the qualifications to bring the opinion into the pool of evidence which a court should consider is wanting.

86. Experts are expected to differ on the fundamental principles which may apply or the methodology of their analysis. Nonetheless the line of reasoning must remain discernibly objective and with clear distinctions drawn between what the expert is requested to assume and what is part of his or her own independent research or investigation.

87. It is for these reasons that an expert is required to disclose the source of the information on which reliance is placed. If the information is assumed then the source must be identified. If the information is based on research or analysis then the source documents should be identified.

88. Where it is evident that the expert blurs the line between what he or she has researched as opposed what he or she was asked to assume, a court will be obliged to look more closely at the veracity of the opinion presented.

89. The basic requirement of expert testimony is that it is demonstrably objective and neutral. Moreover on the most critical issue of borehole monitoring and incident reporting the evidence presented was not based on proven facts or data. On the contrary when it was extracted from Mr R that he had seen some data it was referenced in either his report or in the documents BP had been required to disclose and produce, which in turn meant that the stated reliability of the purported data he claimed to have considered (on one of his versions) could not be demonstrated.

90. In *Jacobs and Another v Transnet Ltd t/a Metrorail and Another* 2015 (1) SA 139 (SCA) at para 15, Majiedt JA (at the time) referred to the overriding duty of an expert as being to provide independent assistance to the court by way of objective unbiased opinion in relation to matters within his or her expertise. In *Road Accident Fund v Madikane* [2019] ZASCA 103 at para 4 Weiner AJA (at the time) reaffirmed that the opinion must be based on proven facts, data or evidence. Moreover the facts, data or evidence upon which the opinion is based

must have been provided to the parties. See *Twine and another v Naidoo and another* [2018] 1 All SA 297 (GSJ) at para 18 (*per* Vally J).

91. in the present case Mr R made statements as if they were objective facts established independently by him.

This is evident from his evidence of 10 June 2022. By way of illustration he stated as a fact that the Regulations were to the effect that authorisation was in fact *not* required because of some exemption . He then backtracked to state that this is what the industry understood. He then was forced to claim that there was a debate at the time suggesting that it was advanced by those seeking to get a foot into what was hoped to be a lucrative field of environmental work.

Not once did Mr R suggest that, if true, it may equally have been by those who were advocating the position in support of reluctant petroleum companies.

92. More was to follow. When Mr R was asked about his present stance on whether authorisation was required, he again attempted to backtrack but eventually was compelled to concede that on actually looking at the regulation, in his expert opinion the exemption that he claimed was being relied on to relieve petroleum companies from the legislative obligation to obtain authorisation could not possibly apply.

93. Furthermore Mr R failed to answer questions directly. This dilutes the value a court can place on his opinion evidence, let alone his direct evidence.

In one exchange Mr R was asked to deal with whether borehole tests were in fact done. Mr R replied that he '*hoped that BP would have done the test*".

94. It is not an overstatement to say that his reply rendered the value of his report almost nil, and Mr R is experienced and intelligent enough to know this. He would have known that he could not as a professional assume the regularity of what BP was doing when the very analysis he was required to deal with before the court as an expert was to test that very proposition.

95. The fact that he claimed at one stage not to have asked BP for their borehole data when it was an essential part of his mandate as an expert would impact adversely on not only the methodology he applied but also why he refrained from making such a basic enquiry., if that was indeed the case. During evidence in chief he sought to induce the court to believe that he had obtained all the necessary data and that his opinion was based on going through them.

96. But matters became worse. Mr R also claimed that he had in fact seen the data when given to him for consideration but that he did not have it, nor was it produced by BP as was required in terms of this court's order. On this version, Mr R cannot claim not to have appreciated their relevance and the need to identify it properly in his report. Furthermore it means that BP fell fowl of this court's production requirements. In a case where the required information is exclusively within the possession of the other party but no explanation is offered for their non-production[26], then even in a criminal case the court is entitled, when weighing all the evidence to consider that the documents are likely to be against interest.

97. Mr. R did testify about the 4000 litre fuel spill. In his report he stated that he was informed that groundwater pollution was detected after a spillage incident in 2010. He claimed that the incident was properly reported to the authority and that it was managed" *in accordance with the applicable requirements of NEMA and the BP HSSE manual and that a remediation order was issued by the Department of Environmental affairs in 2018.*"

98. During his evidence it turned out that he knew at the time he wrote the report that the fuel spill was in fact 8000 litres (not 4000 litres), that the incident had not been reported to the relevant authorities either under s 30(3) of NEMA or at all, that the applicable provisions of the National Environmental Management Waste Act were not applicable when the incident occurred, that the requirements in BP's HSE manual had not been complied with and that the remediation order issued in 2018 was pursuant to a report of contaminated land without any

[26] It is to be borne in mind that when making discovery a party is obliged to also identify documents which were, but no longer are, in its possession.

reference being made to the 2010 fuel spill or that it had never been reported to the relevant provincial authority.

99. The court cannot ignore the fact that 8000 litres of fuel had been spilt, that corrective action had not been undertaken at the time or all by November 2011 and that the contamination was considered to be highly significant requiring urgent corrective action. It is also significant that ground water monitoring ("*GWM*") reports recorded that there had been a down slope migration off-site of the contamination plume. This has yet to be adequately explained.

100. Nonetheless it should be borne in mind that in relation to all the other filling stations, Mr. Steyn who had testified on behalf of Uzani said that the natural attenuation over a lengthy period of time would make it extremely difficult to ascertain whether significant historical degradation had occurred.

101. In this regard the evidence of Mr. van der Westhuizen is relevant. He is a project and electrical engineer who has significant experience in the construction of filling stations. He testified that at the time of their construction, all the filling stations to which the offences relate were compliant with the requirements imposed by the local authorities and what he referred to as being code compliant.

He also demonstrated that filling stations make use of an automatic tank gauge which continuously monitors the level of the product within the fuel tanks. The inference being that a fuel spill would be immediately discernible.

102. Mr Roux sought to rely on BP's Health, Safety. Security and Environment ("*HSSE*") manuals which set out the requirements which must be met for managing filling stations

103. The overall difficulty facing BP is that it has not been frank with the court. It did not provide the data that was necessary. Its monitoring, while claimed to be extensive, has been shown to be inadequate both in relation to Rabie Ridge and the failure to produce historic monitoring records. The mere fact that BP has a manual does not mean that it was being adhered to. Once again, the Rabie Ridge fuel spill incident bares testimony to this.

However it should be added that the monitoring results which were produced in 2021 show the presence of petroleum compounds in the groundwater at concentrations within accepted industry standards.

104. Finally, and of great significance, is that Mr van der Westhuizen contended that all filling stations were code compliant when constructed, and that a fuel spill of such magnitude at Rabie Ridge could only be accounted for on the basis of inadequate maintenance, not want of physical integrity, and this was therefore unrelated to the construction of the sites

Count 21 (BP Rabie Ridge)

105. On a consideration of all the evidence presented I was satisfied with the evidence that there had been environmental degradation at the BP Rabie Ridge filling station. This relates to count 21 of the offences on which BP has been convicted.

106. I was also satisfied that from the time the s 24G application was made, and throughout the s 24G process BP failed to disclose a significant spill at any relevant time until at least April 2016.

The effect of this is that the s 24G applications as from December 2010 did not equate with a s22(1) report under ECA. This exposed risk to either people or the environment, such as to the groundwater.

107. In addition the authorisations which BP since obtained were not adequate to give the necessary comfort that there has been compliance with environmental assessment requirements because the s 24G applications lack the necessary specialist reports.

In respect of each of the counts 12 to 21 (see the filling stations identified in the appendix below)

108. The evidence also revealed that the s 24G reports were not compliant with the legislation at the time and furthermore BP failed to either make a full disclosure or comply with the requirements and conditions of the authorisation granted in respect of the monitoring of ground water.

Accordingly, irrespective of whether a s 24G report equated with a s22(1) report as contended for by BP, at the very least the authorisations that BP had since obtained were not adequate to give the necessary comfort that there has been compliance with environmental assessment requirements.

Furthermore I was satisfied that the failure to obtain the type of environmental impact report required under s 22 of the ECA, at the time the s 24G rectification and authorisation was applied for during about June 2005, exposed risk to either people or the environment in relation to groundwater.

Court Order of 3 October 2022

109. On 3 October 2022 I made the following order based on the above findings:

In respect of count 21

1. *There was, in respect of count 21 of the offences in respect of which the accused has been convicted, environmental degradation at the BP Rabie Ridge filling station after it applied for a s 24G rectification under the National Environmental Management Act 107 of 1998 ("NEMA ") and failed to disclose such degradation at any relevant time during the s 24G rectification process until April 2016.*

2. *The effect is that as from December 2010 the s 24G application did not equate with a s 22(1) report under the Environmental Conservation Act*

73 of 1989 ("ECA") thereby exposing either people or the environment, such as the groundwater and soil, to risk.

3. *There we goIn addition the authorisation that the accused since obtained was not adequate to give the necessary comfort that there was compliance with environmental assessment requirements.*

4. *As a result of these findings which are pursuant to the present leg of the summary enquiry, the court exercises its discretion to continue with the section 34 (3) enquiry in respect of the conviction relating to count 21 and assess the monetary value of any advantage gained or likely to be gained by the accused in consequence of this conviction and consider, in addition to any other punishment imposed in respect of this offence, a fine equal to the amount so assessed or such other amount having regard inter alia to any relevant factor including whether the spill in December 2010 was contained within the perimeter of the filling station by April 2016 and whether the accused intends establishing independently whether the December 2010 spill has affected the groundwater or the environment (such as soil conditions or other pollution) for the inhabitants of Rabie Ridge living downstream from the filling station.*

5. *In order to determine the amount of the fine to be imposed and before hearing argument thereon, the accused shall by 15 November 2022 provide this court and the prosecution with;*

    a. *a duly authorised affidavit together with supporting documents;*

        i. *containing the monthly amounts owing by each business conducted on the BP Rabie Ridge premises together with the duly rendered monthly statements of accounts and the accounting records therefor;*

        ii. *identifying separately the source of all income and revenue of whatever nature and the monthly amount of*

each, derived by the accused from each business conducted on the BP Rabie Ridge premises, including but not limited to franchise fees, rental/lease income, royalties in whatever form, EMPAR and Regulatory Accounting System participation benefits/capex margin, retail margin, secondary storage margin, secondary distribution margin;

iii. *providing a written calculation of all such income and revenue received together with an explanation of how the figures are arrived at;*

iv. *identifying separately all expenditure incurred by the accused in relation to each business conducted on BP Rabie Ridge premises and the monthly amount of each, and further identifying in each case whether the expenditure is on capital or revenue account and where applicable, the terms on which the accused obtained and provided financing therefor;*

v. *providing a written calculation of all such expenditure incurred together with an explanation of how the figures are arrived at;*

for the period from December 2010 to April 2016 inclusive

In respect of counts 12 to 21 inclusive (the filling stations are identified in the Appendix below)

6. *The s 24G reports were not compliant with the legislation at the time and furthermore the accused failed to either make a full disclosure or comply with the requirements in respect of the monitoring of ground water;*

7. *The s 24G NEMA reports did not equate with a s22(1) ECA report and the authorisations that the accused since obtained were not adequate to give the necessary comfort that there was compliance with environmental assessment requirements;*

8. *The failure to obtain, at the time the s 24G rectification and authorisation was applied for during about June 2005, the type of environmental impact report required under section 22 of ECA exposed either people or the environment, in relation to groundwater and soil, to risk.*

9. *As a result of these findings which are pursuant to the first leg of the summary enquiry the court in its discretion will continue with the section 34 (3) enquiry in respect of the convictions regarding counts 12 to 21 and assess the monetary value of any advantage gained or likely to be gained by the accused in consequence of these offences and consider, in addition to any other punishment imposed in respect of these offences, a fine equal to the amount so assessed or such other amount having regard inter alia to any relevant factor.*

10. *In the exercise of its discretion, the court finds that there is the risk of a disconnect between the profits which may have been derived from the continued operation of the filling stations under counts 12 to 20 and the failure to comply with environmental assessment requirements*

11. *Section 34(3) of NEMA does not only contemplate profits derived by an accused directly or indirectly from the unlawful operating of a filling station under its own management or by another from which it derives profits.*

12. *Section 34 (3) is broadly worded and a court convicting under a Schedule 3 offence, is enjoined, in its discretion, to assess the monetary value of any "advantage gained or likely to be gained by such*

person in consequence of that offence, and ...., in addition to any other punishment, may order .... a fine equal to the amount so assessed."

13. *An advantage "likely to be gained" in consequence of such offence is the maintenance in this country of the perception that the accused is an environmentally conscious, responsible and compliant citizen, thereby encouraging members of the public to purchase products from its outlets.*

14. *Such perception is created or maintained by the accused's advertising campaigns promoting such an image and the accused itself appears to recognise such a correlation otherwise, it would not incur the advertising costs involved in promoting such an image.*

15. *The extent to which a correlation can be assessed between the advertising expenditure incurred in promoting the accused as an environmentally conscious, responsible and compliant citizen on the one hand and the advantage likely to be gained in consequence of the offences in respect of which it has been convicted is a matter for discovery and possibly subpoena. However the fact that there are such advertising campaigns to promote the accused's image in the eyes of the consumer is sufficient at this stage to warrant the supply of such information*

16. *In order to determine the amount of the fine, the accused shall provide detailed records of;*

    a. *its annual spend in all advertising media and formats promoting or otherwise holding out that it is environmentally conscious, responsible or compliant, for each of its financial years from the date the offence was committed in respect of each count, as set out in the appendix below, until the accused obtained s 24G*

rectifications under NEMA in respect of each filling station respectively;

b. *its audited annual financial statements reflecting its income and expenditure for each of the said financial years and in which the line item for advertising is reflected.*

c. *copies of its advertisements if in its possession and if not all in its possession to provide details of its advertising agencies*

d. *....*

e. *during each of the relevant periods;*

f. *report backs from its advertising agencies on the impact or value of their advertising campaigns promoting or otherwise holding out that the accused is environmentally conscious, responsible or compliant*

General

17. *The dates reflected above do not indicate that the fine is to be determined from or up to that date and the court will hear argument as to what the proper commencement and termination date ought to be once the documentation has been provided.*

18. *In the event that the accused contends that the fines would exceed the current commercial value of each of the filling stations to which counts 12 to 21 relate then it shall;*

a. *notify the court by 15 November 2022 of its contention;*

b. *provide the Court and the prosecution, at the accused's cost, with a joint sworn valuation of the current commercial value of each of the filling stations to which counts 12 to 21 relate from*

two sworn valuators, one nominated by the accused, the other to be nominated in writing by the prosecutor within five Court days of 15 November 2022.

19. *The accused is to indicate by 15 November 2022 whether it claims confidentiality to any of the documents which it is required to produce so that suitable orders and arrangements can be made to limit publication*

20. *The court will hear argument on any ameliorating factors regarding the application of s 34 (3), whether subsequent non-compliance with the conditions of the s 24G authorisation can be taken into account for the purposes of a s 34 (3) enquiry and any other relevant matter in order to finalise a determination under s 34(3).*

The hearing will take place after 15 November 2022 and once it is determined if any other documents may be relevant after production has been made by the accused. This will necessitate a further case management meeting.

SUBSEQUENT HEARINGS

110. BP produced advertising material from its international parent company relating to its Beyond Petroleum campaign. It was evident that internationally BP was promoting itself as an environmentally conscious corporation concern. However the advertising spend was not by the accused and that part of the October 2020 order dealing with a correlation between the advertising expenditure incurred in promoting the accused as an environmentally conscious, responsible and compliant citizen on the one hand and the advantage likely to be gained in consequence of the offence fell away for the purposes of s 34(3).

111. The subsequent hearings were more in the nature of considering the financial information provided pursuant to the October 2022 order.

FACTORS RELEVANT TO THE SECTION 34(3) FINE

112. The court is now in a position to consider the fine which ought to be imposed by reason of the advantage gained or likely to be gained by BP in consequence of the offences.

113. In my view the advantage was the ability to operate Rabie Ridge without any proper authorisation and to have obtained subsequent authorisation without disclosing a highly significant contamination, which was the fuel spill of some 8000 litres, or its cause.

114. Furthermore, BP was in a position to operate all the other filling stations to which the offences related at a time when it did not have authorisation to do so. Its failure to provide monitoring data or its complaints and incidents registers fails to allay the court with regards to degradation or that it would have been able to obtain authorisation prior to construction.

It did not help BP's case that Mister R claimed that the industry held a view that entities such as BP were exempt from requiring authorisation. No reasonable person could believe that the exemption could apply to BP. Moreover BP cannot be regarded as a member of the general public. It has specialized skills and operates with hazardous substances requiring special care and diligence. BP has sufficient internal legal resources and external legal access to know that authorisation was required.[27]

115. In *Uzani (2)* the court was of the view that in the case of a penalty under s 34(3), there either had to be some degradation or some evidence that authorisation could not have been obtained had it been sought prior to construction. The court believed that other considerations applied in the case of an award. I have reconsidered my position. There appears to be no reason why a failure to obtain proper authorisation should not result in the disgorgement of profits made during the period prior to the situation being remedied. What it may

[27] Compare the reasoning in the civil law case of *Durr v Absa Bank Ltd and another* 1997 (3) SA 448 (SCA) as to the higher duty of a person engaged in a hazardous activity

impact more acutely is the cumulative effect of the fines imposed under both this section and s 29(4) of ECA.

116. In reaching this conclusion I have also had regard to NEMA which is the law giving effect to the Constitutionally protected rights in relation to the environment set out in s 24.

117. The Preamble to NEMA commences by recognising that *"many inhabitants of South Africa live in an environment that is harmful to their health"* and continues by *inter alia* repeating the provisions of s 24 of the Constitution. It then adds the desirability that, among other things;

> *".. The law should be enforced by the State and that the law should facilitate the enforcement of environmental laws by civil society"*

118. Section 2(4) of the principles which inform the application of NEMA provides that:

> *"(a) Sustainable development requires the consideration of all relevant factors including the following:*
>
> *(i) That the disturbance of ecosystems and loss of biological diversity are avoided, or, where they cannot be altogether avoided, are minimised and remedied;*
>
> *(ii) that pollution and degradation of the environment are avoided, or, where they cannot be altogether avoided, are minimised and remedied;*
>
> *....*
>
> *(vii) that a risk averse and cautious approach is applied, which takes into account the limits of current knowledge about the consequences of decisions and actions; and*
>
> *(viii) that negative impacts on the environment and on people's environmental rights be anticipated and prevented, and where*

they cannot be altogether prevented, are minimised and remedied.

(Emphasis added)

119. Accordingly high store is placed on the need to properly apply for and obtain authorisation in order to achieve a risk averse approach which anticipates negative impacts on the environment and on people's environmental rights. A failure to subscribe to these tenets is therefore to be considered a serious infraction and dealt with firmly.

120. In all the circumstances the court imposes a fine which requires the disgorgement of the full financial advantage obtained during the period BP failed to obtain authorisation. This is in the sum of R 6 245 424, which is the amount calculated by BP to be the financial advantage derived if the court was to find that s 34(3) applied.[28]

121. It will be recalled that a court can impose a fine of up to three times the value. I do not intend imposing a fine of more than the actual financial advantage, even if it is at the lower end of the spectrum.

SECTION 29(4) OFFENCES

122. In conformity with the ordinary considerations when imposing sentence, the court will consider the nature of the crime, the interests of society and the circumstances of the offender. In the present case it is appropriate to deal with the interests of society first.

[28] BP's HOA para 6.

THE INTERESTS OF SOCIETY

Object and purpose of ECA and NEMA

123. The starting point is that the essence of both statutes is to give content to the constitutionally entrenched right contained in s 24 of our Bill of Rights that:

> *"Everyone has the right-*
>
> *(a) to an environment that is not harmful to their health or well-being; and*
>
> *(b) to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that-*
>
> *(i) prevent pollution and ecological degradation;*
>
> *(ii) promote conservation; and*
>
> *(iii) secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development."*

The offences for which BP has been found guilty directly engage subsections (a) and (b)(i)

124. In *Director: Mineral Development, Gauteng Region, and another v Save the Vaal Environment and others* 1999 (2) SA 709 (SCA) at 719C–D the court considered the import of s 24 of the Constitution and said:

> *"Our Constitution, by including environmental rights as fundamental, justiciable human rights, by necessary implication requires that environmental considerations be accorded appropriate recognition and respect in the administrative processes in our country. Together with the change in the ideological climate must also come a change in our legal and administrative approach to environmental concerns."*

125. These are therefore entrenched protected rights which can only be diminished by a law of general application which conforms with the requirements of s 36 of the Constitution.

126. The purpose of ECA is identified at its commencement to be:

"*To provide for the effective protection and controlled utilization of the environment and for matters incidental thereto.*

The provisions relating to Policy for Environmental Conservation have been repealed but under Part VII which deals with offences, penalties and forfeiture, s 29(7) also provides that

"In the event of a conviction in terms of this Act the court may order that any damage to the environment resulting from the offence be repaired by the person so convicted, to the satisfaction of the Minister, the Administrator concerned, or the local authority concerned."

This has been the position since 7 April 1995 (*via* Proclamation R29).

127. It is evident that the purpose of ECA is to secure the protection promised by s 24 of the Constitution of a sustainable environment applying the same considerations which inform NEMA, and to which reference has already been made.

128. Similarly therefore, these are protected rights which seek to give content to the s 24 rights in respect of the environment and which can only be diminished by a law of general application which conforms with the requirements of s 36 of the Constitution.

129. Similarly too, a high store is placed on the need for properly applying for and obtaining authorisation in order to achieve a risk averse approach and which anticipates negative impacts on the environment and on people's environmental

rights. A failure to subscribe to these tenets is therefore to be considered a serious infraction and dealt with firmly.

130. The environment is fragile and we now have sufficient appreciation of the risk of degradation whether by over-exploitation or a failure of secure an adequate regulatory framework to ensure that activities which may pose a danger are adequately monitored and controlled.

By failing to submit to the regulatory framework, an offender avoids subjecting itself to the necessary measures introduced to safeguard the environment and its people. A store must be placed by requiring compliance from the initial step of planning to engage in an activity that poses a hazard or danger to the environment and to people.

THE NATURE OF THE OFFENCE

131. BP claims that the requirement of prior environmental authorisation was not fully appreciated in the industry. It draws this conclusion from the fact that over 1700 applicants applied to the department for a s 24G authorisation. Reference was made also to alleged confusion in relation to the grant of the mining right in the *Macsand* case[29]. Whatever the situation in other industries, the only reason BP claims, through Mr. R, that there was confusion is that they believed that an exemption applied to the petroleum industry. I have already found that such a contention cannot withstand scrutiny.

132. BP denies that it is a serial offender in that it failed to apply for environmental authorisation in respect of some 21 filling stations it constructed between the period from May 1999 through to March 2002. However the facts reveal that not only did BP fail to apply for environmental authorization but when it got caught out in relation to Rabie Ridge, it also failed to make a proper disclosure of it in the s 24G applications.

[29] *Macsand (Pty) Ltd v City of Cape Town and Others* 2012 (4) SA 181 (CC); 2012 (7) BCLR 690 (CC)

It does not end there: The s 24G applications failed to attach any expert or professional reports despite BP assuring the court during the main trial that it had undertaken a more onerous task in applying under s 24G than would be the case had it sought environmental authorisation prior to initiating any construction.

133. BP did not simply make a mistake. It revealed to the court a stratagem which relies on not submitting to regulatory scrutiny or, when doing so, does it on the basis that the authorities will either turn a blind eye and rubber stamp what is presented to them or lack the competence or resources to properly scrutinise and follow up. The latter was the case in respect of a filling station where qualified approval was given to the s 24G application but where there was no follow up.

THE OFFENDER

134. Mr. Roux submitted that in the end, no degradation could be shown in respect of any of the filling stations other than Rabie Ridge. He also relied on the fact that BP complied with the building code.

135. He also submitted that BP voluntarily disclosed its failure to apply for environmental authorisation when it brought the s 24G authorisations. The submission is speculative because BP did not explain nor subject itself to cross examination in relation to the reason for bringing the s 24G applications. At best it is a neutral factor.

136. Other mitigating factors raised by BP were that none of the sites were constructed in sensitive environmental areas and local authority approval had been obtained. Furthermore subsequent groundwater monitoring reports did not demonstrate that environmental authorisation should not have been granted by reason of the existence of any environmental sensitivities (e.g. wetlands or groundwater conditions) which would have prohibited the construction of filling stations at those sites nor did the construction *per se* cause degradation or damage beyond that ordinarily associated with the construction of filling stations.

137. A further consideration impressed on the court was that people were not exposed to concentration levels in the groundwater that are above acceptable

levels of health risk while other receptors did not demonstrate the existence of such risks. It was put that the risk of hydrocarbon compounds being present at filling stations is inherent in any such operation.

138. Again I have difficulty accepting these as mitigating factors. BP did not make a full disclosure of the documentation and data that, according to its own manuals, it should have or have access to. They also do not address the continued failure by BP to submit itself to the regulatory framework required under the environmental laws. In total though, I believe that they should be considered as mitigating factors.

139. BP sought to overcome the Rabie Ridge fuel spill by submitting that the aggravating factors concerning the state of the groundwater can only be relevant to the s 34(3) enquiry and that to take them into account when considering sentence under s 29(4) would amount to double punishment.

140. I disagree for two reasons. The first is that s 34(3) expressly states that its sanctions are in addition to any other punishment imposed. I have already considered that s 34(3) is more concerned with the discouragement of profits so that no benefit can be derived from failing to apply for authorisation when required. In other words a fine simply places BP in a neutral position that does not amount to a penalty. It says no more than that you cannot benefit from your crime. The considerations therefore do not engage the issue of punishment.

141. The second reason is that BP's conduct in respect of almost every step it took at Ruby Ridge, from concealing the fuel spill, from materially understating the volume and to not making a proper disclosure either to the authorities or in its s 24G application reflect on BP's general state of mind in relation to contraventions under s 29 (4) of ECA.

142. A further aggravating factor is that it did not make proper disclosures to this court in relation to either the true nature of its s 24G application despite holding out through the counsel originally engaged (i.e. not its present counsel) that whatever the original authorisation required, its s 24G application did much more.

I have dealt with the reality that no expert or other meaningful reports were attached to the s 24G application.

GENERAL

143. Environmental degradation or the failure to comply with environmental laws which are put in place to protect the environment and ensure a proper balance between development and environmental consciousness is of great concern to society; and not only in the interest of the current generation but also of future generations.

144. Unless there is proper compliance with the regulatory framework by those engaged in activities which may pose a threat to the environment, the objectives of both NEMA and ECA are frustrated and the protection afforded by s 24 of the Constitution in respect of the environment is undermined. Put another way; proper compliance with the regulatory framework in respect of environmental authorisation is a *sine qua non* for protecting the interests of society at large and hence its elevation to a fundamental protected right under our Constitution.

145. BP is a major petroleum company which, because of its claim to environmental consciousness and because of its footprint of engagement in activities which are considered potentially hazardous or dangerous, should have set itself up as an example, rather than avoid its responsibilities and duties under clear legislative directions. It is difficult to accept that BP's in-house legal team would not have understood the requirement for authorisation or if in doubt would not have engaged competent lawyers to advise them. As already stated, engaging in an activity which *per se* is defined by our legislation as potentially hazardous or dangerous requires it to exercise a greater degree of care.

146. It is necessary that an example be made of leading corporations who flout environmental laws.

147. While not a mitigating factor, the fact that BP did pay administrative penalties should be taken into account as they sufficiently approximate a penalty.

148. In all the circumstances the following fine is imposed under s 29(4).

Firstly a maximum fine of R 400,000 in respect of each of the 17 filling stations which amounts to R6 800 000. From this amount an amount of R 612 350 will be deducted in respect of the actual amount paid by BP in administrative fines under s 24G. The invitation to adjust this amount to current values is declined. The amount would not have been invested but would have gone to the fiscus and used at that time.

Accordingly the initial fine as envisaged under s 29(4) will be R6 187 650

Secondly the court is of the view that the gravity of the BP's conduct and the overwhelming aggravating factors in this case warrant the imposition of fines well in excess of that. For present purposes the fine of R 6 245 424 under s34(3) of NEMA is treated as the disgorgement of profits earned prior to obtaining environmental approval under s 24G.

Accordingly the court is of the view that the further penalty provisions of s 29(4) should be invoked.

149. This involves a calculation of a commercial value based on cost. I have already referred to the one calculation performed by Mr. Harman.

150. His other cost based calculation had regard to the depreciated current asset value. This came to a total of R77 289 280 for fuel related assets and R 99 886 732 for non-fuel related assets.

His final cost-based calculation was the depreciated replacement value of the assets, which was R106 523 143 for fuel related and R148 704 876 for non-fuel related.

151. The fundamental difference between the three calculations based on a cost related basis is that;

a. the historic asset value adjusted for inflation is the cost actually incurred by BP in constructing the relevant assets at each of the 17 filling stations. These are the values recorded in BP's fixed asset register and carried over to its audited annual financial statements. These values are then increased by cumulative rates of inflation, between the date of construction and the valuation date, being 31 December 2022, to express the historic value in current terms.

b. The depreciated current asset value is not only of assets which were initially constructed but also replacement assets.

c. The depreciated replacement asset valuations are based on the current cost of replacing the assets on each of the sites. These assets would also include subsequent alterations and replacement.

152. I am of the view that the legislature did not intend to impose a fine which had regard to the replacement value of the assets nor did it intend to impose a fine which did not have regard to the effects inflation had on the erosion of money between the date of the commission of the offense and the date of sentencing.

153. I am also of the view that the attempt to calculate the depreciated current asset value by reference to BP's records cannot avoid including assets which were not in existence at the time of the offence or the subsequent replacement, or modification of those that were. Mr Erasmus did not argue that they could have or should have been separately identified, presumably because it is an impossible task.

154. A court must naturally err on the side of conservative calculations in the sentencing phase in conformity with one or more of the general principles to be applied.

155. The court will therefore have regard to the first calculation. As previously stated only the fuel related assets will be taken into account. The result would be an additional fine under s 29(4) of R 47 112 970.

156. The final question is that if regard is had to the cumulative total of all fines, whether it is disproportionate to the offences having regard to the conduct of BP and the extent of its blameworthiness having regard to the function and purpose of proper compliance with the environmental regulatory framework.

157. Without any further adjustment the total fines would be the sum of R47 112 970 together with the earlier amounts under s 34(3) and 29(4) of R12 433 074. The sum total would therefore be R59 546 044 .

158. In my view one of the major considerations is that of deterrence in an area where there is a need for vigilance in protecting our environment through respect for the regulatory framework. The only available figures regarding BP's overall financial situation is that the main overseas company posted a U$ 27.7 billion after tax net profit in 2022.

159. It appears to the court that the only effective deterrent to BP and other large corporates is that the fines should be sufficient to appear as a line item for which management may be held accountable.

SENTENCE

160. In the circumstances the sentence imposed is:

a. In respect of the counts under s 34(3) of NEMA, a fine of R 6 245 424
b. In respect of the counts under s 29(4) of ECA, an initial fine of R 6 187 650
c. In respect of the additional fine under s 29(4) of ECA, an amount of R 47 112 970.

161. As stated earlier, costs will be dealt with in a separate judgment.

[redacted]

SPILG J

APPENDIX

Count	Date of Offence	Filling Station
12.	May 1999	BP Radiokop
13.	August 1999	BP Fourways
14.	August 1999	BP Atterbury Value Mart
15.	October 1999	BP Waterkloof Ridge
16.	September 1999	BP Glenfair
17.	November 1999	BP Katlehong
18.	December 1999	BP Simon Vermooten
19.	May 2000	BP Salt Lake
20.	May 2001	BP Melrose Arch
21.	March 2002	BP Rabie Ridge

DATES OF HEARING AND

PRESENTATION OF SUBMISSIONS:

DATE OF JUDGMENT on SENTENCE: 6 September 2024

REVISED: 20 and 23 March 2025

FOR PROSECUTION: Attorney G Erasmus
FVS Attorneys, Pretoria

FOR ACCUSED: Adv B Roux SC

Adv AC McKenzie

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