

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

CASE: ESH 82/11

ERMELO REGIONAL COURT

ERMELO CAS 462/07/2009

In the matter between:

The State

and

Golfview Mining (Pty) Ltd

A corporate body, as represented by Albrecht Frick, 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 1991/13742/07 (hereinafter referred to as the Accused);
- 1.2 Albrecht Frick is an employee of the accused and duly authorized to enter into a formal plea and sentence agreement;

09102012

- 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("NEMA").
- 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 authorized 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 Messrs.' Roux SC, Van Vuuren and Stockwell, 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;

09102012

- 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 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 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, the Department of environmental affairs (Altus Lotter - MDEDET) and the Department of Water Affairs (Dr Paul Meulenbeld) 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.

09102012

- 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.
- 5 Whereas it is agreed that the matter be withdrawn as against Albrecht Frick, Robert Pryde and Sonita Kruger 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.
- 6 Whereas all other charges referred to in the charge sheet are withdrawn in terms of this agreement and cannot be instituted again.
- 7 Therefore the parties agree as follow in respect of a plea of guilty and a just sentence:
- 7.1 The accused admits that the Regional Court Ermelo has the required jurisdiction to deal with this case;
- 7.2 The accused admits all the facts in relation to the charges set out herein (as set out in the charge sheet and further particulars thereto) and referred to in this document.

8 THE ACCUSED PLEADS GUILTY TO THE FOLLOWING CHARGES:

8.1 COUNT 1:

- 8.1.1 Mr Albrecht Frick admits that he has the required authorisation from Golfview Mining (Pty) Ltd to submit this plea of guilty.
- 8.1.2 The accused admits that it is guilty of contravening Section 28(14)(a) read with Sections 1, 28(15) , 32, 34, 34B, 34C

09102012

and 34H of the National Environmental Management Act 107 of 1998.

8.1.3 The accused admits that during the period March 2009 to August 2010 at Portion 18 Leliefontein 136 IT farm Ermelo in the Regional division of Mpumalanga, it wrongfully and negligently committed acts or omissions which are likely to affect the environment in a significant manner by:

8.1.3.1.1 mined within a wetland; and or

8.1.3.1.2 The diversion of the Holbankspruit as well as an unnamed tributary to the Holbankspruit and or

8.1.3.1.3 The inadequate pollution control and evaporation dams on site; and or

8.1.3.1.4 Failure to separate dirty and clean water at the mining site; and or

8.1.3.1.5 Failure to construct an evaporation dam with specific requirements outside the box-cuts according to the EMP; and or

8.1.3.1.6 Constructing and using a washing bay on site on a downslope towards to Holbankspruit; and or

8.1.3.1.7 Failing to deposit the 'run of mine coal' (ROM) within each opencast box-cut areas.

8.2 **COUNT 2:**

8.2.1 Mr Albrecht Frick admits that he has the required authorization from Golfview Mining (Pty) Ltd to submit this plea of guilty.

8.2.2 The accused admits that during the period March 2009 to August 2010 at portion 18 of Leliefontein farm 136 IT Ermelo in the Regional division of Mpumalanga, the accused wrongfully and negligently use water otherwise than as permitted under the National Water Act to wit:

09102012

8.2.2.1 Impeded or diverted the flow of water in a watercourse in terms of section 21(c); and or

8.2.2.2 Altered the bed, banks, course or characteristics of a watercourse in terms of section 21(i).

8.3 **COUNT 3:**

8.3.1 Mr Albrecht Frick admits that he has the required authorization from Golfview Mining (Pty) Ltd to submit this plea of guilty.

8.3.2 The accused admits that during the period March 2009 to August 2010 at Portion 18 Leliefontein farm 136 IT Ermelo in the Regional Division of Mpumalanga, the accused wrongfully and negligently 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:

8.3.2.1 Listed activity No 1: "The construction of facilities or infrastructure, including associated structures or infrastructure, for (m) any purpose in the one in ten year flood line of a river or stream, or within 32m from the bank of a river or stream where the flood line is unknown, excluding purposes associated with existing residential use, but including canal, channels, bridges, dams & weirs."

8.3.2.1.1 - by temporarily constructing an addition bridge to cross the Holbankspruit; and or

8.3.2.1.2 - by dumping the overburden stockpiling rocks inside the river and or

8.3.2.1.3 - by constructing offices and associated structures within the 1: 10 year flood line of the Holbankspruit and or

8.3.2.1.4 - by constructing canals and or channels.

09102012

8.3.2.2 Listed activity No 12: – “The transformation or removal of indigenous vegetation of 3 hectares or more ...”

8.3.2.2.1 By transforming or removing indigenous vegetation of more than 3 hectares due to the mining activities taking place.

9 **SENTENCE**

9.1 **AGGRAVATING AND MITIGATING CIRCUMSTANCES**

9.1.1 It is recorded that the state and the representatives of the accused have had extensive negotiations and discussions with regards to the charges against the Accused and have considered the following factors:

9.1.1.1 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;

9.1.1.2 The expense to which the state and the Accused would be put by such a trial, which would be a lengthy one;

9.1.1.3 The burden of the Prosecution and the court of being engaged in such a lengthy trial;

9.1.1.4 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;

9.1.1.5 The mitigating circumstances present in the case as set out below;

9.1.1.6 The interest the state has in securing a conviction on the charges against the accused, such interest having a number of purposes, which are:

09102012

- 9.1.1.6.1 The interest of securing a conviction against the accused of the offences which it hereby plead guilty too;
- 9.1.1.6.2 The interest to demonstrate to the community that such contraventions will be detected and prosecuted;
- 9.1.1.6.3 The interest to demonstrate that environmental compliance and sustainable mining is key to our future;
- 9.1.1.6.4 The interest to demonstrate that environmental legislation and the National Water Act applies equally to all persons and the industry across the country;
- 9.1.1.6.5 The interest to demonstrate that the constitutional rights as contemplated in Chapter 2 section 24 of the Constitution of South Africa will be protected.

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

- 9.1.2.1 The accused is a first offender;
- 9.1.2.2 The accused admitted guilt thereby showing remorse;
- 9.1.2.3 The accused has contributed to the economic and social development of the Ermelo community and other communities through its mining operations;
- 9.1.2.4 The accused provides employment to several people.
- 9.1.2.5 The accused contributes to the much needed production of electricity in South Africa through its mining operations;
- 9.1.2.6 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;

09102012

9.1.2.7 It is accepted that mining is, by its very nature a destructive operation, mitigated by complying with an approved environmental management program report.

9.1.2.8 The offences in question were committed through negligence and not intent by virtue of the fact that the accused employed an independent contractor known as Altivex Mining (Pty) Ltd with specific instructions to comply with the legislation and guidelines relevant thereto. By virtue of the fact that the accused retained the ultimate responsibility to oversee due compliance by the contractor, the accused should have reasonably ensured due compliance by the contractor which it failed to do and which in the present instances constitutes negligence.

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

9.1.3.1 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;

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

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

9.1.3.4 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;

9.1.3.5 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;

09102012

- 9.1.3.6 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.
- 9.1.3.7 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.
- 9.1.3.8 South Africa is a signatory to the RAMSAR convention and as such bound thereto to protect our wetlands;
- 9.1.3.9 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;
- 9.1.3.10 The conduct by the accused in failing to comply with the approved EMP is of a serious nature;
- 9.1.3.11 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*';
- 9.1.3.12 The mining industry is in fact self-regulated with the department of Mineral Resources being under staffed and under 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;

09102012

- 9.1.3.13 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;
- 9.1.3.14 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.”
- 9.1.3.15 The accused has benefitted from the mining operations by not submitting a revised environmental management program to mine within the said areas.;
- 9.2 The parties agree that should the accused be convicted of the abovementioned offences in terms of this agreement that the accused be sentenced as follows:

10 **SENTENCE**

- 10.1 That counts 1 – 3 are taken together for purposes of sentence.
- 10.2 The accused is sentenced to a fine of R 1 000 000.
- 10.3 The payment of the R 1 000 000.00 fine is suspended for a period of 5 years on condition that;
- 10.3.1 the accused is not convicted of contravening
- 10.3.1.1 section 28(14)(a) of NEMA; and
- 10.3.1.2 section 151(1) read with 21 (c) or (i) of the National Water Act
- 10.3.1.3 section 24F(1)(a) of of the National Environmental Management Act 105 of 1998

09102012

in relation to mining activities at Portion 18 Leliefontein 136 IT and Portions 6 & 8 of Joubertsvlei 260 IT committed during the period of suspension and for which a fine per contravention is imposed in the amount of not less than R 500 000.00;

10.4 Additional Court Order:

By virtue of:

- 10.4.1 The agreement between the parties that the Accused undertake the activities referred to hereunder and having regard to the provisions of section 34(3)(b) of NEMA and the fact that asset forfeiture is not ordered the court orders the following:
- 10.4.2 That Professor van Hoven, Dr van der Waals and Dr. Titus compile a rehabilitation report, to be completed prior to 28 February 2013, regarding portion 18 Leliefontein farm 136 IT in consultation with the department of water affairs and to obtain a peer review from Anton Limstrom;
- 10.4.3 That the accused comply with the rehabilitation report as far as it relates to the contraventions charged with;
- 10.4.3 That Professor van Hoven be appointed by the accused to oversee the rehabilitation process to finalization and which person must compile a 3 monthly report for the office of the Public Prosecutor, Adv Charles Lloyd or other designated prosecutor, regarding compliance with the rehabilitation report and that such report be presented to the quarterly Grootdraai Water Forum;
- 10.4.4 That an amount of **R 1 million** be paid towards the Water Research Counsel (a research institution),
- 10.4.5 That an amount of **R 1 million** be paid towards the Environmental Empowerment Services of MDEDET'
- 10.4.6 That an amount of **R 1 million** be paid toward the Mpumalanga Tourism and Parks Agency – Lydenburg Aquatic Services office for the purpose of the proper execution of their mandated duties in the account Nelspruit Standard bank 032895968 branch code 0528520

09102012

- 10.4.7 which payment will be made in equal amount to the three entities respectively as follows;
- 10.4.7.1 R 333 333.00 on or before 31 December 2012 – towards each of the three entities;
- 10.4.7.2 R 333 333.00 on or before 30 June 2013 towards each of the three entities;
- 10.4.7.3 R 166 666.33 on or before 31 December 2013 towards each of the three entities;
- 10.4.7.4 R 166 666.33 on or before 30 June 2014 towards each of the three entities.
- 10.4.7.5 That the said funds may only be utilized for environmental research, awareness, protection and training within Mpumalanga;
- 10.4.7.6 That the utilization of said funds be audited in terms of the Public Finance Management Act (PFMA).
- 10.4.7.7 That proof of payment be forwarded to the office of the public prosecutor Ermelo – Adv Charles Lloyd.
- 10.4.7.8 The parties agree that the court order shall be enforceable as a civil judgement.