



GAUTENG DIVISION, PRETORIA

CASE NO: CC 82/2017

(1)	REPORTABLE: YES
(2)	OF INTEREST TO OTHER JUDGES: YES
(3)	REVISED.
<p>14 November 2017</p> <p>.....</p> <p>SIGNATURE</p>	

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 Ms Julia Stewart)

REASONS FOR RULINGS

of 13 November 2017

SPILG, J:

14 November 2017

INTRODUCTION

1. Uzani Environmental Advocacy (CC) (“Uzani”) instituted a private prosecution against BP Southern Africa (Pty) Ltd (“BP”), represented now by Ms J Stewart

Uzani claims that it has complied with all the legislative requirements set out in s 33 of the National Environmental Management Act 107 of 1998 ("*NEMO*").

2. On 29 June the Judge President granted Uzani leave to institute the private prosecution in the Gauteng Division. A writ of summons and indictment was issued out of this court and served on 3 August 2017
3. The Judge President directed that the matter be provisionally enrolled on 4 September. At the hearing a number of pre-trial issues were dealt with and agreement was reached pursuant to which I made the following order by consent:
 1. *In the event that the prosecution by Uzani Environmental Advocacy (CC) ("Uzani") is competent the representative of BP Southern Africa (Pty) Ltd ("BP") as identified in the indictment is replaced by Ms Julia Stewart*
 2. *In respect of counts 22 to 42;*
 - a. *it is recorded that Uzani has not obtained a nolle prosequi and has not provided security for costs and contends that it does not require either as it is pursuing the prosecution under s 32 of NEMA*
 - b. *Uzani will on or before 11 September 2017 notify BP and the court in writing whether or not it intends pursuing counts 22 to 42 and if not what it contends should happen in respect of any costs arising from a withdrawal;*
 - c. *If Uzani withdraws counts 22 to 42 and the costs consequences contended for by Uzani are disputed then BP will on or before 13 November 2017 notify Uzani and the court in writing as to its contentions regarding costs;*
 3. *In respect of all counts:*
 - a. *It is recorded that Uzani relies on having complied with s 33(2) of NEMA*

- b. *Uzani will on or before 11 September 2017 provide such documentary proof as it possesses that it has complied with ss 33(2)(b) and (c) of NEMA;*
 - c. *BP will on or before 13 November 2017 indicate in writing whether it contends that Uzani has failed to comply with the provisions of s 33 (2), on the assumption that s 33(2) is applicable*
- 4. *Uzani will on or before 11 September 2017;*
 - a. *provide copies of all the statements and documents it proposes to produce and rely upon as well as all documents in its possession which are relevant as referred to in para 5(a) of the letter from BP's attorneys dated 14 August 2017*
 - b. *Furnish a written response to para 5(b) of the said letter together with its list of witnesses indicating whether it is a final list or not;*
 - c. *Furnish a written response to para 5(c) of the said letter and provide such documentation it contends it is obliged to produce and state why it objects to produce any other*
- 5. *BP will on or before 13 November 2017 list in writing and notify Uzani and the court of:*
 - a. *All pre-plea applications, including production of documents and request for particulars it intends to bring*
 - b. *All s106 pleas it intends to raise*
 - c. *All constitutional issues it intends to raise*
- 6. *Both Uzani and BP will on or before 13 November 2017 in writing notify each other and the court of when it is intended that BP is to plead to the charges under s 105 and s 106 and whether the s106 pleas may be dealt with separately*

7. *The case is postponed to 10am 13 November 2017 at the North Gauteng High Court sitting in Pretoria before Spilg J on which date Ms Julia Stewart has been warned, in open court, to attend as representative of BP.*
 8. *All notifications between the parties and the court may be effected by way of email to the following addresses*
4. On 11 September Uzani provided its response to the court order. On 9 November BP dealt with Uzani's response and in turn dealt with those parts of the order which concerned it.

The net effect of the responses by the parties, in so far as they are now relevant, is:

- a. Uzani withdrew the fraud charges (counts 22 to 42) and contended that costs should only be argued at the end of the trial.

BP contended that it is entitled to an order for costs "*on the attorney and client scale, which ... should be determined by the court as being half the costs incurred to date of the withdrawal...*"

- b. Uzani disclosed that it intended to call as its witness the recently appointed head of the Department for Agriculture and Rural Development, Gauteng Province for the purpose of introducing into evidence BP's application in terms of s 24G of NEMA in respect of the twenty-one filling stations listed in the indictment and to testify to his and his department's competencies and mandate under the applicable environmental legislation. Uzani however would not be drawn into limiting the witnesses it may call but stated that it would give timeous notice should other witnesses be called.

Furthermore Uzani stated that it was not in possession of any witness statements and contended that it had delivered all documents that were

relevant to the prosecution of the case and that were in its possession to BP.

BP responded by bringing an application to compel Uzani to produce duly sworn witness statements, alternatively such notes of consultations with witnesses as were in its possession. It contended that a prosecution cannot proceed unless the private prosecutor has witness statements or notes of the evidence that the witness intends giving. It also indicated that other arguments will be raised centred on among other things its fair trial rights and entitlement to fully and adequately prepare for trial.

- c. BP produced the plea which it will tender in terms of ss 105 and 106(1) (b) and (h) of the Criminal Procedure Act 51 of 1977 (*“the CPA”*). It contended that:

“ In light of the Private Prosecutor having brought the prosecution, and having brought the Accused before court, it is appropriate that the Accused be allowed to plead to the remaining charges, Counts 1 to 21, in court on 13 November 2017”

In a subsequent paragraph of its response to the order of 4 September BP added that was not only appropriate but also necessary to plead to the charges and that at the hearing on 13 November it intends to plead to the charges ... *“as required by sections 105 and 106 of the CPA”* in accordance with the plea that was attached.

ISSUES FOR DETERMINATION

5. At the hearing of 14 November two issues crystallised which required a determination.

6. Firstly *Adv Hellens* contended that BP must be entitled to plead. *Adv Burger* on behalf of Uzani claimed that it was not yet ready to put the charges to BP under s 105.
7. The second issue arose when Uzani's tender to pay the wasted costs occasioned by the withdrawal of the fraud charges on the party and party scale was rejected. BP contends that it is entitled to costs on the attorney and own client scale.

PLEADING TO THE CHARGES

8. *Adv Hellens* submitted that BP had been dragged to court and that this was the second appearance without charges being put. It should be pointed out that it was never intended by the parties that BP was to plead at the hearing of 4 September. Accordingly the hearing of 13 November was the first occasion when it might have been possible for BP to have pleaded, bearing in mind too that the Judge President's grant of leave to prosecute in this division was only in late June. What occasioned the delay in initiating the prosecution before that date may however be a different matter; but there is insufficient detail placed before me in that regard.
9. *Adv Burger* indicated that consideration was being given to making "*adjustments*" to the indictment and that Uzani was not yet ready to put the charges. He also contended that it is for Uzani to trigger s 105. The response was that there was effectively a long delay in proceeding with the matter and that BP could have given consideration to relying on s 342A which provides an accused with relief in cases of unreasonable delay.
10. It would be inappropriate to regard a prosecutor as the sole arbiter of when an accused is to plead to the charges. Unreasonable delay will afford the accused a right under s 342A(3)(d) to have the case struck off the roll if he or she has not yet pleaded with the result, at least in prosecutions by the State, that the prosecution cannot be resumed or be instituted *de novo* without the written instruction of the Prosecuting Authority¹. The right would be reinforced by the

¹ See s 342A(3)(d)

constitutional fair trial right under s 35(3) (d) to have proceedings commence and be concluded without unreasonable delay; which may not necessarily be a separate right but is subsumed within and informs the application of s 342A. Since no argument was addressed in that regard it is unnecessary to consider it further.

11. In the circumstances of this cases if BP is entitled to compel Uzani to put the charges to it then it must bring itself within the provisions of s 342A. As correctly pointed out by Adv Burger s 342A contains detailed provisions with regard to what a court is to take into account when considering whether any delay in putting the charges to BP at this stage is unreasonable for the purposes of that section, or any possible broader fair trial considerations that may not be covered by the section. Certainly BP did not suggest what they might be.

12. There is a further aspect. While BP argues that Uzani must by now be able to formulate the charges it appears to me that the real need to consider amending the indictment arises from the special pleas that BP intends to raise. They are not limited to a s106 (1) (h) denial although the precise peg on which the other special pleas hang is not identified. At best they either fall under a s 85 objection or a defence under a constitutional section 35(3) fair trial right.

By way of illustration the defences range from potentially purely technical issues such the description of the private prosecutor to substantive issues such as the prosecutor's title to prosecute, whether the private prosecution is in the public interest and whether s 24G (6) of NEMA limits the right to prosecute where there has been an application under s 24G (1) which resulted in the imposition of an administrative fine.

13. In my view it would be premature to oblige Uzani to have put the charges to BP at the hearing of 13 November in the face of the various special pleas raised whether under one of the subsections to s 106(1) or otherwise.

As already indicated BP's pro-form plea to the charges is not simply one of not guilty. One of the special pleas is expressly stated to fall under s 106(1) (h);

namely that the prosecutor has no title to prosecute. A number of different grounds are relied upon to support this special plea.

In terms of s 106(3) where an accused intends to tender a plea other than one of guilty or not guilty then he or she “*shall give reasonable notice to the prosecution ...and shall in such notice state the grounds on which he basis his plea*”

14. It is evident that the purpose of reasonable advance notice is to enable the prosecution to amend the indictment, bearing in mind that once an accused has pleaded the prosecution may not amend the charges without the leave of the court, where prejudice will then be a major consideration.²
15. While the point of s106(3) was not raised it is evident from the submissions made by Adv Burger that Uzani wishes to consider its position in light of the pro-forma plea presented. It seems to me that having regard to the nature of the issues raised by the several special type pleas a period of at most two clear court days since delivery of the pro-forma plea would not constitute reasonable notice ahead of any possible obligation to put the charges to BP.
16. In my view the lack of reasonable notice, irrespective of the reasons for it, is dispositive of the first issue whether under s 106(3) or under a consideration in terms of s342A of the reasonableness or otherwise of a delay in putting charges to an accused.

Having said that I fully support the underlying premise of BP’s contention; namely that it is entitled to have clarity as to when and if the indictment is to be amended. I considered that to achieve this end, and after hearing any submission if there was no agreement, the court should put Uzani on terms as to the date by when it must finalise and deliver the indictment to which BP is expected to plead.

17. In view of the manner in which I believe the case should proceed it is necessary to raise a further ground as to why it is inappropriate to accede to BP’s contention that it should be entitled to plead ahead of its application to compel the

² See s 86 of the CPA

production of documents. BP framed the preamble to the application in a manner which seeks to direct when the application is to be dealt with:

“Be pleased to take notice that on the 13 of November 2017, subsequent to the Accused having pleaded to the remaining charges, the Accused intends to make application for an order ... “

compelling the production of witness statement, all notes taken by Uzani’s legal representatives of evidence relevant to the prosecution, and responses, to requests for other documents.

18. I have grave doubts as to whether it is within the competency of an accused to unilaterally determine when applications of this nature are to be brought. Either the substance of the application falls within the provisions of the CPA in which case those provisions must be adhered to or if not then subject to some innovative principle the right to bring such an application must be found in the fair trial right provision of s 35(3) of the Constitution.³

19. While BP contends that this is not a request for particulars to any matter alleged in the charge as contemplated by s 87 of the CPA in its response to para 5(a) of the 4 September order it contends that it;

“is not in a position to decide whether to request further particulars and if so, which further particulars to request, until the Private Prosecutor has complied with its obligation to make proper discovery as described in the application to compel and as required by law”

20. Accordingly irrespective of whether the manner of framing the request for documents falls under s 87 or is pursuant the rights to a fair trial under the Constitution⁴ it is evident that BP contemplates the possibility of requesting

³ See generally *Shabalala and Others v Attorney - General, Transvaal, and Another* 1996 (1) SA 725 (CC)

⁴ See s35(3) and *Shabalala*

particulars to which it believes it is entitled. If it is entitled to request particulars then this is likely to fall within s 87. If not, then it appears unwise to have a parallel process that may undermine the logical structure of the CPA and be subject to unnecessary challenge by the prosecution. Ultimately it seems that what is not provided for under the CPA must be founded on the inability to properly prepare for trial thereby prejudicing the right to a fair trial. In all these situations the complaint must impact on the ability to plead meaningfully. It is difficult to see how the one can be completely separated from the other.

The founding affidavit to the application to compel which is deposed to by BP's attorney confirms in at least two substantive paragraphs⁵ that it is based both on an entitlement to the documents sought under the right to a fair trial and that it cannot properly prepare for trial without having the means of testing whether the prosecution is in the public interest or in the interests of the protection of the environment.

21. The issues for which BP seeks the documents with a possible follow up request for particulars, on its own showing relate to the special pleas, or at least some of them, it intends to raise under s 106(h) and possibly a constitutionally based plea of trial prejudice
22. Moreover there are special pleas raised which do not profess to rely on s 106(1)(h) which, having regard also to Adv Hellens' submissions, may fall within an objection to the charges that an accused can take under s 85. I must consider this also in light of a possible amendment to the charges which may itself give rise to an objection.

Since objections must precede a plea under s 106 it appears appropriate that BP should retain the right, should it so elect, to object.

⁵ Paras 14 and 18

23. For these various reasons it is necessary to rule that the sequence in which the matter is to be dealt with commences logically with Uzani being obliged to have a final amended indictment prepared and that it must be put on terms to do so.

After that BP's application to compel documents will be heard. It appears appropriate that the application to compel documents should be dealt with procedurally in the same manner as the delivery of particulars in terms of s 87

Once that is ruled on then either BP will exercise its rights under s 85 to object⁶ or will plead to the charges. From a case management point of view it appears unwise at this stage to regulate the running of the matter beyond that point.

COSTS

24. There is a tender in respect of the wasted costs occasioned by the withdrawal of the fraud charges. It is however limited to party and party costs. Adv Hellens makes a compelling argument for a special costs order based on Uzani being apprised that such charges were incompetent since it relied solely on the provisions of NEMA to institute the private prosecution. He also submitted from the bar that unfounded allegations of fraud were made against BP.

25. In reply Adv Burger also from the bar contended that the allegations of fraud were not lightly made. It seems to me that if BP are correct then they may make a compelling argument for costs on the attorney and own client scale. However such a finding cannot be made without evidence. It is only when all the evidence has been presented that an informed decision can be made with regard to whether the court should make a special costs order, in one form or another, or only order costs on the ordinary scale. I do not wish to prejudice either party by making a call on it at this stage.

⁶ See the extended application of s 85 per Cloete J, at the time, in *S v Friedman (2)* 1996(1) SACR 196 (W)

RULINGS AND ORDER

26. I gave my ruling on 13 November. The ruling included directions that dates be determined for the future course of this case. These were then all agreed upon by the parties. One of the dates would be contingent on when I deliver judgment in the application to compel. While the parties were reluctant to include in any order a date by when judgment should be delivered, in order to have fixed dates I considered that it was appropriate that the parties know by when judgment will be handed down so that the crucial date when either the objection will be heard or the charges will be put is fixed.

27. The rulings of 13 November, which are based on the reasons set out in this decision read :

1. *Uzani Environmental Advocacy (CC) ("Uzani") is to deliver to BP Southern Africa (Pty) Ltd ("BP") any amended indictment by no later than a date to be determined, after hearing counsel, which shall be prior to the date of the hearing of the application to compel documents.*
2. *The application to compel documents will be dealt with procedurally in the same manner as the delivery of particulars in terms of s 87 of the Criminal Procedure Act 51 of 1977 ("the CPA") and after hearing counsel the court will determine dates for the filing of affidavits and the hearing of the application prior to BP pleading under s106 of the CPA.*
3. *Within a period to be determined, after hearing counsel, BP shall be entitled to exercise its rights under s 85 of the CPA to object to the charge prior to pleading and a date for such hearing will also be determined.*
4. *If BP does so object then a date will be determined, after hearing counsel, by when any documents are to be delivered and when such objections will be heard.*

5. *If BP does not so object then Uzani shall put the charges to BP on the same date determined for the disposal of any objections and BP shall plead thereto in accordance with s 106 of the CPA*

6. *The determination of the dates will be made on 13 November 2017 and immediately after this ruling is handed down*

7. *Uzani shall pay the wasted costs occasioned by the withdrawal of counts 22 to 42 however the scale on which such costs are to be paid will be reserved for determination at the conclusion of the trial*

28. Furthermore by agreement between the parties I order that:

1. *Uzani Environmental Advocacy (CC) ("Uzani") is to deliver to BP Southern Africa (Pty) Ltd ("BP") any amended indictment by no later than 15 December 2017.*

2. *The application to compel documents will be dealt with procedurally in the same manner as the delivery of particulars in terms of s 87 of the Criminal Procedure Act 51 of 1977 ("the CPA") and;*

a. Uzani is to file an answering affidavit by 15 December 2017;

b. BP is to file its replying affidavit if any by 31 January 2018;

3. *The application to compel documents is to be heard on 20 March 2018 and the court has indicated that it will deliver judgment within two weeks of that date*

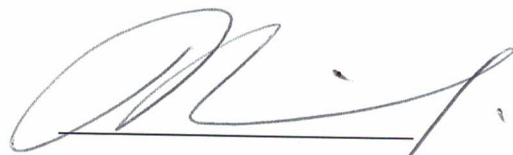
4. *BP shall be entitled to exercise its rights under s 85 of the CPA to object to the charge by;*

a. giving notice thereof on or before 13 April 2018

b. delivering its application by 4 May 2018

5. If BP does so object then the objections will be heard on 18 May 2018.

6. If BP does not so object then on 18 May 2018 Uzani shall put the charges to BP in terms of s 105 of the CPA and BP shall plead thereto in accordance with law.



SPILG J

DATE OF HEARING:	13 November 2017
DATE OF RULING:	13 November 2017
DATE OF REASONS AND ORDER:	14 November 2017
FOR THE PROSECUTION:	Adv S Burger SC Adv Pretorius Erasmus Attorneys
FOR THE ACCUSED:	Adv M Hellens Warburtons Attorneys