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PRIVATE PROSECUTION IN THE SECURING OF A SUSTAINABLE FUTURE

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Environmental rights are protected in the Bill of Rights of the South African Constitution. Whilst all the protected rights and freedoms have the common thread of "protection for all", only section 24 of the Constitution (right to a healthy environment) includes the caveat "*for the benefit of present and future generations*". No other right or freedom covers future generations so explicitly or expressly (although it can be inferred that they are catered for regardless). The writers of the Bill of Rights were mindful of the importance of a sustainable planet, to allow for an inhabitable earth for those yet to come.

While the above is true, one must juxtapose the above provision with section 24(b)(iii) of the Constitution, which attempts to marry sustainable development with (justifiable) economic and social development. As a country with an unacceptably high unemployment rate and massive inequality, the economics have clearly (and to a certain extent, understandably) overtaken the sustainability agenda. This, via the introduction of, among others, multinationals who trade in biologically hazardous (and essential) materials, like petroleum.

The government has failed to both effectively and sustainably balance these interests, as well as hold these conglomerates accountable, as was shown in the recent ruling of the Pretoria High Court in *Uzani Environmental Advocacy CC v BP Southern Africa*.

Briefly, the facts are that in the early 2000s, BP Southern Africa (BP) undertook to build and upgrade petrol stations in Gauteng. These activities, according to the *Environmental Conservation Act* (ECA), require prior authorisation from the Minister of Environmental Affairs and Tourism (the Minister) after the consideration of the requester's environmental impact assessment reports (EIAs). This process is required because any activity involving petroleum is environmentally hazardous, as petroleum is a heavy pollutant. BP did not conduct the prerequisite EIAs and in continuing with the aforementioned activities, contravened provisions in the ECA, as well as the *National Environmental Management Act* (NEMA).

In cementing its case, Uzani fielded the expert evidence of Professor I.J. Van der Walt, whose experience in the field of chemistry was put forward. One fundamental piece of information he proffered was that many companies flouted the prior authorisation process and opted for what is known as a "rectification". This is when a company in contravention of the prior EIA process seeks a condonation of sorts. Van der Walt said that this process adopts lower standards than the pre-construction EIAs. One deciding factor is the potential job loss, should the construction be halted. As stated before, unemployment is rife in South Africa and any means by which to secure the income of individuals is seen as a positive development. Where the Department of Environmental Affairs notes that jobs will be lost, it is likely to permit the work to continue, despite the failure to follow the correct authorisation process. This once again illustrates the State favouring economic development over environmental sustainability.

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Section 28(1) of NEMA places a duty on anyone who pollutes or degrades the environment to take reasonable steps to avoid or stop it, unless such harm has been authorised by law or cannot be reasonably avoided. Where it cannot be shown that reasonable steps were taken, NEMA imposes hefty fines and prison terms. Through the private prosecution provision in section 33 of NEMA, it is possible for private individuals/entities to hold actors accountable where the State fails or is unable to do so, for whatever reason. Section 33 of NEMA states that any private entity or individual may, in the public interest, or in the interest of the protection of the environment, institute private prosecution (this is not possible where the offender is an organ of State holding/exercising a public duty).

All the entity must do is notify the relevant public prosecutor of an intention to prosecute. If within 28 days of receipt that prosecutor does not state in writing that he or she intends to prosecute the alleged offence, that person/entity may continue with the private prosecution. What this provision does is remove the requirement that when instituting private prosecutions generally, in terms of the *Criminal Procedure Act*, the National Prosecuting Authority (NPA) must issue a certificate stating that it does not wish to prosecute. In terms of NEMA, the NPA simply has to *not* respond, and the person/entity may proceed with prosecution.

The simplification of the process can be described as being progressive as far as environmental rights are concerned. In the *Uzani* case, the Court highlighted the fact that NEMA was enacted to enable and encourage private actors to pursue environmental criminals. The Court also suggested that government on its own was not successfully addressing the issue. NEMA emphasises the collective responsibility bestowed upon civil society and other private actors to preserve the environment for future generations per the Constitution.

The *Uzani* case is the first successful private prosecution executed in terms of NEMA. When BP is fined, it will likely set a ground-breaking precedent. Such a ruling serves to encourage other actors to step forward and participate in the protection of our democracy, of which environmental rights are a part, regardless of how overlooked they often are.

**BP Southern Africa was found guilty of contravening environmental laws and the fines have yet to be established.*

**To find out more on the state of environmental rights in South Africa, please visit the Centre for Constitutional Rights website and view our annual Human Rights Report Card.*