



# The cart before the horse: Reversing the order (Section 24G NEMA)

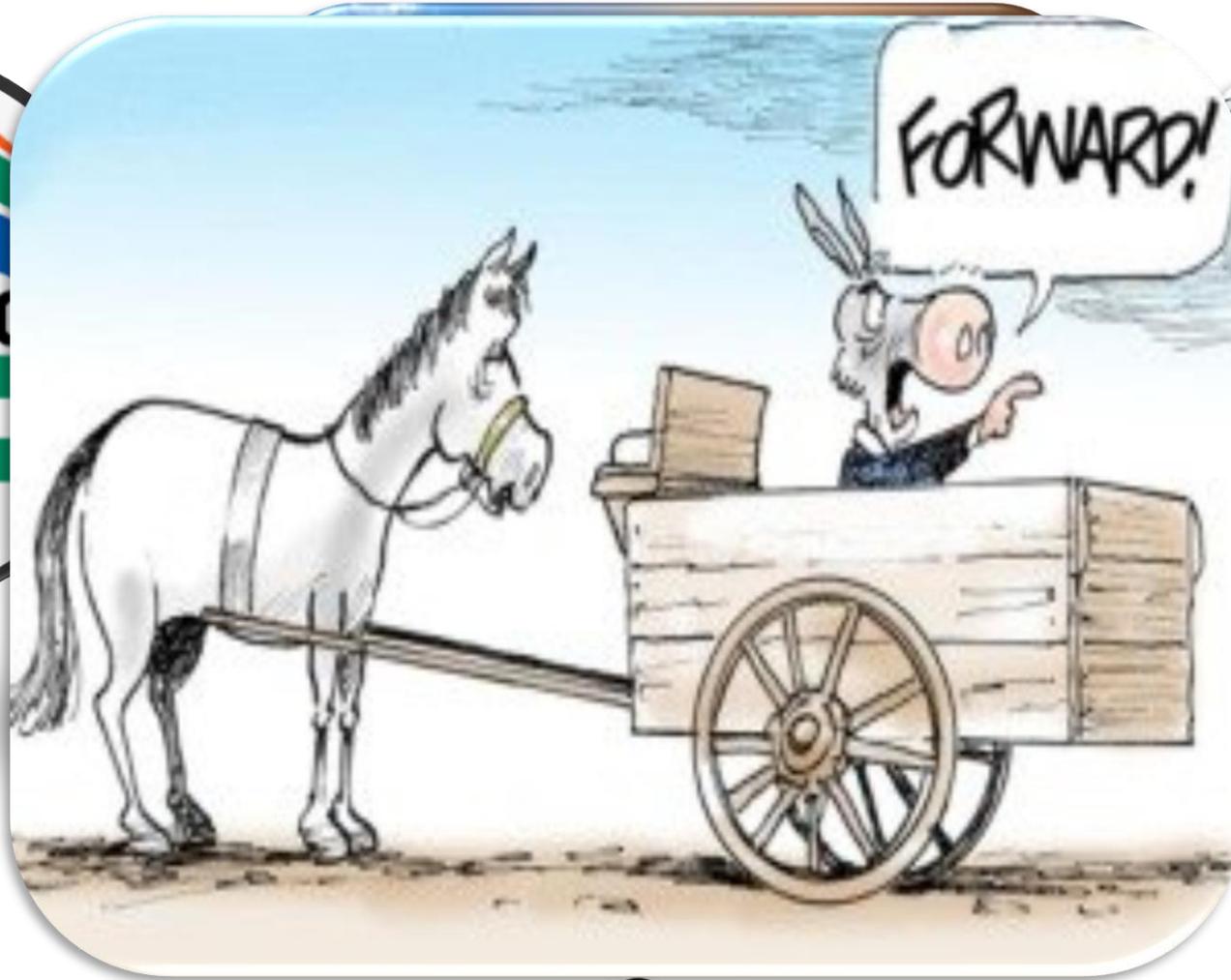
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# INTRODUCTION



# OUTLINE



- ❑ **History of retrospective environmental authorisation**
- ❑ **Section 24G**
- ❑ **Case study**
  - ❑ **Uzani case:**

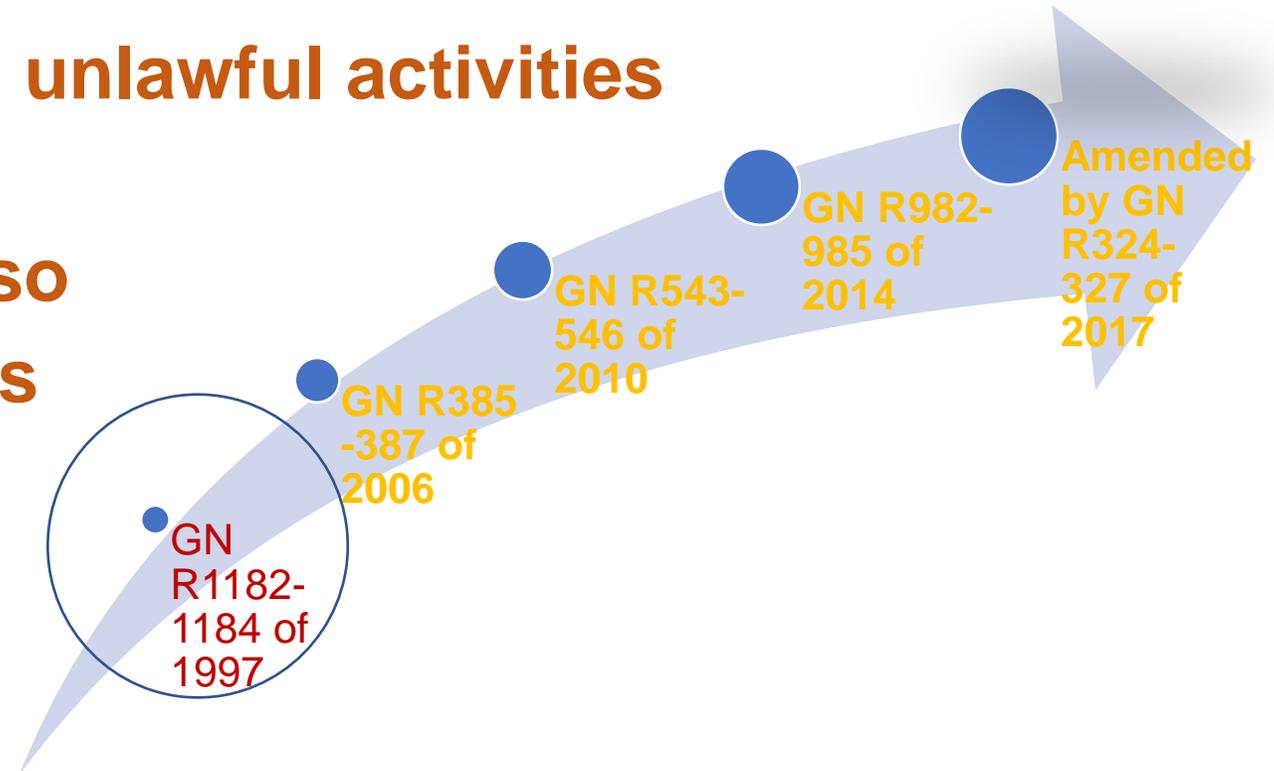


# HISTORY



□ ECA & its Regs prohibited unlawful activities

□ NEMA was enacted & it also prohibited unlawful activities



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# HISTORY



❑ *Supersize Investment 11 CC v MEC of Economic Development, Environment & Tourism, Limpopo (2011)*

- ❑ S24G was only applicable after conviction in terms of s24F

❑ **S24G was seen as an alternative to prosecution**

❑ *Interwaste v Coetzee (2013)*

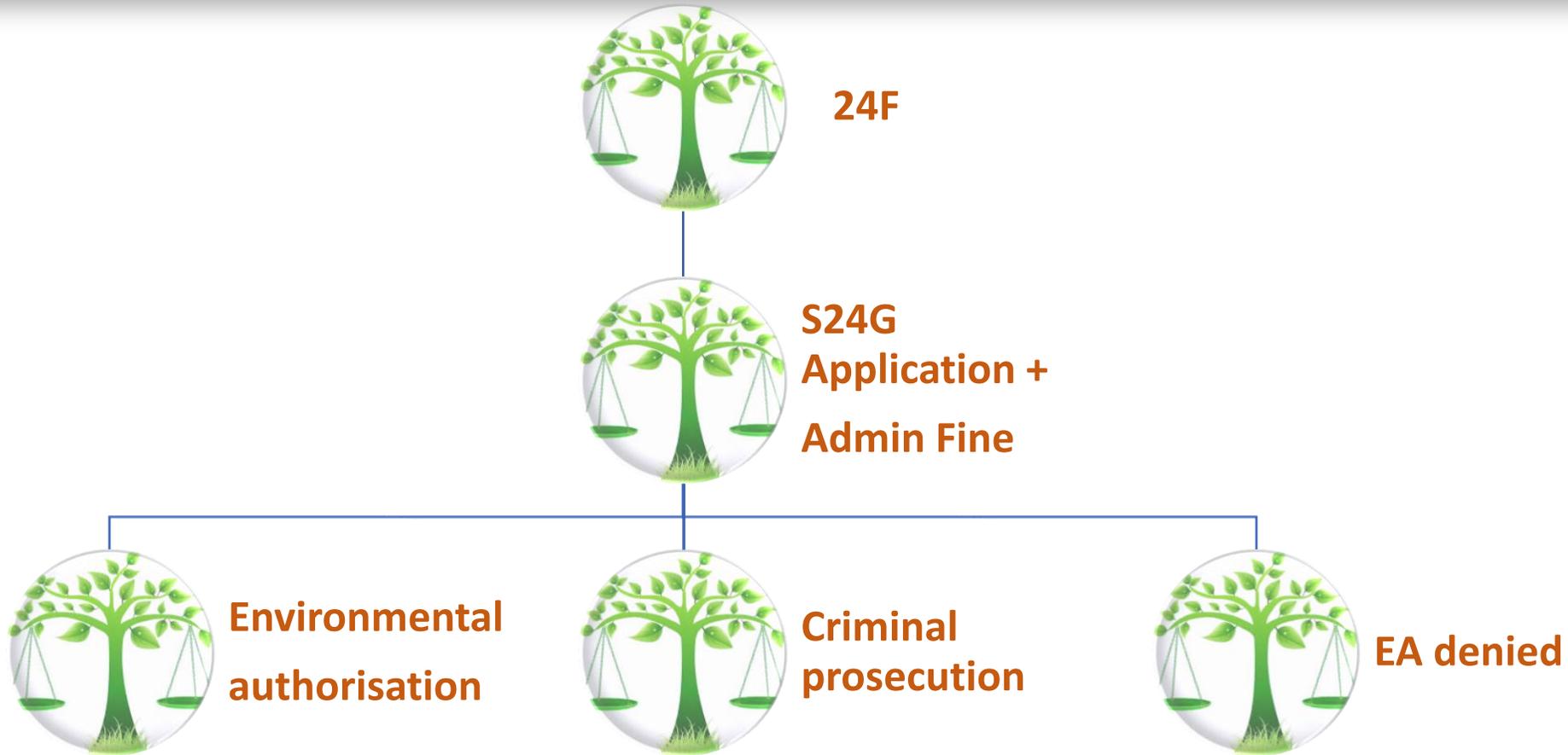
Court erred by holding that s24G applied to unauthorised activities in terms of the Waste Act

❑ *York Timbers v NDPP (2015)*

It was not legally required of a person who commenced an activity without authorisation to make an application in terms of s24G

❑ ***NEMA Amendment Act 2013***-Included Waste Act and emphasise that s24G is not an alternative

# Section 24G



# Uzani Environmental Advocacy v BP Southern Africa (Uzani case) 2019



- ❑ Uzani instituted proceedings in terms of s33 of NEMA in the interest of public and protection of environment
- ❑ BP was charged with 21 counts of contravening s22(1) r/w s 29(4) of ECA & item 1(c) of schedule 1 and schedule 2 of the GN R1182 in GG 18261 of 5 September 1997
  - ❑ *The construction and/or upgrading of the filling/service stations .... without the written authorization of the minister responsible for environmental matters or a competent authority or a local authority or an officer designated by the minister.*
- ❑ BP plead not guilty

s 106(1)(h)  
denying Uzani's  
entitlement to  
prosecute and the  
other is a plea of  
not guilty under s  
106(1)(b)

# Evidence



## ⚖️ Prof van der Walt:

- ⚖️ **NEED for EA prior commencement of an activity & and post construction assessment adopts lower standards vs pre-constriction EIA**
- ⚖️ **Refusing s24G is not an option because of job losses**
- ⚖️ **Post-construction application is qualitatively inferior to the rigorous requirements of EIA**

## ⚖️ Head of the then Gauteng provincial Department of Agriculture and Rural Development

- ⚖️ Identified BP's applications in respect of the 67 activities that were said to have been unlawfully commenced without EA
- ⚖️ The filling stations to which counts 3, 4, 7 and 10 related he could find no record of BP submitting a rectification report, paying an administrative fine or of GDARD issuing an EA

## ⚖️ Erasmus :

- ⚖️ Testify about his passion for and extensive involvement in environmental affairs
- ⚖️ Uzani's entitlement to pursue the prosecution

# ISSUES



- ❑ **The first set of issues arise from BP's plea under s 106(1) (h) that Uzani had no title to prosecute. They concern;**
  - ❑ **Whether the written notice to the DPPs is defective in that it failed to identify the accused or the alleged offence with sufficient accuracy as required by s 33(2) of NEMA;**
  - ❑ **Whether there was prior consultation with the DPP.**
  - ❑ **Bp contends that a reading of s 33 (2) of NEMA with s 8 of the CPA requires that a private prosecutor can only exercise a right to prosecute under s 33(1) *after* consultation with the DPP as envisaged by s8 of the CPA, which would in turn require the DPP to be possessed of sufficient information to make an informed decision.**
  - ❑ **Whether Uzani has proved that the private prosecution is in the public interest or in the interests of the protection of the environment as required by s33(1) of NEMA;**

# Judgement



The notice covered the terms of s 24G and

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# Judgement



## Counts convicted on:

## Acquitted on counts

⚖️ Counts 1, 2, 5, 6, 8, 9 and 11 to 21 inclusive of contravening s 22(1) read with ss 21(1) and 29(4) of the ECA and items 1 (c) of schedule 1 and schedule 2 of GN R1182 of 5 September 1997.

⚖️ Counts 3, 4, 7 and 10

# Discussion



- The court concurred with two significant statements:
  - Retrospective authorisation requires submission of assessment report which refusal thereof was not really an option because it will result in job losses.
  - That the post construction approval under s 24G is less stringent than the pre-construction
  
- Is that the case though?

# Discussion



- CA are forced to allow the activities they would have otherwise not been allowed
- Exacerbated by pressure for need for development (S 24 of the const, s2 NEMA & NDP)
- Downside is that:
  - a) the activity would have never been allowed in that specific place
  - b) development has already impacted the environment
  - c) EIA is anticipatory tool, not necessarily retro-active tool. All it can do is to try to mitigate the impact that would have not been allowed
  - d) Are there not better tools other than EIA that can be an retro-active tools?

## Final word



**□ If the government does not act, especially in relation to section 24F transgressions – are we going to see more citizen action and more private prosecutions?**

*The End*