

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

CASE:

ERMELO CAS 94/11/2010

In the matter between

the State

and

Vunene Mining (Pty) Ltd Reg No. 2006/006702/07

A corporate body, as represented by Bertus Venter, Director of the said corporate body.

STATEMENT BY THE ACCUSED IN TERMS OF SECTION 112(2) OF THE CRIMINAL PROCEDURE ACT 51 OF 1977

1. WHEREAS

- 1.1 the accused is a registered company in terms of the Laws of the Republic of South Africa, duly registered with registration number 2006/006702/07, originally known as City Square Trading 734 (Pty)Ltd, having its name changed to Vunene Mining (Pty) Ltd (hereinafter referred to as the Accused);
- 1.2 Bertus Venter is an employee of the accused and duly authorized to enter into a formal plea and sentence agreement;
- 1.3 The accused is charged with the offences of:
 - 1.3.1 **Count 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 **Count 2:** contravening Section 151(1)(a) read with Sections 1, 2, 4, 13, 14, 16, 17, 19, 21, 22, 151(2), 152, 153 and 154 of the National Water Act 36 of 1998 and read with sections 90 and 250(1) of the Criminal Procedure Act 51 of 1977.
 - 1.3.3 **Count 3:** contravened section 24F(1)(a) read with sections 1, 24F(4), 32, 34, 34B, 34C and 34H and schedule 3 of the National Environmental Management Act 107 of 1998.

1.4 Charles Lloyd, Regional Court Prosecutor Ermelo has, as required by section 105A of Act 51 of 1977, been authorised by the Director of Public Prosecutions 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 Mr Johan Smuts, before entering into this agreement, has been fully informed as follows:

2.1.1 That it has the right to be presumed innocent until it 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 the accused 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 Acknowledge 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 Acknowledge that they have 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, as well as the complainant, Mr Hendrik Mills in his representative capacity for the Environmental Protection Association, on the terms of the agreement, more particularly with regard to:

- 3.2.1 The nature of the offences;
- 3.2.2 The circumstances of the accused;
- 3.2.3 The previous convictions of the accused; and
- 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 properly in terms of section 105A(1)(b)(iii) consulted with the complainant in this matter 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 so mentioned herein and pleads guilty thereto on the basis set out below and the State is prepared to accept such plea of guilty. Whereas it is agreed that the matter be withdrawn as against Bertus Venter and George Dyman in their personal capacity by virtue of the terms of this agreement and on the basis that the accused pleads guilty in terms of this agreement and cannot be raised again as against the abovementioned persons in a criminal capacity. Whereas all other charges referred to in the charge sheet are withdrawn in terms of this agreement and cannot be instituted again.

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 FOLLOWING CHARGES:

6.1 COUNT 1:

6.1.1 Mr Bertus Venter admits that he has the required authorisation from Vunene Mining (Pty) Ltd to submit this plea of guilty.

6.1.2 The accused 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 The accused admits that during the period 26 February 2007 to 7 December 2012 at farm Jan Hendriksfontein 263 IT, portion 14A and portion 6b, in the Regional division of Mpumalanga, it wrongfully and unlawfully committed acts or omissions which are likely to affect the environment in a significant manner by:

- 6.1.3.1 mined within a wetland;
- 6.1.3.2 conducted blasting operations;
- 6.1.3.3 stripped top soil and sub soil layers disrupting soil profiles;
- 6.1.3.4 altered the land capability of the area;
- 6.1.3.5 altered and removed the natural vegetation of the area;
- 6.1.3.6 exposed soils which may lead to increased silt loads in surface water run off;
- 6.1.3.7 movement of vehicles over the stripped areas generated dust;
- 6.1.3.8 increased noise levels;
- 6.1.3.9 excavation of boxcuts resulted in the disturbance of the geographical profile and created voids;

- 6.1.3.10 water captured in the pits were exposed to carbonaceous material and which resulted in elevated mining related contaminants such as SO₄ concentrations;
- 6.1.3.11 altered local topographical patterns due to the formation of overburden stockpiles;
- 6.1.3.12 constructed a pollution control dam without lining it and creating a topographical void and resulting in the change of local topographical patterns of the mentioned area;
- 6.1.3.13 conducted mining activities within 100m from the Witpuntspruit;
- 6.1.3.14 conducted coal mining activities of which the carbonaceous material remaining on site may cause acid mine drainage.

6.2 COUNT 2:

- 6.2.1 Mr Bertus Venter admits that he has the required authorization from Vunene Mining (Pty) Ltd to submit this plea of guilty.

- 6.2.2 The accused admits that it is guilty of contravening section 151(1)(a) read with Sections 1, 2, 4, 13, 14, 16, 17, 19, 21, 22, 151(2), 152, 153 and 154 of the National Water Act 36 of 1998 and read with sections 90 and 250(1) of the Criminal Procedure Act 51 of 1977;

- 6.2.3 The accused admits that during the period 26 February 2007 to 7 December 2012 at farm Jan Hendriksfontein 263 IT, portion 14 and portion 6b, in the Regional division of Mpumalanga, the accused wrongfully and unlawfully used water otherwise than as permitted under the National Water Act to wit:
 - 6.2.3.1 took water from the Witpuntspruit in terms of section 21(a);
 - 6.2.3.2 stored water in a dam in terms of section 21(b) ;
 - 6.2.3.3 Discharged waste or water containing waste into a water resource through a canal in terms of section 21(f) ;

- 6.2.3.4 disposed of waste in a dam that may impact on water in terms of section 21(g);
- 6.2.3.5 Altered the bed and banks or characteristics of the Wetland by mining within 500 meters of the boundaries of the wetland in terms of section 21(c) and 21(i).

6.3 COUNT 3:

- 6.3.1 Mr Bertus Venter admits that he has the required authorization from Vunene Mining (Pty) Ltd to submit this plea of guilty;
- 6.3.2 The accused admits that it contravened section 24F(1)(a) read with sections 1, 24F(4), 32, 34, 34B, 34C and 34H and schedule 3 of the National Environmental Management Act 107 of 1998.
- 6.3.3 The accused admits that during the period 26 February 2007 to 7 December 2012 at Jan Hendriksfontein 263 IT, portion 14 and 6b, in the Regional Division of Mpumalanga, the accused unlawfully and wrongfully commenced with activities listed in terms of section 24(2)(a) and (b) without the Department of Environmental Affairs issuing an environmental authorisation for the activity – to wit:

Schedule 1 of GNR 386:

- 1: “The construction of facilities or infrastructure, including associated structures or infrastructure, -
 - (c): The storage of 250 tons or more but less than 100 000 tons of coal;
 - (m): for any purpose in the one in ten year flood line of a river or stream, or within 32 metres from the bank of a river or stream where the flood line is unknown, excluding purposes associated with existing residential use, but including –
 - (i) Canals;
 - (ii) Channels;
 - (iii) Bridges;
 - (iv) Dams; and
 - (v) Weirs.
- 4: “The dredging, excavation, infilling, removal or moving of soil, sand or rock exceeding 5 cubic meters from a floodplain or wetland.”
- 12: “The transformation or removal of indigenous vegetation of 3 hectares or more”

Schedule 1 of GNR 387:

- 1: "The construction of facilities or infrastructure, including associated structures or infrastructure, -
- (e) "any process or activity which requires a permit or license in terms of legislation governing the generation or release of emissions, pollution, effluent or waste and which is not identified in Government Notice No. R 386 of 2006.

7. SENTENCE

7.1 AGGRAVATING AND MITIGATING CIRCUMSTANCES

- 7.1.1 It is recorded that the state and the representative of the accused have had extensive negotiations and discussions with regards to the charges against the Accused and have considered the following factors:
- 7.1.1.1 The length of the trial should the Accused plead not guilty to the charges. By pleading guilty, the accused drastically curtailed criminal proceedings. Had the accused pleaded not guilty, the trial could have run for several weeks;
- 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 accused has fully cooperated with the Prosecuting Authority in this matter and has offered full assistance to the authorities, which is in the interest of the society and law enforcement agencies;
- 7.1.1.5 the mitigating circumstances present in the case as set out below;
- 7.1.1.6 the interest the state has in securing a conviction on the charges against the accused, such interest having a number of purposes, which are:
- 7.1.1.6.1 the interest of securing a conviction against the accused of the offences which it hereby plead guilty too;
- 7.1.1.6.2 the interest to demonstrate to the community that such contraventions will be detected and prosecuted;

- 7.1.1.6.3 the interest to demonstrate that environmental compliance and sustainable mining is key to our future;
- 7.1.1.6.4 the interest to demonstrate that environmental legislation and the National Water Act applies equally to all persons and the industry across the country; and
- 7.1.1.6.5 the interest to demonstrate that the constitutional rights as contemplated in Chapter 2 section 24 of the Constitution of South Africa will be protected.

7.1.2 The following are common cause in mitigation of sentence:

1. The accused is a first offender;
2. The accused admitted guilt thereby showing remorse;
3. The accused has contributed to the economic and social development of the Ermelo community and other communities through its mining operations;
4. The accused provides employment to several people.
5. The accused contributes to the much needed production of electricity in South Africa through its mining operations;
6. 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. It is accepted that mining is, by its very nature a destructive operation, mitigated by complying with an approved environmental management programme report;
8. The costs involved of instructing several independent specialists to assist with rehabilitation.
9. The accused has voluntarily initiated a compliance strategy and undertake to comply with the concept of responsible mining.

7.1.3 The following are common cause in aggravation of sentence:

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;
2. The interest of current and future members of our society;

3. The charges are of an environmental nature which are, in that respect, of a serious nature;
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;
5. With regards to count 2 a fine or imprisonment for a period not exceeding 5 years or to both such a fine and imprisonment – for a first offender;
6. With regards to count 3 a fine not exceeding R 5 million or to imprisonment for a period not exceeding 10 years, or to both such a fine and imprisonment.
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.
8. South Africa is a signatory to the RAMSAR convention and as such bound thereto to protect our wetlands;
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;
10. The conduct by the accused in failing to comply with the approved EMP is of a serious nature;
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’*;
12. The mining industry is in fact self regulated with the department of Mineral Resources being under staffed 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;
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;
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."

15. The accused profited from the monetary gain by mining and removing coal in some portions which was not approved or provided for in an environmental programme. Those gains were thus obtained through unlawful conduct

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:

7.3 That counts 1 – 3 are taken together for purpose of sentence.

7.4 That in terms of section 297(1)(a) of the Criminal Procedure Act 51 of 1977 the passing of sentence is postponed for a period of 5 years on the following conditions:

7.4.1 Having regard to the provisions of section 34(3)(b) of NEMA and the fact that asset forfeiture is not ordered, that in line with the time frames mentioned in the rehabilitation report, the accused must implement and comply with the conditions and requirements of the rehabilitation report, compiled by Anton Linstrom ,Piet-Louis Grundling and Dr. Johan Engelbrecht, regarding the contraventions and the wetland of concern which traverse over the following farm portions: 06, 09, 14 and 15 of the farm Jan Hendriksfontein 263 IT and portion 18 of the farm Uitkomst 292 IT. The report is attached hereto;

7.4.2 Anton Linstrom & Piet-Louis Grundlingh must be instructed by the accused, and on own expense, to monitor and advise on the rehabilitation progress;

7.4.3 Anton Linstrom & Piet-Louis Grundlingh must at the expense of the accused compile a quarterly report to the office of the Public Prosecutor Ermelo regarding the progress and compliance of the rehabilitation program;

7.4.4 A copy of said report must be submitted to the quarterly Grootdraai Water Forum by the accused;

7.4.5 Having regard to the provisions of section 34B of the National Environmental Management Act 105 of 1998 and section 297(1)(a)(i)(aa) of the Criminal Procedure Act

that, before or on 15 January 2013, an amount of R750 000.00 be paid towards the Environmental Protection Agency in the account of E.V. Trust Account No. 1036476731 branch 15164400 Nedbank;

- 7.4.8 That before or on 15 January 2013 an amount of R 250 000.00 be paid towards the Ermelo Animals Rescue Services (EARS) a non-governmental and non-profit organisation (MPO 95961/EARS) for their work in animal protection and rescue – EARS Acc No. 1516103122 branch 15164400 Nedbank.
- 7.4.9 That before or on 28 February 2013, an amount of R 1.5 million be paid towards the Inspection, Compliance and Monitoring division of the Wildlife Protection Services office - Ermelo (MTPA Operating account Standard Bank Nelspruit Acc No. 032895968) and that the following specific order shall apply to this payment;
- 7.4.9.1 That such funds may only be utilised by the said Ermelo Regional office and at the discretion of the appointed district conservationist officer, Mr Johan Coetser;
- 7.4.9.2 That such funds may only be utilised for environmental protection, awareness and law enforcement within the jurisdiction of the Ermelo district office;
- 7.4.9.3 That proper records be kept on the utilisation of said funds and that it be audited in terms of the Public Finance Management Act (PFMA).
- 7.4.10 That before or on 30 March 2013 an amount of R 500 000.00 be paid towards the Working for Wetlands a non-governmental organisation for their work in Research & Planning to provide clarity on the extent, distribution and condition of South Africa's wetlands.
- 7.4.11 It is further ordered that Bertus Venter or other designated employee representing Vunene mine appear before this court at the expiry of the 5 year period being 7 December 2017;
- 7.4.12 Should the court be satisfied that Vunene mine has complied with the conditions as set out above it shall be discharged without the court passing sentence and that such discharge shall have the same effect of an acquittal, except that the conviction shall be recorded as a previous conviction.