



# CERTAIN PROVISIONS OF THE ENVIRONMENTAL CONSERVATION ACT REMAIN IN FORCE

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The case of the *Minister of Water and Environmental Affairs v Really Useful Investments (436/2015) [2016] ZASCA 156* is a reminder that certain provisions found in the Environmental Conservation Act 73 of 1989 ("ECA") remain in force.

### INTRODUCTION

The ECA is erroneously considered to be repealed, however, certain provisions and notably sections 31A, 34 and 37 of ECA, remain in force.

Really Useful Investments ("RUI"), a developer of immovable property in Hout Bay, purchased certain vacant lots adjacent to the Disa River with the intention of developing them into residential and commercial properties. During 2010, RUI commenced development activities adjacent the Disa River by dumping rubble and fill on specific properties to raise their height. This activity precipitated the City of Cape Town issuing a directive in accordance with sections 31A (1) and (2) of ECA ordering RUI to take specific steps that included:

- > Surveying and demarcating the 1 100 year flood line for future management;

- > Engaging the services of an independent freshwater ecologist to assess:
  - (a) the extent of the wetland that has been filled;
  - (b) the impacts of the filling on the receiving environment;
  - (c) the potential future flooding and water quality as a result of filling; and to
  - (d) make detailed recommendation for rehabilitation.
- > Surveying and pegging the wetland extent on the site under supervision of an ecologist;
- > Removing soil, general rubble and fill that was placed within the floodplain of the Disa River to natural ground level as it existed prior to filling; and
- > Providing ecologist reports to the Environmental Resource Management Department of the city for approval prior to any work commencing.

RUI complied fully with the directive at significant cost and attempted to recover this cost from The City, the Minister and the MEC in terms of Section 34 of ECA. Action ensued on the basis of a compensation claim against the Minister or competent authority for actual loss suffered as a result of the authority placing a "limitation" on the purpose for which the land may be used.

The Respondent's defence was premised on RUI not having disclosed a proper cause of action, in that on the basis of section 37 of ECA and section 49 of the National Environmental Management Act 107 of 1998 ("NEMA") the State and relevant third parties are entitled to an exemption as the action complained of was undertaken in good faith, in performance of a duty conferred in terms of ECA and NEMA. It must be noted that this exemption will not be applicable in circumstances where the State or relevant authority has acted unlawfully, negligently or in bad faith.

## THE SUPREME COURT OF APPEAL FINDINGS

Savage J of the Western Cape Division of the High Court, distinguished between claims based in delict and those that in essence equate to an expropriation by virtue of the nature of the curtailment of the rights of the owner of the property. In her view, RUI's claim was sustainable as section 34 provides for a statutory right to recover compensation and section 37 of ECA and section 49 of NEMA do not limit or restrict such right, as these exemptions are more appropriate defences to a claim in delict.

While the SCA confirmed Savage J's finding that section 37 of ECA and section 49 of NEMA do not apply to compensation claimed under section 34, it indicated that the circumstances under which such compensation could be claimed were limited. The directive issued under section 31A of ECA was not eligible for compensation for the following reasons:

- > Actions taken under sections 20 (now repealed), 21, 22 and 31A are aimed at regulating harmful activities. It is difficult to conceive of a right to compensation for a restriction correctly imposed to prohibit a dangerous or potentially harmful process. To allow such an interpretation would inhibit the environmental authorities from fulfilling their constitutional mandate to protect the environment.
- > Owners and the holders of real rights over property are in the normal course of ownership, subject to numerous limitations, both at statutory and common law, that restrict the use of the property in such a manner as to not cause harm or nuisance. None of these restrictions when applied entitle the land owner/real right holder to compensation.

- > Similarly, the limitations contained in NEMA, the specific environmental management Acts and ECA primarily contain restrictions on land owners and real rights holders that are aimed at the protection of the environment. The restrictions sought to be placed on RUI in terms of the directive were cast in such terms.
- > A distinction should be drawn between a curtailment of a rights and a confiscation (or expropriation) of rights. It was in respect of the latter that section 34 was framed. Compensation is payable where the land owner or real rights holder is deprived of its rights where the action taken seeks to advance public interest and protect the environment. The directive issued in the present instance did not limit the real rights of RUI; it sought to rectify a potentially environmentally harmful situation.

If Savage J's judgment was upheld, it could result in the unintended consequences of:

- > Land owners taking advantage of section 34 by undertaking potentially harmful environmental activities on their land in the hope that the authorities would take action under section 31A and compensation could as a result be claimed.
- > By the same token, environmental authorities would be discouraged from fulfilling their constitutional obligations to protect the environment by utilising enforcement instruments at the risk of receiving a claim for compensation by land owners.

## CONCLUSION

The SCA, through its judgment, may have accordingly averted a slew of unreasonable environmental compensation claims by aggrieved polluters seeking financial redress in terms of Section 34 for the remedying of harm that they have caused. A potentially untenable situation if one considers the very purpose of the punitive enforcement tools available to authorities in punishing non-compliance and taking effective measures to protect the environment.

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Bronwyn joined Werksmans Attorneys as a senior associate in 2016, working in the firm's Corporate Mergers & Acquisitions and Environmental Law Practices.

Her areas of speciality include environmental legal compliance evaluations, compiling legal frameworks for feasibility and implementation of projects, due diligence assessments and negotiating environmental offset agreements and rehabilitation trusts.

She is also able to advise on aspects of Administrative Law and International Environmental Law. Bronwyn graduated with an LLB from the University of Pretoria. She has completed a course in Environmental Analysis and Management at the University of the North West and is currently doing her Masters in Environmental Law at the University of KwaZulu-Natal.

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