



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

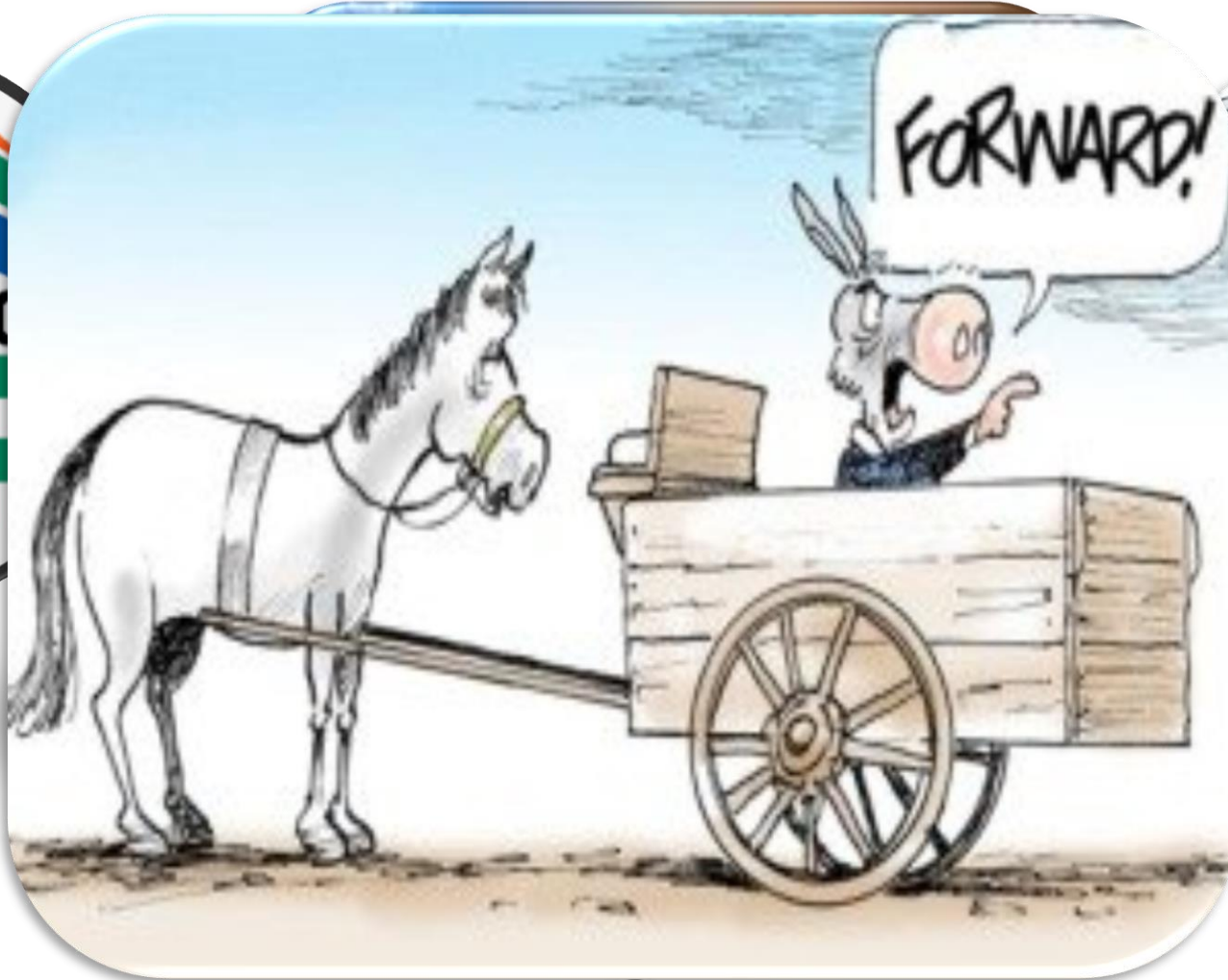
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INTRODUCTION



OUTLINE



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

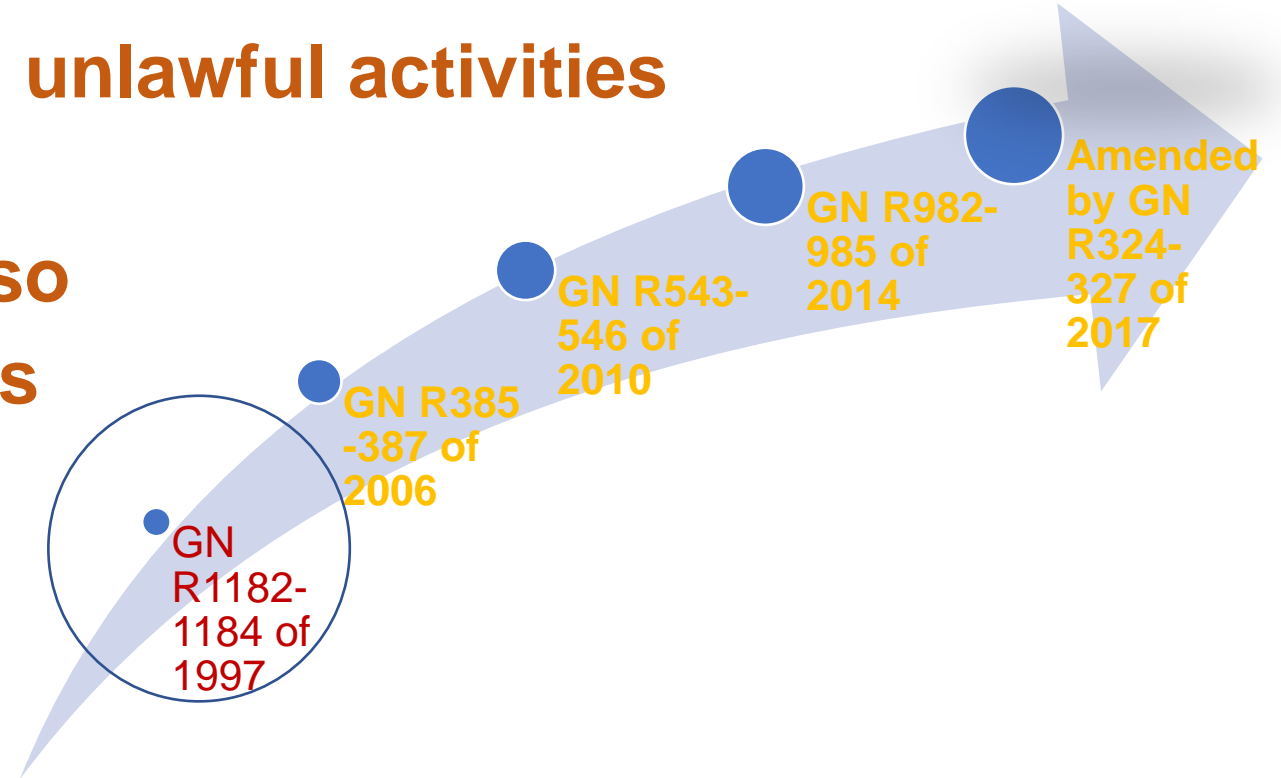


HISTORY



❑ ECA & its Regs prohibited unlawful activities

❑ NEMA was enacted & it also prohibited unlawful activities



HISTORY



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- ❑ Litiga
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- ❑ S24G



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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)

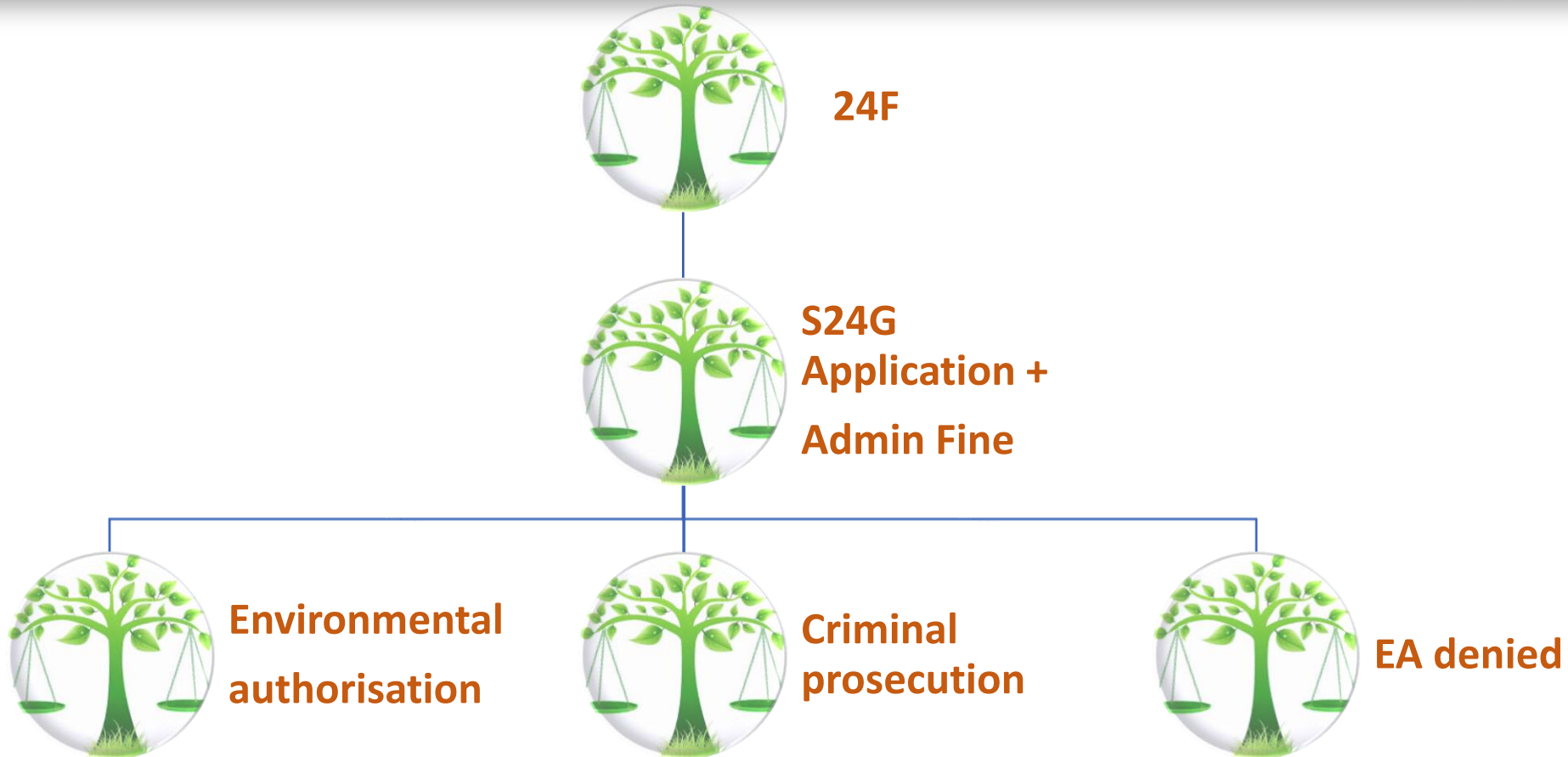
Court erred by holding that s24G applied to unauthorised activities in terms of the Waste Act

- ❑ 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-construction 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

☐ There was consumer necessarily be fact exchange of corre

☐ It would be absurd brought under s not, a private pro initiated by the N

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Judgement



Counts convicted on:

⚖️ 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.

Acquitted on counts

⚖️ 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