

IN THE HIGH COURT OF SOUTH AFRICA
WESTERN CAPE DIVISION, CAPE TOWN

CASE NO: 10152/2015

In the matter between:

UMHLABA PLANT HIRE CC

Applicant

And

**THE DIRECTOR OF PUBLIC PROSECUTIONS,
WESTERN CAPE**

First Respondent

**THE DIRECTOR, ENVIRONMENTAL COMPLIANCE AND
ENFORCEMENT, WESTERN CAPE GOVERNMENT**

Second Respondent

**THE COMMANDING OFFICER, SOUTH AFRICAN POLICE
SERVICES VEHICLE IDENTIFICATION AND SAFEGUARD
SECTION, STIKLAND**

Third Respondent

JUDGMENT DELIVERED ON THIS 15th DAY OF SEPTEMBER 2015

VAN ROOYEN, AJ:

[1] Gerhard Conradie is a member of the applicant and also a director of G L Conradie Plant Hire (Pty) Ltd ("G L Conradie").

[2] During 2014 G L Conradie was contracted by the owners of the farm Hazendal Wine Estate ("Hazendal") in the Stellenbosch region to level and terrace sections of farmland on Hazendal for agricultural purposes and work commenced in 2014. For that purpose, G L Conradie hired from the applicant a bulldozer ("the bulldozer") owned by the applicant.

[3] On 7 August 2014 the second respondent, acting in terms of ss 20 and 21 of the Criminal Procedure Act, 51 of 1977, read with ss 31H(5) and 31G of the National Environmental Management Act, 107 of 1998, ("NEMA") obtained a warrant from a Magistrate at the Kuils River Magistrates' Court, authorising the seizure of articles that were on reasonable grounds believed to be concerned in (and intended to be used in) the suspected commission of offences contemplated in NEMA. That same day the bulldozer was attached in terms of the warrant and it has been in the custody of the third respondent since then.

[4] In this application the applicant, in terms of s 34F(1) of NEMA, seeks the release of the bulldozer. Section 34F reads as follows:

"34F. Security of release of vehicles, vessel or aircraft

(1) If a vehicle, vessel or aircraft is seized in terms of this Act and is kept for the purposes of criminal proceedings, the owner or agent of the owner may at any time apply to a court for the release of the vehicle, vessel or aircraft.

(2) A court may order the release of the vehicle, vessel or aircraft on the provision of security determined by the court.

(3) The amount of the security must at least be equal to the sum of –

(a) the market value of the vehicle, vessel or aircraft.

(b) the maximum fine that a court may impose for the alleged offence; and

(c) costs and expenses incurred or reasonably foreseen to be incurred by the State in connection with prosecuting the offence and recoverable in terms of this Act.

(4) If the court is satisfied that there are circumstances that warrant a lesser amount of security, it may order the release of the vehicle, vessel or aircraft subject to the provision of security for such lesser amount.”

[5] The first and third respondents do not oppose the application. The second respondent is not opposed to the release of the bulldozer on condition that security be provided in terms of s 34F.

APPLICANT’S APPROACH

[6] The applicant contends that circumstances contemplated in s 34F(4) exist which warrant a deviation from the formula for security contemplated in s 34F(3).

[7] Disregarding the seizure, the market value of the bulldozer would have been approximately R750,000-R1,200,000. However, since the seizure, the condition of the bulldozer has deteriorated because it has not been used and serviced. Consequently, the market value is only approximately R250,000.

[8] The applicant therefore offered security of R250,000 which was rejected by the second respondent.

[9] In oral argument, counsel for the applicant contended that, in the circumstances of this matter, the bulldozer ought to be released without the payment of any security but the applicant is prepared to undertake to: (a) refrain from alienating or otherwise encumbering the bulldozer until the first or second respondent confirms in writing that the criminal matter has been finalised; (b) maintain and insure the bulldozer pending finalisation of the criminal matter.

SECOND RESPONDENT'S APPROACH

[10] In a letter dated 4 February 2015 the second respondent refused to release the bulldozer.

[11] After this application had been launched on 29 May 2015, the second respondent asserted in a letter dated 1 July 2015 that the formula in s 34F(3) applies but that the second respondent is prepared to accept security in the amount of R2,500,000.

[12] In its opposing affidavit the second respondent again contended that the formula in s 34F(3) applies which means that security in the amount of at least R40,750,000 is required (R750,000 being the minimum market value of the bulldozer according to the second respondent, plus R10,000,000 x 4, being the maximum fines that may be imposed in respect of the four alleged offences).

[13] In argument, it was accepted by counsel for the second respondent that there are circumstances, contemplated in s 34F(4), which warrant an amount of security

less than an amount contemplated in s 34F(3). An amount of R1,200,000 was proposed.

CONTEXTUAL INTERPRETATION OF S 34F OF NEMA

[14] It is evident from the provisions of NEMA that pollution or degradation of the environment is considered to be a serious offence which has far-reaching consequences for perpetrators.

[15] Substantial sentences may be imposed for offences provided for in NEMA. Section 49B, for example, provides for a maximum fine of R10,000,000 or 10 years imprisonment for certain offences including degradation of the environment contemplated in s 49A(1).

[16] Integral to the scheme of NEMA, is attachment of goods used in the process of committing offences contemplated in NEMA and the forfeiture of such goods in the event of conviction (s 34D). Thus, goods may be attached pursuant to a warrant issued in terms of ss 31H(5) and 31G(2)(b) if such goods, on reasonable grounds, *inter alia* are believed to be concerned in (or intended to be used in) the suspected commission of offences contemplated in NEMA.

[17] In terms of s 34F a court may order the release of attached goods. Read contextually, and unless s 34F(4) applies, it appears that a court may only order the release of attached goods if an amount of security, calculated in accordance with s 34F(3) is ordered.

[18] These stringent provisions are understandable in view of the mischief that the legislature seeks to address in NEMA.

[19] However, it is equally understandable that the provisions of s 34F(3) may have iniquitous results and that circumstances may warrant a deviation from the drastic formula in s 34F(3). NEMA does not identify those circumstances in s 34F(4), or elsewhere, and it stands to reason that it depends on the facts of each matter.

[20] It was argued by counsel for the second respondent that, in the application of s 34F(4), the formula in s 34F(3) should still be borne in mind. It was further contended that the reference to "*a lesser amount*" in s 34F(4) implies of necessity that, although a court may reduce the amount of security contemplated in s 34F(3), it must order an amount of security in the event of the release of attached goods being ordered. I do not believe that the legislature intended to fetter a court's discretion to the extent contended for. Such a construction may have absurd results. If, for example, it transpires after an attachment that the attached goods had not been used (or are not intended to be used) at all in the commission of an offence or they had been attached by mistake, the legislature could not have intended to compel a court to: (a) use the formula in s 34F(3) as a point of departure; or (b) order a nominal amount of security just for the sake of ordering an amount of security.

[21] In exercising its discretion a court should, of course, bear in mind the mischief that the legislature seeks to address in NEMA but s 34F(4) should be

applied with reference to the circumstances that prevail in a particular case under consideration.

CIRCUMSTANCES IN THIS MATTER

[22] In this matter the following circumstances ought to be considered as a whole in the process of applying s 34F(4): (a) The importance of the protection of the environment and the role of NEMA; (b) The nature of the alleged offences; (c) The involvement of the bulldozer; (d) The interests of the owner of the bulldozer; (e) The effect if the bulldozer is not released; (f) Proportionality. Each of these considerations will be dealt with below.

NEMA and protection of the environment:

[23] The importance of the protection of the environment, the significant role of NEMA in that process and the part played by s 34F have been dealt with earlier herein.

Nature of the alleged offences:

[24] Dr Mahed, who made a statement in terms of s 212(4) of the Criminal Procedure Act, has degrees in environmental science and geology, with a background in hydrogeology and experience relating to water resource management. On 27 August 2014 he conducted a study of the impact of sand mining on the hydrological regime at Hazendal and, in conclusion, he stated the following in his report:

"It is clearly evident that significant environmental degradation has occurred on the Hazendal Wine Estate ... due to the anthropogenic activities. The sand mining, road construction and dumping of builder's rubble have altered the environment, affecting the aesthetic aspects of the site, as well as having removed valuable topsoil, led to soil erosion, and altered the hydrological regime. This is likely to have implications for the local water cycle, and affect surface runoff and groundwater dynamics and quality."

[25] On 18 November 2014 the second respondent produced a list of four alleged offences after completion of its investigation, namely: (a) An unlawful act/omission which causes or is likely to cause significant pollution or degradation of the environment in contravention of s 28 read with s 49A(1)(e) of NEMA; (b) The construction of a culvert pipe underneath the road within a watercourse or within 32 metres of a watercourse, without authorisation, in contravention of s 24F(1) of NEMA, read with Government Notice Regulation 544 of 18 June 2010; (c) The construction of a road wider than 4 metres over a wetland in contravention of Government Notice Regulation 544; and (d) Mining activities within a wetland in contravention of Government Notice Regulation 544.

Involvement of the bulldozer:

[26] Dr Mahed does not deal with the involvement of the bulldozer. It will be illustrated later herein why, for present purposes, it must be accepted that G L Conradie and the bulldozer were not involved in the "road construction and dumping of builder's rubble" referred to by Dr Mahed.

[27] In terms of s 28 of NEMA, G L Conradie submitted a rehabilitation plan ("the plan"), regarding Hazendal, to the Western Cape Department of Environmental Affairs and Development Planning ("the Department") during September–November

2014. In a letter dated 12 December 2014 the Department stated that it "is satisfied with the proposed rehabilitation methods and timeframes".

[28] On 2 March 2015 G L Conradie, through its attorneys, made written representations to the first respondent in which G L Conradie's response to the alleged offences was set out and the plan was referred to. The response to each of the alleged offences will be summarised below.

[29] First offence (pollution or degradation of the environment): Hazendal is zoned for agricultural activity which, by its very nature, implies an unavoidable disturbance of the environment. The earthmoving activities on Hazendal resulted in some farmland being levelled. There is no evidence that any alleged degradation was not minimised or that G L Conradie did not intend thereafter to rectify any degradation that may have resulted. In fact, G L Conradie presented the plan to the Department, and it was accepted. Ultimately, there is no degradation, let alone significant degradation. G L Conradie did not dispose of any rubble on the site. It was already there when G L Conradie was contracted by the owner of Hazendal to remove it.

[30] Second and third offences (construction of a road and culvert pipe): the road and culvert pipe underneath it, referred to in the alleged second and third offences, existed when G L Conradie commenced with work on Hazendal and were not constructed by G L Conradie.

[31] Fourth offence (sand mining activities within a wetland): no activities took place within a wetland. That is borne out by the Department's directive which refers

to “earthmoving activities in close proximity to a watercourse”. If those activities were within a wetland, the Department would have said so.

[32] The first respondent has not informed G L Conradie of any decision regarding the applicant’s representations.

[33] The second respondent did not deal with the contents of the representations in his answering affidavit (or elsewhere) and merely contended that the “cogency of criminal offences will best be determined by the court entertaining the criminal prosecution and after all the evidence has been presented”. In principle, that is correct. However, for purposes of this application it is relevant to consider the extent of the bulldozer’s involvement in the alleged offences. The investigation has been completed and the second respondent has all the relevant information at his disposal. Whilst, in these proceedings, it cannot be expected of him to prove the guilt of alleged perpetrators and to deal in every bit of detail with the involvement of the bulldozer, it can be expected of the second respondent to at least put up some evidence if he is in disagreement with G L Conradie’s contentions in its representations.

[34] It is stated on behalf of the second respondent that, during a meeting with the state advocate who deals with the matter on 1 July 2015, she indicated that the first respondent would be proceeding with the criminal prosecution. However, it is not stated who the accused will be. It may very well be that the owner of Hazendal will be an accused and that the first respondent may decide, on the strength of G L Conradie’s representations, that G L Conradie will not be prosecuted.

Interests of the owner of the bulldozer:

[35] Before the attachment, the bulldozer was rented out by the applicant at a rate of R750 per hour to various clients. Based on the rental history, the applicant has been suffering a loss of income in excess of R90,000 per month as a result of the attachment.

[36] The member of the applicant who deposed to the founding affidavit is also a director of G L Conradie who rented the bulldozer for purposes of the work done at Hazendal. The applicant was therefore probably aware of the nature of the work done at Hazendal. However, it has been illustrated that, on these papers, G L Conradie and the bulldozer were not involved at all in the activities that led to most of the alleged offences.

[37] The bulldozer will deteriorate whilst being under attachment as it will not be used and serviced. Consequently, its market value will be reduced.

Further consequences if the bulldozer is not released:

[38] G L Conradie will be deprived of a bulldozer that is needed for rehabilitation of Hazendal in terms of the plan (that was explained to the second respondent in a letter from the applicant's attorneys dated 20 January 2015).

[39] In these circumstances it will not be in the interest of the environment if the release of the bulldozer is not ordered or if an amount of security is ordered which is so high that the applicant will not be able to provide such security.

Proportionality:

[40] I am of the view that it will be just to make an order that is proportionate to the involvement of the bulldozer.

CONCLUSION

[41] In these circumstances, the security in the amount of R250,000 offered by the applicant on 20 January 2015 was reasonable.

[42] It is therefore ordered that:

(a) The Komatsu D65EX bulldozer, with chassis number KMTOD060A01067871, be released to the applicant immediately upon security in an amount of R250,000 being furnished to the second respondent either by way of payment of that sum or by way of a bank guaranteed cheque and which security shall be held in terms of s 34F(4) of the National Environmental Management Act, 107 of 1998, pending the finalisation of the criminal matter in respect of which the bulldozer was attached.

(b) The costs of this application be paid by the second respondent.

R F VAN ROOYEN, AJ