

**IN THE REGIONAL COURT FOR THE REGIONAL DIVISION OF MPUMALANGA HELD
AT ERMELO**

CASE: ESH 8 /11

ERMELO REGIONAL COURT

SHEEPMOOR CAS 26/06/2009

In the matter between:

The State

Versus

ANKER COAL & MINERAL HOLDINGS S.A. (Pty) Ltd

ACCUSED NO. 1

Registration Number: **1996/010609/07**

a corporate body, as represented by Albrecht Frick, managing director of the said corporate body.

**PLEA AND SENTENCE AGREEMENT IN TERMS OF SECTION 105A OF THE CRIMINAL
PROCEDURE ACT 51 OF 1977 (AS AMENDED)**

1 WHEREAS

- 1.1 accused No 1 is a registered company in terms of the Laws of the Republic of South Africa, duly registered with registration number 96/10609/07 known as Anker Coal and Mineral Holdings S.A. (Pty)Ltd (hereinafter referred to as Accused No 1);
- 1.2 Albrecht Frick is an employee and the Managing Director of accused 1 and duly authorized by Accused No 1 (as contemplated in section 332(2)(a) of the Criminal

Procedure Act 51 of 1977) to enter into a formal plea and sentence agreement and to plead guilty to the said charges;

1.3 The accused is charged with the offences of:

1.3.1 Contravening Section 28(14)(a) read with Sections 1, 28(15), 32, 34, 34B, 34C and 34H of the National Environmental Management Act 107 of 1998.

1.3.2 Contravening Section 98(a)(vi) read with Sections 1, 99(1)(e) and 108 of the Mineral and Petroleum Resources Development Act 28 of 2002 and

1.3.3 Contravening Section 98(b) read with Sections 1, 99(1)(g) and 108 of the Mineral and Petroleum Resources Development Act 28 of 2002.

1.4 Charles Lloyd, Regional Court Prosecutor Ermelo has, as required by section 105A of Act 51 of 1977, been duly authorized by the Chief Prosecutor, to enter into a plea and sentence agreement and to conduct proceedings in Court on behalf of the State in connection with this agreement;

2 WHEREAS THE ACCUSED

2.1 As represented by Adv Roux and Adv van Vuuren (instructed by Mr Stockwell from the firm Werksmans Attorneys), before entering into this agreement, has been fully informed as follows:

2.1.1 That it has the right to be presumed innocent until he has beyond reasonable doubt been proven to be guilty;

2.1.2 That it has the right to remain silent and not to testify during the proceedings;

2.1.3 That it has the right not to be compelled to give self-incriminating evidence;

2.1.4 That it is not obliged to enter into this agreement but that should it do so, the contents of the agreement will be placed before the court, which could then find it guilty in terms of the provisions of the agreement and sentence it in terms thereof or the court may refuse to accept the agreement, in which case

the agreement would be null and void and could not be used as evidence against him in a court of law;

- 2.2 admits having entered into this agreement freely and voluntarily whilst being of sound and sober senses and without having been unduly influenced thereto;
- 2.3 Acknowledges that it has been made aware that this agreement cannot bind the court not to exercise its discretion to make a specific order or conduct a specific enquiry; and
- 2.4 Acknowledges that it has been made aware that the court is not obliged to accept this agreement.

3 **WHEREAS**

- 3.1 the prosecutor has complied with the provisions of Section 105A(1)(b)(i), (ii) and (iii) of Act 51 of 1977 (as amended);
- 3.2 the prosecutor has properly consulted in terms of section 105A(1)(b)(i) and (ii) with the investigating officer in this case, Cst Ackloo from the office of Organised Crime Unit Secunda, Mr Francios Roux from the Mpumalanga Tourism and Parks Agency on the terms of the agreement and the sentence, more particularly with regard to:
 - 3.2.1 The nature of the offences
 - 3.2.2 The circumstances of the accused
 - 3.2.3 Any previous convictions of the accused
 - 3.2.4 The interest of the community

as would appear from the admitted facts and circumstances set out in this agreement.

- 3.3 The prosecutor has in terms of section 105A(1)(b)(iii) properly consulted with the complainant, Mr Forbes, in this matter regarding the contents of this agreement and the inclusion of conditions relating to compensation or the rendering of some benefit or service in lieu of compensation for damage or pecuniary loss and gave him an

opportunity to make representations regarding the contents of the agreement and he has agreed to the provisions contained herein.

4 **Whereas** the accused admits guilt in respect of the charges mentioned herein and pleads guilty thereto on the basis set out below and the State is prepared to accept such plea of guilty.

5 **THEREFORE** the parties agree as follow in respect of a plea of guilty and a just sentence:

5.1 The accused admits that the Regional Court Ermelo has the required jurisdiction to deal with this case;

5.2 The accused admits all the facts in relation to the charges set out herein (as set out in the charge sheet) and referred to in this document;

6 **The accused pleads guilty to the 3 charges herewith:**

6.1 **COUNT 1:**

6.1.1 Albrecht Frick admits that he has the required authorization from Anker Coal & Mineral Holdings (Pty) Ltd to submit this plea of guilty.

6.1.2 Accused No 1 admits that it is guilty of contravening Section 28(14)(a) read with Sections 1, 28(15), 32, 34, 34B, 34C and 34H of the National Environmental Management Act 107 of 1998.

6.1.3 In that upon or about January 2009 – April 2010 at or near Steenkoolspruit farm in the Regional division of Mpumalanga, the accused wrongfully and negligently committed an act which was likely to cause significant degradation of the environment in that, the accused,

6.1.3.1 Drilled prospecting holes within a sensitive area to wit: riverbanks, river bed and wetland;

6.1.3.2 that core drillings were left in the veld and road and were not removed from the operations site;

6.1.3.3 that prospecting activities took place within the 1:100 year floodline or within 100m from the Usutu river and an unnamed tributary thereto and;

6.1.3.4 failed to properly fill and cap all drill holes.

6.2 **COUNT 2:**

6.2.1 Albrecht Frick admits that he has the required authorization from Anker Coal & Mineral Holdings (Pty) Ltd to submit this plea of guilty.

6.2.2 Accused No 1 admits that it is guilty of contravening Section 98(a)(vi) read with Sections 1, 99(1)(e) and 108 of the Mineral and Petroleum Resources Development Act 28 of 2002

6.2.3 In that upon or about the 16 December 2009 and at or near Steenkoolspruit farm in the Regional division of Mpumalanga the accused wrongfully and negligently

6.2.4 failed to comply with a notice issued by the Regional Manager Mpumalanga on 02 December 2009 in terms of Section 93 1(B)(1) of the Mineral and Petroleum Resources Development Act 28 of 2002 by omitting to:

6.2.4.1 to take rectifying steps to rehabilitate all the boreholes that have been left unsealed within the time period specified in the notice;

6.2.4.2 to remove all the core materials which have been dumped in the wetland and veld;

6.2.4.3 to submit within 14 days from 2/12/2009, a rehabilitation plan and strategy on how the aforesaid non-compliance would be rectified.

6.3 **COUNT 3:**

6.3.1 Albrecht Frick admits that he has the required authorization from Anker Coal and Mineral Holdings (Pty) Ltd to submit this plea of guilty.

6.3.2 Accused No 1 admits that it is guilty of contravening Section 98(b) read with Sections 1, 99 (1)(g) and 108 of the Mineral and Petroleum Resources Development Act 28 of 2002.

6.3.3 In that upon or about 17/05/2005 at or near Witbank in the Regional division of Mpumalanga, the accused wrongfully and negligently submitted inaccurate or incorrect information in connection with matters required to be submitted under the Mineral and Petroleum Resources Development Act 28 of 2002 to the DMR. The submissions related to :

6.3.3.1 That no signs of fauna (animal life) were identified on site and, (p10)

6.3.3.2 That the area only comprised of grassveld cover without trees or plants and;

6.3.3.3 That the proposed operation would be more than 60 meters from open water (dam, river, pan and lake) and;

6.3.3.4 That no foreign material, like crushed stone, limestone, or any material other than the naturally occurring top soil be placed in the road surface and;

6.3.3.5 That the only waste that would be generated would be domestic waste and; and

6.3.3.6 That no prospecting activities would be conducted within 100 meters of the tributaries to Steenkoolspruit.

7 **SENTENCE:**

7.1 **AGGRAVATING AND MITIGATING CIRCUMSTANCES**

7.1.1 It is recorded that the State and the representatives of the Accused have had extensive negotiations and discussions with regard to the charge against the Accused and have considered the following factors:

7.1.1.1 the length of the trial should the Accused plead not guilty. By pleading guilty, the Accused drastically curtailed criminal proceedings. Had the Accused not pleaded guilty, the trial could have run for at least 10 days;

7.1.1.2 the expense to which the State and the Accused would be put by such a trial, which would be a lengthy one;

7.1.1.3 the burden of the prosecution and the Court of being engaged in such a lengthy trial;

7.1.1.4 the nature and extent of the involvement of the Accused in the offence and, more particularly, the fact that the Accused incorrectly relied on

the conduct of other persons in circumstances where it trusted those persons;

- 7.1.1.5 The Accused has fully co-operated with the Prosecuting Authority, the Department of Mineral Resources and the Department of Water Affairs in this matter and has offered full assistance to the authorities, which is in the interest of society and law enforcement agencies. Its co-operation includes;
- 7.1.1.6 a number of factors disclosed on a without prejudice basis, including disclosing the relevant contraventions to the departments and requesting assistance on how to remedy the transgressions;
- 7.1.1.7 the mitigating circumstances present in the case (as set out below);
- 7.1.1.8 the interest the State has in securing a conviction on the charge laid against the Accused, such interest having a number of purposes, which are:
 - 7.1.1.8.1 the interest of securing a conviction against the Accused of the offence which it hereby plead's guilty too;
 - 7.1.1.8.2 the interest to demonstrate to the community that such contravention will be detected and prosecuted; and
 - 7.1.1.8.3 the effect that a conviction will have on the Accused and other mines in the Ermelo area.

7.1.2 **The following are common cause in mitigation of sentence:**

- 7.1.2.1 The accused is a first offender;
- 7.1.2.2 The accused admitted guilt thereby showing remorse;
- 7.1.2.3 The accused did not act intentionally when committing the acts complained of in that it employed the services of an independent contractor, believed to be reputable, to render the services and as a consequence the accused's liability is to be found as a consequence of it's omission to properly oversee the contractor; ;

- 7.1.2.4 The accused has contributed to the economic and social development of the Ermelo community and other communities through its various mining operations;
- 7.1.2.5 The accused provides employment to approximately 500 people. Approximately 260 people work for the accused's subsidiary and a further 240 people work for the sub contractors that the accused and its subsidiary employ;
- 7.1.2.6 The accused contributes to the much needed production of electricity in South Africa through its mining companies;
- 7.1.2.7 No major environmental damage has been caused due to the drilling operations;
- 7.1.2.8 The accused has agreed to rehabilitate the affected environment regarding these charges in order to prevent any possible long term environmental damage and as such would incur the cost involved thereto;
- 7.1.2.9 The accused's attempt to rehabilitate the affected environment was hampered by the complainant refusing its personnel entry to his property;
- 7.1.2.10 The accused has suffered the loss of expenses incurred in drilling the mentioned boreholes and the studies conducted in relation to the core data obtained from the drilling operations;
- 7.1.2.11 The accused has not gained any monetary profit through its conduct and as such no order is requested in terms of section 34 of NEMA regarding the value of any advantage gained;
- 7.1.2.12 It is accepted the prospecting and mining are, by their nature, destructive operation, mitigated by complying with an approved environmental management programme report;
- 7.1.2.13 The representations made to the DMR were made on the strength of a report prepared by Mr A Maiyana, a former employee of the accused in the belief that the content of the report was true and correct;
- 7.1.2.14 The accused has engaged the services of a host of new Environmental Practitioners and Consultants to assess report previously furnished to it in order to avoid future transgressions;
- 7.1.2.15 The actions complained of were not committed intentionally;

7.1.2.16 The explorations were discussed with Mr Forbes, Dr Forbes and Dr K Pretorius; and

7.1.2.17 The “fauna” referred to in the charge sheet consisted of Black Wattle trees which are not indigenous to South Africa and the Ermelo area. .

7.1.3 **The following are common cause in aggravation of sentence:**

7.1.3.1 Section 24 of the Constitution of South Africa provides for the rights of current and future generations to have the environment protected, to have an environment that is not harmful to our health or well-being, to prevent ecological degradation and pollution and to secure ecologically sustainable development;

7.1.3.2 The interest of current and future members of our society;

7.1.3.3 The charges are of an environmental nature which are, in that respect, of a serious nature;

7.1.3.4 With regards to count 1 the National Environmental Management Act 107 of 1998, provides for a fine of R 1 million or to imprisonment for a period not exceeding 1 year or to both such a fine and imprisonment;

7.1.3.5 With regards to count 2 a maximum fine of R10 000.00 is provided for;

7.1.3.6 With regards to count 3 a fine or imprisonment for a period not exceeding 6 months or to both a fine and such imprisonment;

7.1.3.7 Section 2(4)(r) of NEMA state : “sensitive, vulnerable, highly dynamic or stressed ecosystems, such as coastal shores, estuaries, wetlands, and similar systems require specific attention in management and planning procedures, especially where they are subject to significant human resource usage and development pressure.” These are but some of our National Environmental principals.

7.1.3.8 South Africa is a signatory to the RAMSAR convention and as such bound thereto to protect our wetlands;

7.1.3.9 Compliance with approved environmental authorizations is of crucial importance in order to secure the future of our children and the environment through regulated and sustainable development;

- 7.1.3.10 The conduct by the accused in failing to comply with the notice issued by the DMR and subsequently informing the DMR that it has been complied with;
- 7.1.3.11 Regarding count 1 '*significant degradation*' has been discussed in the case *Hichange Investments (Pty) Ltd v Cape Produce Company (Pty) Ltd t/a Pelts Products 2004(2) SA 393 (E)* – the assessment of what is significant is a subjective one and the standard not a particularly high one. It was said to be '*considered in the light of the constitutional right to an environment conducive to health and well-being, as well as the relevant principals of NEMA..*' '*The threshold level of significance is not particularly high*';
- 7.1.3.12 The mining industry is in fact self regulated with the department of Mineral Resources being understaffed and – equipped to conduct enforcement and as such require strong ethical and moral standards by the mining industry to comply to the strictest sense with their approved environmental authorizations;
- 7.1.3.13 As stated in the well known *De Blom-case* a person working in a specific sphere of activity ought to know the law relating to that activity;
- 7.1.3.14 In *S v Waglines (Pty) Ltd and Another 1986(4) SA 1135 (N)* it was stated :“ the question therefore posed by such a case is whether the person concerned should reasonably have realized that what he was doing or about to do might well be unlawful. And the answer depends largely on the care he took or did not take to acquaint himself with the true legal position... Strong demands are placed... on all those engaged in trades, occupations or activities which are legally regulated and known by them to be. They are expected to learn the rules and are obliged to make the effort.”
- 7.1.3.15 The protection of our wetlands and other water resources are of national importance for present and future generations;

7.2 The parties agree that should the accused be convicted of the abovementioned offences in terms of this agreement that the accused be sentenced as follow with the added conditions:

8 **COUNT 1:**

8.1 A fine of R150 000.00 which is wholly suspended for 5 years on condition that:

8.1.1 The accused not be convicted of intentionally contravening section 28(14)(a) of the National Environmental Management Act 107 of 1998 committed during the period of suspension and;

8.1.2 an independent environmental consultant be appointed by the accused, approved by a representative of MTPA – Mr. Francois Roux (0823667708), at the accused' own expense, within 14 days after the date of sentence, being 20 April 2012, and that the consultant investigate and assess the damage caused at Steenkoolspruit and the non-compliance by the accused of the EMP. The details of the Consultant approved by Mr Roux are as follow: Anton Linstrom – Wetland Ecologist (Pr. Sci. Nat) P.O. Box 4442, Lydenburg, South Africa. Church Street 58 Lydenburg 1120 T: [+27] (13) 235 2889 | C: [+27] 83 226 1089 | Fax: (+27) 86 2974948 | E – Mail : wetearth@telkomsa.net |

8.1.3 Proof of such appointment must be lodged with the clerk of court which is to be added to the charge sheet;

8.1.4 that the appointed consultant draft a report on the rehabilitation that is still required at the farm Steenkoolspruit and set time limits within which the rehabilitation must take place;

8.1.5 that after the drafting of said report, a copy of such report be submitted to Mr Roux from MTPA as well as the Prosecution;

8.1.6 that the accused comply with and implement the conditions and requirements of the said rehabilitation report and which is subject to Dr Forbes granting the accused written permission to access the property for the period of such rehabilitation operations;

8.1.7 that the consultant draft a compliance report within 30 days of completion of the rehabilitation or after 5 years of the date of the sentence, being 30 March 2017, whichever comes first, and hand it to MTPA – Mr. Roux and the Prosecution at Ermelo;

8.1.8 That an amount of R80 000.00 be paid towards the Mpumalanga Tourism and Parks Agency – Lydenburg office for purpose of the proper execution of their mandated duties. This is to be paid within 30 days of the date of sentence. Banking detail: Nelspruit Standard Bank current account 032895968 branch code 0528520 – Mpumalanga Tourism and Parks Agency.

9 **COUNT 2:**

A fine of R10 000.00 which is wholly suspended for 5 years on condition that the accused is not convicted of intentionally contravening Section 98(a)(vi) of the Mineral and Petroleum Resources Development Act 28 of 2002 committed during the period of suspension.

10 **COUNT 3:**

10.1 A fine of R20 000.00 which is wholly suspended for 5 years on condition that the accused is not convicted of intentionally contravening Section 98(b) of the Mineral and Petroleum Resources Development Act 28 of 2002 committed during the period of suspension.

11 In terms of section 300(1) of Act 51 of 1977 the court orders that the owner of the farm Steenkoolspruit, Dr Collin Forbes, be compensated for damages to the amount of R144 000.00. This amount is to be paid within 30 days of the date of sentence.

Banking details: David Forbes Will Trust Standard Bank Ermelo Account – 031079865 Bank code: 052844