

In the Regional Division of North Gauteng

Held at Pretoria

In the matter between

Case Number 14/1740/2010

The State

versus

1. Stefan Frylinck

Accused 1

2. Mpofu Environmental Solutions CC

Accused 2

JUDGMENT

On 6 April 2011

For the State: Adv V Nemaorani, DDP.

For Defence: Adv L Vorster SC, on instruction by Friedman Hart Solomon & Nicolson Attorneys.

Patterson, EK: Regional Magistrate

A. INTRODUCTION

The Accused

1. Accused 1 is Stefan Frylinck, an adult male who works as an environmental consultant. Accused 2 is a legal entity, to wit a close corporation, within the meaning of section 332 of the Criminal Procedure Act (CPA), Act 51/1977. Accused 1 appeared in his representative capacity of accused 2.

The Charge

2. The two accused are charged respectively as follows: Accused 1 is charged in count 1 with Fraud, read with the provisions of section 103 of CPA, Act 51/1977 (hereinafter referred to as the CPA) and in count 2 with c/s 81(1)(a) of the Environmental Impact Assessment Regulations of 2006 (hereinafter referred to as the EIAR). Accused 2 is charged with c/s 81(1)(a) of the EIAR of 2006.

Plea Proceedings

3. Both the accused pleaded not guilty to the charges on 1/03/11. In a plea explanation i.t.o. s115 of the CPA, the accused deny 3.1 the existence of a wetland on the particular property

which was the object of an application for authority for development; 3.2 that they had intention to defraud as alleged in the charge sheet and 3.3 that they in any manner acted negligently as alleged in the charge sheet. In further plea proceedings 3.4 the accused stated that Zoning Solutions (ZS) appointed and requested accused 2 to compile a 'Basic Assessment Report' (hereinafter referred to as the BAR); 3.5 that the BAR was necessary in order for ZS to apply for approval of a town development with the relevant authorities. 3.6 Accused 2 was tasked with and consulted by ZS to determine what investigations needed to be done to comply with the requirements for the BAR. ZS would pay the consultants for these investigations because ZS or its principal was the applicant for the proposed development. 3.7 At no stage was it acc2' task to determine if a wetland existed on the property. 3.8 At no stage acc2 had any reason to suppose that a wetland exists on the development terrain which was the object of his involvement with the BAR.

Evidentiary Material

4. In respect of the formalities the following is placed on record: 4.1 The following documents were accepted as annexure to the charge sheet: Annexure A – charge sheet; Ann. B - request for further particulars; Ann. C – further particulars; Ann. D – State's HOA; Ann. E - Defence HOA; Ann. F – Defence's Supplementary HOA. The respective HOA's were either hand delivered or emailed to the presiding officer. 4.2 The court accepted the following exhibits in the matter: Exhibit A - BAR: Pan Africa Parliament compiled by Environmental Assessment Practitioners, Mpofu Environmental Consulting; Exh. B – Letter by Gauteng Provincial Govt: Agriculture, Conservation and Environment dd 22/08/07 to Mpofu Environmental Consulting; Exh. C – Record of Decision by Dept of Environmental Affairs and Tourism dd 19/10/07; Exh. D – Environmental Authorisation of construction site for PAP by Dept of Environment and Tourism dd 19/10/07; Exh. E – admissions i.t.o. s220 of CPA; Exh. F – email by acc1 to Ms. R Mukheli dd 25/09/07 re GDACE comments; Exh. G – report by J Louis van Rooy, Engineering Geologist re Geotechnical site investigation for the PAP site dd March 07; Exh. H – Flora Assessment by Galago Environmental for PAP site dd April 07; Exh. I – Soil Based Wetland Assessment by Terrasoil Science compiled by J H van der Waals; in defence case Exh. J – PAP Geohydrological Report compiled by K Sami dd January 2011 and Exh. K – Soil Assessment of PAP development by D G Paterson dd December 2010.

Background: The Need for BAR

5. This matter is the result of a dispute whether the construction site at Headway Hill Ext 1 on portion 442 of the farm Randjiesfontein 405JR contains a wetland on which a building development takes place. This area is better known as the Pan Africa Parliament site (hereinafter called the PAP site) and the construction of the PAP building is the subject matter of the development.

6. Simply put: In order for this area to be rezoned and/or developed a BAR was required i.t.o. the National Environmental Management Act, Act 107/98 (hereinafter called NEMA) which is required by a competent authority i.t.o. the NEMA Regulations, 2006. For this reason acc1 and 2 were appointed by Zoning Solutions to compile a BAR. Acc1 at all relevant times acted as sole director of Mpofu Consulting CC. A BAR was compiled and submitted to the Dept of Environmental Affairs (DEA). It is required of the environmental assessment practitioner as compiler of the BAR to assess and report on various issues which might be relevant in consideration of the suitability of a site as appropriate and in conforming to requirements for development. To this extent as example the BAR contains inter alia 'Section E: Impact Assessment' pp 21 – 25.

Origin of Charges

7. In para 5 on p16 of the BAR (Exh I) in the 4th column 2nd from bottom it is indicated that "River, stream or wetland" does not occur within a 500m radius of the site. In its submission of the BAR to DEA the GDACE, as an interested party, were consulted for comment of the BAR. The GDACE, per exh B, requested Mpofu Consulting CC to undertake further studies for this project: 7.1 wetland delineation as per the Dept of Water Affairs and Forestry's guideline; 7.2 hydrological study and delineation of the watercourses and headwaters and 7.3 specialist invertebrate studies. To these comments acc1 in his capacity of Mpofu Consulting CC responded via email on 25/09/07 to Ms Mukheli: Exh F. It appears that not only did GDACE raise concerns of a possible wetland on the site but the DPW also received information that the PAP site "...might be affecting a wetland system in the area; that the Department might be in violation of the NEMA and that the Dept might be in violation of the National Water Act." See Ann2 to Ann C, which contains the reply to the request for further particulars. This Dept requested it be supplied with proof or reference to address these queries to which acc1 in his capacity of Mpofu Consulting CC responded on 17/06/09. Mr. Paul Edward Fairrell, at the time unaware of the above-mentioned correspondence and independent to any of such mentioned parties or departments, testified that he was approached by the project manager of the development at the PAP site. On his first visit to the site he became aware that the "...civil contractor experiences unbelievable problems with the site; there was a large seepage area and clear signs of wetland emanating from the seepage area and that a trench was dug from N to S which was a classical feature of what one finds in a wetland." By this time construction of the site had commenced but stopped due to concerns raised and a panel of experts was appointed to do wetland delineation. Investigations followed which in turn led to the criminal charges being laid against the two accused.

B. EVIDENCE

State Case

8. Ms. Rodzani Mukheli holds a Hons Degree in Environmental Management. Her evidence was largely undisputed. She testified that at the time a BAR was compiled and submitted i.r.o. the PAP site she was employed by the DEA and Tourism as a Principal Environmental Officer. It was her evidence that if a wetland was present on the proposed site it had to be indicated in the BAR. Its mere existence would not necessarily prevent development but certain conditions would be set to create a buffer so that the proposed development does not affect the wetland. As to the queries raised whether the area consisted of a wetland, Ms Mukheli informed the court that acc1 informed her that he did not see any necessity to undertake wetland delineation due to the fact that the area was not affected by a wetland. She had a site inspection with the accused and he had pointed to her a leakage area slightly NW of the site from a sewer pipe.

9. Mr. Johan Hilgard v/d Waals holds a PhD in Soil Science and Soil Chemistry and is a Professional Scientist. His work experience relates to soil classification. He was a member of the panel that was appointed to do wetland delineation on the PAP site. On inspection of the site he found a distinct canal exist in the southern half of the site which runs into the Rietspruit. The site has been impacted significantly through the earth works for the development. He also saw close to the construction site were distinct tracks where a truck got stuck with typical wetland grey soils. This is usually an indication of the presence of a wetland. He took into account previous studies and investigations of the site; the legislation pertaining to wetlands and the wetland delineation guides. Different entities define wetlands differently. A common thread in wetland definitions are that it is an area of land that is inundated for prolonged periods of time and that has due to prolong inundations characteristics that show up typically in form of vegetation adapted to wet conditions, a water table close or at the land surface and soils which show distinct signs of saturation, be it permanent or seasonal. In his report he states that wetlands are defined in the National Water Act as: "Land which is transitional between terrestrial and aquatic systems where the water table is usually at or near the surface, or the land is periodically covered with shallow water, and which land in normal circumstances supports or would support vegetation typically adapted to life in saturated soil."

In a manual published in 2005 by the DWAF the definition of a wetland in the guidelines is the same as that of the NWA. A wetland must have one of the following attributes: 9.1 wetland (hydromorphic) soils that display characteristics resulting from prolonged saturation; 9.2 the presence, at least, of water loving plants (hydrophytes) and 9.3 a high water table that results in saturation at or near the surface, leading to anaerobic conditions developing in the top 50cm of the soil.

10. The guidelines list four indicators to be used for the finding of the outer edge of a wetland. These are 10.1 Terrain Unit Indicator: this indicator identifies valley bottom wetlands and also wetlands on steep and mild slopes in crest, midslope and footslope positions. 10.2 Soil Form Indicator: various types of soil are listed as indicative of

permanent, seasonal and temporary wetland zones. 10.3 Soil Wetness Indicator: wet soils may be indicated by certain soil colours and mottles. This is the primary indicator for wetland soils. According to v/d Waals' evidence: "...the reduction and removal of iron (Fe) in the form of 'bleaching' and the accumulation of Fe in the form of mottles are the two main criteria for the identification of soils that are periodically or permanently wet." 10.4 Vegetation Indicator is another key component of the delineation of a wetland in the NWA. However, v/d Waals testified that the vegetation on the site is almost non-existent due to construction of the PAP. This scenario caused him not to rely on the vegetation indicator which, in turn, placed greater emphasis on the soil form and soil wetness indicators. Vegetation communities are dynamic and react rapidly to external factors whereas soil form and soil wetness indicators are more permanent.

11. v/d Waals is of the opinion that the Halfway House granites constitute a "Specific Case" as listed in Appendix A of the guidelines and as such cannot be slavishly subjected to the procedures contained in the guidelines. It is the further opinion of v/d Waals that the catena (topographical sequence of soil forms) that forms on the Halfway House granite differs from what one would normally find "...in that the landscape is an old stable one, the parent material is relatively hard and therefore resistant to weathering as well as that it has a very low Fe content/reserve. The implication is that the whole catena is dominated by bleached sandy soils with a distinct and shallow zone of water fluctuation. The zone is often comprised of a high frequency of Fe/Mn concretions and sometimes exhibits feint mottles." Confer Para 3.4 p 11 of Exh I.

12. v/d Waals testified that he observed in the top part of the site the area had almost no vegetation left. Further down the site was an excavation; there was no vegetation but exposed soils could be seen. Areas south of the excavation were burnt. According to him they found signs of dry wetland.

13. He further observed that a sewer pipe was leaking upon inspection of the site. His evidence is that one can differentiate between fresh water and water from sewage affluent. Sewage water has lots of nutrients, nitrogens and is phosphorous. He concluded that the area affected by the sewage was far less than 1 hectare. The spillage from the sewage was localised and caused wetland conditions but the volume of sewage spill was such that he could not trace the effect beyond the plume he found. If one takes into account the size of the PAP site then it might have had a small influence and completely insignificant. The area of the PAP site is 19800 hectares.

14. He stated that other indicators showed it to be a wetland. The first was that on Google map 1 (of Exh I) it can be seen that 3 contours run through the site which show distinct incindentation and therefore it is a concave landscape. Secondly, in the Google image of the site he could identify the texture differences on the site. This would be the first order assessment. Thirdly, a GIS practitioner could superimpose 2m contours on the Google image to produce a map. Evidence from contours shows a drainage feature and the water flow exit

through the drainage channel. Fourthly, through soil survey conducted on the site one could identify soil forms and soil wetness indicators.

15. v/d Waals testified that he observed that in the top part of the site the area had almost no vegetation left. Further down the site was an excavation; there was no vegetation but exposed soils could be seen. Areas S of the excavation were burnt. According to him they found signs of dry wetland.

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17. In para 4.2.2 of his report he states that the soil sample positions are indicated on map2 of his report. He could identify the driest soils on the gradient landscape with increasing signs of wetness up to the wettest sites for delineation of wetlands. The principles of soil wetness apply throughout in the wetland delineation guidelines. The soils he found at the site at the centre of the wetland are predominantly of the Kroonstad and Longlands forms with a distinct Hard Plinthic B-horizon at approximately 80 cm depth. This area was indicative of very wet soils and indicates a zone in the soil where significant lateral transport of water takes place. The underlying ground indicates zones of clay and Fe accumulation and is an area that is saturated with water for long periods of the year. See Exh I p15. In point 17 of map2 there is evidence of significant lateral water movement through the landscape. Fe rich water seeped from a profile on the site. Further upslope from the exposed profile Fe was noticeable and this is a very distinct sign of wetland seepage. The white section of the profile (see pp 15 – 24 of Exh I) illustrates the rapid rate of Fe oxidation in seepage water when exposed to the atmosphere. In all the trenches dug on the site significant water movement was found. In addition, ponding water was seen to the N of the site.

18. During xov he stated that a wetland could not be classified merely by a water table being at or near the surface. He did find water on the site, about 30m from a void to the S of the construction site. This area is a seasonal wetland. In the Kroonstad soil form is found a gehorizan(?). A gehorizan(?) is one that shows signs of saturation for prolonged periods of time and show signs of prolong saturation. He inferred the watertable from the colours of the soil. On the suggestion that it is an unsafe conclusion of the final consideration of a wetland he disagreed from the defence counsel. The colours are defined in numerous publications, not only wetland delineation guidelines; the colours, i.t.o. mottling and Fe depletion are accepted throughout the world in the field of geology and in countless classifications. Therefore when he pronounces on the soils he does it with the knowledge of countless classifications, kinds of wetness, soil chemistry of the physics of the soil i.t.o. the water movement of the soil and his years of experience where he has done delineations of

the soils. He confirmed his earlier assessment the area is seasonal wetland. He testified that it is not necessary to find water but that by only looking at soils one can make a finding of wetland. He disagreed with DG Paterson's report where he states the site is a side sloped drainage area. He disputes Paterson's specific reference to the Kroonstad soil form occurs in 1.9 billion hectares in SA. The type of Kroonstad soil found on the site might not constitute a wetland in another part of the country. What is clear is that hydromorphic conditions are considered by most international publications as well as our delineation guidelines as a sign of wetland. If the delineation guidelines do not apply then he takes one step back and look at what his science says. Hydric (sic) soils are a sign of a long indicator. That is found in the Kroonstad. Re the specifics of the Kroonstad soils which occur under sugarcane, Paterson makes the assertion that the areas under sugarcane are not wetlands. That is a totally incorrect assertion because we have numerous examples where agriculture has taken place within wetlands and wetland fringes because it minimises farmers risk of drought and drought conditions. In dry years farmers would lose their crops and in wet years the crop gets drowned. The assertion that sugarcane fields are not in wetland is not correct. The fact that he found Kroonstad soils and that it forms the lowest and wettest part of the landscape means that the area is the drainage channel but to remember that hydric (sic) soils are soils that experience long periods of wetness. According to him in the definition of wetland seasonality is implied because rainfall has seasonality and this would mean fluctuation of the water table.

19. In respect of mr. Sami's report v/d Waals commented 19.1 Sami did not refer to surface flow of water, i.o.w. surface loss of water. That is a critical component of any hydrological model. 19.2 On the site v/d Waals and others built a whole complex of berms. The berms are at least 80cm, 1m or even higher. Those berms have been placed in areas specifically to divert any flow of water during massive rainfall events away from the construction site. 19.3 The berms were installed early in December when we hadn't had any significant rain. The hole was drilled through the hard and thick layer of soil. The piezometer fills up from below. The measuring of the water in the piezometer is entirely dependent of the rate at which the water seeps above the permeable layer into that pipe through what was the water flow at that stage. In no way is that accounted for by Sami. His conclusion of the data was that if Sami had generated data of surface flow of water he would see that the water had dammed up; they've put in measures to prevent the water from rushing through. I.o.w, they had a volume of water in excess of 4-500 cm³ sitting in a portion to wit 1/6th of the site. That does not account for all the water being diverted away from the site by the berms. Between 5 to 15000 cm³ of water were not accounted for and he finds it a major flaw in the report by mr. Sami.

20. Mr. J L van Rooy is an engineering geologist and holds a PhD in engineering geology. His report was accepted as Exh G. His job entails amongst others conducting geotechnical investigations for the development of areas. He stated that in his geotechnical finding the

shallow ground water table was due to leakage of the sewer pipe and from natural drainage. He never stated when the pipe is fixed the water table will drop.

21. Mr. Edwin Paul Fairrel testified he had in excess of 30 yrs experience working with wetlands. He was asked by the project manager of the PAP site to give a quotation to do a wetland delineation of a wetland area of such site. After walking for approximately 10 mins on the site he concluded tests in more than one discipline needed to be done. A soil scientist needed to do a soil assessment. His general observations were that the "...civil contractor experiences unbelievable problems with the site; there was a large seepage area and clear signs of wetland emanating from the seepage area" and that a trench was dug from N to S which according to him was a classical feature of what one finds in a wetland. It was his opinion that the site was a hill sloped wetland and a Google image clearly indicated to him a marked vegetation outline. He noticed same vegetation, tones and colouring if compared to others in the area. For the last 20 months prior to giving evidence he was on the site to assist in implementing remedial plans. According to him the wetland was irreparably damaged. He further stated this wetland is situated in the 3rd most important area of Jhb. During xov he admitted the catchment area is not necessarily a wetland.

Defence Case

22. Mr. K Sami holds an MSc in geology and is a Professional Scientist. On 8/12/10 he visited the site and drilled 5 boreholes below and above the excavations and within the zones delineated a wetland and a seepage zone. No seepage or perched water table was encountered in any of the 5 boreholes, drilled to almost 5m or into the workings. The soil was dry to moist. All ground layers up to 2m below the surface had Fe and Mn nodules suggesting moist conditions sometimes occur. At the time of the drilling all layers were dry. When he visited the site thereafter he conducted further tests. After 200mm of rain in 18 days the water has risen to 1/2m from the surface. In an usual wet rainy season the water table has only risen 200mm. Lateral flow of water down slope during storm events might occur but it does not imply that it is a zone of water accumulation or that long term saturated conditions exist. During xov he testified that in December 2010 it rained 34 days out of 47 and the water table rose gradually.

23. Mr. DG Paterson is a snr soil scientist who holds an MSc degree. He visited the PAP site on 7/12/10 and had to assess whether wetland soils occur on the site. He has read the report compiled by mr. v/d Waals. He finds that: "*Much of the Terra Soils report is correct, and the situation and soils occurring are, by and large, accurate. Where exception may be made is in the conclusions and interpretations that the report reaches.*" Confer Exh K, last para in para 3. He proceeds to state in para 4 of his report that the soils are largely underlain with hard plintithe (ferricrete). The soils on top of this ferricrete are grey-brown on top of a grey to yellow brown with mottles. When water enters the soil in the rainy season, it is unable to drain vertically downward. Instead, it remains held in the subsoil layer, where it eventually moves laterally downslope. Over a long period of time Fe and Mn and other

matter are removed in solution and deposited further down the hillslope. A contributing factor to the grey subsoil could be the leakage of the sewer pipe. He concludes in his discussion on soils that an area with more than 1m of yellow-brown subsoil was seen in a trench in the middle where v/d Waals has delineated a wetland. This colour soils indicate better drainage than one would expect of a wetland area. During xov he said that the best drain soils are red sands and so too yellow coloured soil. Grey soils are indicative of saturation.

24. Mr. SA Frylinck, the accused, testified that he referred to the geotechnical report compiled by mr. Van Rooy to indicate that no shallow water was present on the site. His finding that there was no wetland on the PAP site was as a result of a Google Earth search and the distances he measured and secondly that he was not the first consultant on the job. He did not see any wetland. He responded to comments raised by GDACE. He denied having defrauded the DEA. He was shocked when accused of the allegations and told court that he was the first environmental consultant. During xov he distinguished between a competent and commenting authority and their powers. He agreed that only a specialist could delineate a wetland. The expenses for appointment of a specialist to do the wetland delineation he would've carried. He elaborated on why it is necessary for wetland delineation. It was not possible to determine with a naked eye that there is a wetland.

C. Facts Disputed and Common

25. It is common cause that 25.1 acc1 and Mpofu Consulting CC were appointed to compile a BAR on Headway Hill Extension 2 on the remainder of portion 442 of the farm Randjiesfontein 405JR, Midrand, Gauteng; 25.2 acc1 was the sole member of the above-mentioned cc; 25.3 Mpofu Consulting compiled a BAR; 25.4 on the strength of the recommendations in the BAR an environmental authorisation, commonly known as the Record of Decision (ROD), was issued; 25.5 the development of the PAP site ensued; 25.6 after construction commenced the development was halted for a wetland delineation to be done.

26. It is not disputed that 26.1 the accused inter alia had to report on the existence or otherwise of a wetland within 500m radius of the site; 26.2 the accused indicated there is no wetland within 500m radius of the site; 26.3 the accused on enquiry in writing stated that he is of the opinion it is not necessary to conduct a wetland delineation.

27. It is in dispute that acc1 fraudulently misrepresented to the DEA that the PAP site did not contain a wetland and acc1 and 2 denies providing DEA with incorrect or misleading information in an application for environmental authorisation i.t.o. the Environmental Impact Assessment Regulations, 2006.

D. Evaluation

28. When considering the evidence led in this matter the court has regard for the fact that all the witnesses are professional people. They testified as experts in their particular field of study. They have no financial or other vested interest in the matter.

29. Ms. Mukheji was a Principal Environmental Officer who testified about the procedure the BAR undergoes upon submission. She knew mr. Frylinck in his dealings concerning the BAR. She accompanied him to the relevant site to verify what is on site is contained in the report. What he reported in the report is what she saw. She enquired about the presence of a leaking pipe and he showed her wet areas caused by the leakage. He also pointed out another green area near the activities. The size of the site was 19.8 hectares. She testified further that a request to the accused was received for assessment whether the site has a wetland and if so, how big it is. She contended that Frylinck was supposed to appoint a wetland specialist for this purpose. However, the accused did not see any necessity to undergo wetland study due to the fact that the area, according to him, was not affected by a wetland. The accused stated that the site was not affected by a flood line as there was no wetland. An Environmental Authority was thus granted. She testified further that if she was aware there was a wetland then she could have excluded the wetland out of the development. She concluded that at no stage did the accused undertake a wetland study.

30. The evidence of v/d Waals is supplemented by a report, with pictures and maps, of the PAP site. The presence of water on the site was noticeable when he first visited the excavation site. He testified that water of sewage affluent has lots of nutrients, nitrogens and is phosphorous. This spillage was localised and caused wetland conditions. The effects of the sewage spill could not be traced beyond the plume he found. According to him the volume of the sewage spill was probably 1 in a million due to the size of the catchment area. He found 4 indicators of a wetland on the site. They relate to the distinct indentation, texture differences, the drainage feature and the soil survey conducted on the site.

31. It is clear that v/d Waals' assessment of the soils found on the terrain of the PAP site is well-documented. In fact, even mr. Paterson who testified o.b.o. the accused agreed to this but his interpretation thereof differs. *"Much of the Terra Soils report is correct, and the situation and soils occurring are, by and large, accurate. Where exception may be made is in the conclusions and interpretations that the report reaches."* It therefore follows that the court must find that he correctly conducted his assessment of the PAP site in accordance with procedure and the guidelines by DWAF. As a lay person to the field of study it appears to the court his work is extensive and an in-depth study. The court therefore finds that v/d Waals' quality of his work is of high standard.

32. Van Rooy's report was used by the accused to compile the BAR. Van Rooy is not a wetland specialist and did not do wetland delineation. Clearly, this witness contradicted a finding in the BAR where accused mentions the water table would drop if the (sewage) pipe

is repaired. When one reads Exh G then the denial of such a claim by van Rooy holds true. If the accused had properly read van Rooy's findings re the water table, led alone properly considered, it had to cause him to easily come to the correct interpretation. In fact, without being disparaging, the wording used by van Rooy when he states the position of the water table, is in simple terms and should easily have been grasped by acc1.

33. Mr. Fairrell testified that he assisted the contractor for the past 20 months at the site. This undisputed evidence indicates that the rehabilitation program that was put into operation clearly requires much effort and time. One must not forget why Fairrell was approached by the civil contractor. One wonders: Would the dampness and seepage of water be so evident if no water problem existed? Would the rehabilitation of the construction site take so long if it was not necessary? Are the reasons to reject his version adequate? This witness has in excess of 30 yrs experience in this field of study. Mere subjectivity or bias could not give rise to his finding. There exists no motive. The evidence does not suggest that, at the time of his first visit to the PAP site, did he know or was he was aware that the accused had compiled the BAR.

34. Paterson describes the grey soils he found on the site as inactive of saturation but that it is not necessarily wetlands. This conclusion of Paterson may be an indirect admission of the area to be wetland. The reasons he advances in denial of wetland cannot be regarded as compelling as that of v/d Waals.

35. The evidence of mr. Sami did not dispute the measures and its effect thereof on the findings of the berms v/d Waals and others installed on the site. Clearly, according to v/d Waals, the surface flow of water was not considered by mr. Sami, neither the underground dammed-up water. That is a critical component of any hydrological model. Those berms on the site have been placed in areas on the site specifically to divert any flow of water during massive rainfall events away from construction site. The piezometers fill up from below. The measuring of the water in the piezometer is entirely dependent of the rate at which the water seeps above the permeable layer into that pipe through what was the water flow at that stage. In no way is that accounted for by Sami. His conclusion of the data was that if Sami had generated data of surface flow of water he would see that the water had dammed up; they've put in measures to prevent the water from rushing through.

36. Defence argues in para 5.1 of HOA that v/d Waals applied the guidelines and soil monsters to determine if it is a wetland. Also, there is no evidence by v/d Waals that the water table was at or near the surface or whether hydrophytes are found on the site. The argument does not hold water (excuse the pun). These guidelines are the means to apply to determine if it is a wetland. The guidelines do not state that all of the requirements must be present to come to such conclusion. The wording of the guidelines makes it clear that all the requirements need not be present. In order for wetland delineation to be made it is sufficient that only one of three requirements is met. Nowhere is it stated that all of, or two out of three requirements must be present. The legal effect of the guidelines is that it must

be adhered to; even the accused witnesses in evidence - to their credit - did not dispute this fact. Evidence further was that these guidelines by DWAF, are prescribed by all Govt Depts. This makes sense for if each govt dept would have its own guidelines then no common ground would exist and the question arises which guidelines prevails in any given circumstance.

37. Defence in HOA para 5.2 states the site presents a lateral drainage area. This is based on Sami's findings. This finding is disputed by the state witnesses. According to v/d Waals the site is seasonal wetland. There is nothing untoward to v/d Waals and Farrel's evidence that the area is seasonal wetland. I must approve of v/d Waals' explanation that by implication the definition of wetland seasonality is implied because rainfall has seasonality and this would mean fluctuation of the water table. Seasonal wetland is not uncommon but is recognised. If not so, the defence witnesses would have disputed this fact. It appears though that the recognition thereof is with counsel and not defence witnesses. Rainfall implies seasonality and therefore it cannot be denied.

38. In addition the defence rely on the fact that ms. Mukheli recommended authority for approval. See HOA para 6. Mukheli merely had to confirm that what is contained in BAR she could see. Her observations of what she saw were not compelling to approval; other relevant authorities have their say. The approval of the BAR was the result of the process taken to determine whether it conformed to requirements, not her expert opinion of the existence of a wetland. She is merely the instrument in the bureaucratic process to recommend approval of authority of BAR.

39. Defence argues i.r.o. count 2 that there is no definition of a wetland in NEMA, Act 107/98. However, the BAR took into account the provisions of the National Water Act. Where one Act overlaps or finds application in the study undertaken, then your first source would be an act applicable in the research. The accused never alleged that he did not know what a wetland is; that he did not rely on the definition of the National Water Act; that he consulted and/or relied on other definitions or interpretations of what a wetland is. The truth is pliable to one's understanding and mistaken or incorrect interpretation. This 'measured opinion' of the accused (geweegde mening, defence HOA para 11) is based on an incorrect approach to and absence of a proper and complete study of wetland delineation as is required. The weight and value of comments by a commenting authority should not be downplayed in the study of the wetland. In this case it was such commenting authority which effectively gave rise to the construction being stopped and the resultant prosecution. A commenting authority is a governmental arm; failure to observe their conditions and instructions have ultimately led the accused to the position where he observes is prosecuted for not acting in accordance with those requests.

40. A study of mr. Sami's report suggest evidence interspersed with possibilities or perhaps speculation, that could give rise to various inferences. Moreover, the absence in his report of any discussion of the berms erected by v/d Waals and others and the subsequent effect it

has on surface flow water and the dammed up water, leaves his report to fall far short of acceptance. Therefore, the weight this court attaches to his report for adjudication of this matter is minimal. In contrast, Paterson largely agrees with the soils forms found by v/d Waals on the construction site. However, he differs in opinion with v/d Waals' conclusions. v/d Waals' comments on the critique by Paterson of his findings were deftly dealt with in his evidence. In para 16 *supra* the court has noted the response by v/d Waals on the inferences drawn by Paterson. I find the arguments by v/d Waals convincing and compelling to the extent that Paterson's conclusions ought to be rejected. It follows that this court rejects both Sami's and Paterson's findings where it is in conflict with that of v/d Waals. I find v/d Waals' evidence satisfactory. His findings are accepted as reliable and to the exclusion of Sami's and Paterson's findings where such reports contradict his.

41. What is clearly inferred from the guidelines to determine wetland is that assessment ought to be done and that a scientific approach is required. In order to make such finding a wetland specialist need to be employed. As a result, common sense dictates that these requirements would – at least in some instances – not make it possible to determine wetland with the naked eye.

Finding on the Merits

42. The definition of wetland is contained in the NWA. It is described as: "*Land which is transitional between terrestrial and aquatic systems where the water table is usually at or near the surface, or the land is periodically covered with shallow water, and which land in normal circumstances supports or would support vegetation typically adapted to life in saturated soil.*" The guidelines state the characteristics of a wetland are: wetland (hydromorphic) soils that display characteristics resulting from prolonged saturation; the presence, at least, of water loving plants (hydrophytes) and a high water table that results in saturation at or near the surface, leading to anaerobic conditions developing in the top 50cm of the soil. In addition wetland indicators are: terrain unit indicators/soil form indicators/soil wetness indicators/vegetation indicators. Reference was made by the defence during xov of v/d Waals and Farrell of marshes, damp areas and swamps. It must be noted that these areas are examples of a wetland. Wetlands are the umbrella name for any area which conforms to certain requirements. A wetland is not equal to what one would expect to find in a marsh or a swamp.

43. Frylinck never consulted an expert on wetland neither did he appoint a wetland specialist to determine if wetland is present. His finding of the absence of a wetland is drawn from inferences made by other reports available to him. Therefore, his findings are a result of his own means and methods employed to determine wetland delineation. The correctness of the findings of previous assessments on which he drew was never tested by a wetland specialist. Quite clearly, he never adhered to the request submitted to him by a national department (DPW) or a provincial department (GDACE). He never did what he was asked or supposed to do. The prosecution correctly and with persuasion argues that the

EIAR expressly provides in Regulation 8(b)(viii) that the competent authority may call on inter alia other organs of state that have jurisdiction for comments. See para 31 of the State's HOA. This resulted in a juggling act where Frylinck attempted to explain in responses to the two respective departments that there was no wetland.

44. The court finds that the state has proven the existence of wetland on the PAP site.

E. The Law

45. The state bears the onus to prove beyond reasonable doubt that acc1 committed fraud and that both accused c/s 81(1) of EAIR, 2006. This onus never shifts in a criminal trial. See *S v van der Meyden 1999 (1) SACR 447 (WLD)*. On the other hand the court must acquit the accused if their version is reasonably possibly true. The court need not believe their version but if doubt exists the accused is entitled to the benefit of such doubt. See *R v Difford 1937 AD @ 373*. It therefore is the duty of the Court to carefully dissect the evidence presented to Court in order to determine if it, in compliance with the guidelines laid down in *R v Blom 1939 AD 188*, any other reasonable inferences justifies, except that the accused, as argued by the prosecutor committed fraud. A compartmentalized approach should not be taken or that the one version should be weighed against the other. Rather, the totality of evidence and evidential material should be evaluated. *S v Mbuli 2003 (1) SACR 97 (SCA)*.

46. Account must be taken of all evidence and evidential material. The court considers the evidence by weighing up all the evidence. The court has due regard to admissions, contradictions, improbabilities etc. I wish to state that the court attempts a considered, careful and cautious approach to the evidence and resultant findings in the matter.

47. Accused 1 is charged in count 1 with fraud. Snyman defines fraud in the following terms: "*Fraud is the unlawful and intentional making of a representation which causes actual prejudice or which is potentially prejudicial to another.*" Confer: Criminal Law, 4th Ed p 520. The question to be decided is whether the accused made a misrepresentation being false or misleading that the area is wetland. There can be no doubt that prejudice to the state and taxpayer would occur due to further assessments and expenses incurred in the rehabilitation of the site. However, was the BAR with its finding of absence of wetland, a deception by means of falsehood? The state presented a thorough argument on this point of the law. I do express my appreciation for the measure and length of this argument. In considering the question I take into account that acc1 was approached, appointed and acted in his professional capacity as an environmental consultant. The BAR speaks of a comprehensive study of the site albeit incorrect in its finding of wetland delineation. In fact, I must accept that the only criticism or incorrectness of the BAR is the issue relating to the wetland. Mr. Frylinck cooperated and responded to the queries raised by two departments in a professional manner. Yes, it must be accepted that he would benefit from the acceptance of his recommendations but is it not the case of every person who so performs

his/her duties in a precise manner? This does not necessarily imply that the information in the report, especially pertaining to wetland delineation, is partly or in its totality correct.

48. The arguments that Frylinck would gain from the report's recommendation and that he would incur expenses as the motivation for motive, are not entirely convincing. The nexus is too remote and the argument without substance. The argument that Frylinck wanted to bypass the wetland delineation for financial gain or urgency to commence construction is flawed. The reasons advanced by the accused to the queries by the DPW and GDACE are motivated responses. He relied on other studies and findings to come to his recommendations. His methods employed to come to the final recommendation might be flawed but it is no excuse to draw further inferences of fraudulent representations. I cannot find that on the strength of these arguments by the state that accused made unlawful and intentional representations in respect of their findings. Quite clearly he relied on the findings of a fauna and a geotechnical report to come to the conclusion that wetland does not exist, albeit incorrect.

49. What the conduct of the accused does suggest is non-conformity with prescribed norms as well as negligent approach to the framework of his study. The fact that he has replied in full to the questions by DPW and GDACE is appreciated but by no means has he adhered to the critical study that had to be conducted. This is manifested in his decision not to appoint a wetland specialist; his repeated arguments why no wetland exists without such study/assessment; his clear assumption of van Rooy's interpretation of the water table will drop; not adhering to the 4 obvious factors according to v/d Waals of what the red lights were for a wetland. One may argue that the comments sought on the second occasion and his disregard of appointment of wetland specialist may be construed as a refusal of appointment of such specialist. The queries by the two government department had to invoke concern if not doubt, in the mind of accused that a further study for wetland delineation is required. He did not apply his mind and was not cautious of the consequences of the implied ramifications.

50. Be that as it may, I find it difficult to believe that in the circumstances described above the accused acted with knowledge of its falsity or with intent to deceive. Confer *S v Heller (2) 1964 (1) SA 524 (W) at 537-538*. Dolus by the accused to deceive that the DEA be misrepresented that the area is not wetland is difficult to find. Proof that a person with the knowledge and skill should have been able to clearly have established that it is a wetland is required by the court. To this extent v/d Waals saw indications of what he believed was wetland on his first visit to the site but was circumspect to declare it wetland less he completed his assessment of the site. The mere fact that two further expert witnesses denies the existence of the site as wetland complicates matters. For that reason there should be clear proof that Frylinck without a doubt knew that it was wetland and stated to the authorities that it is not. Instead the contrary is true. Frylinck did all he believed was

necessary to exclude the need for wetland delineation by submitting subsequent comments as required.

51. Even though mr. Frylinck is an environmental specialist it cannot be argued that the evidence clearly shows he is a person who, in his position, should immediately have known that the area is wetland. The evidence by the state is that it is a seasonal wetland and that it was in winter – therefore outside the period - rainfall when the BAR was completed. He didn't conduct the necessary tests and neither are the experts of the same opinion whether the area is wetland. In their plea explanation the accused denied that: "*At no stage was it accused 2' task to determine if a wetland existed on the property.*" I believe this is a case where the professional opinion of acc1 failed him dismally in that he did not apply his mind properly. The basic flaw in the execution of the mandate he undertook was the lack of understanding his mandate. It is no wonder that the accused later admitted i.t.o. s220 of the CPA in para 5 of Exh E that: "*I admit that, inter alia, I was required to report on the existence or otherwise of a wetland within 500m radius of the site.*"

52. The conduct of the accused proves wilful disregard of the required standard of conduct of the specialist finding whether there is wetland on the PAP site. He admitted that he knows that in order to determine the existence or otherwise of a wetland, wetland delineation must be conducted. The submission of the BAR and whether it is incorrect or misleading is the subject-matter of the possible contravention of this matter. Whereas the accused found absence of wetland a subsequent delineation of the site revealed the existence of wetland. The state contends that the information was misleading because it tended to suggest that reasonable measures were taken to determine the existence or otherwise of a wetland whereas this was not done. The detrimental effect thereof is common cause.


53. The wording in count 2 makes a person to conclude that this either had to be the main count or that the charge had to be put in the alternative to count 1. However, the court finds the area is wetland. By not appointing a wetland specialist or consulting such specialist the accused was negligent in the execution of his mandate and what was reasonably expected of him. In the plea explanation the accused initially denied having to delineate wetland and later admitted to this fact. The court is mindful of the rule stated in *S v Mkohle 1990 (1) SACR 95 (A)* that contradictions *per se* do not lead to rejection of a witness' evidence. However, the totality of his evidence does call for this finding; neither does it warrant any other inference. I find that the inability of the accused to give a reasonable explanation of this fact and the apparent non-conformity to the required standard of work to be done, calls for rejection of their version as not reasonably possibly true. This court is satisfied that acc1 and 2 acted irregular in conducting of, and execution of, duties by concluding no wetland exists on the site.

54. The court finds the recommendations in the BAR to the DEA clearly are in conflict with the accepted fact that wetland exists on the PAP site. The methods of determination

employed by the accused of such finding were negligently made. The standard of work done was not in accordance what a reasonable man would exercise in his duties to come to the conclusion the accused had. Therefore this court finds the information contained in the BAR for granting of an environmental authorisation is incorrect.

F. Order

55. In the event this court is satisfied that the following order to a finding in the matter may be made: In respect of count 1 acc1 is given the benefit of the doubt and acquitted of fraud. In respect of count 2 the evidence adduced by the state overwhelmingly proves the guilt of the accused beyond reasonable doubt. It follows that acc1 and 2 are convicted of c/s 81(1) of the Environmental Impact Assessment Act of 2006.



E K PATTERSON

REGIONAL COURT, PRETORIA.