

## Recent developments

### Private prosecutions and discrimination against juristic persons in South Africa: A comment on *National Society for the Prevention of Cruelty to Animals v Minister of Justice and Constitutional Development & Another*

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#### Summary

*Unlike countries such as the United Kingdom, Kenya, Zimbabwe and Australia, in South Africa companies and associations are not permitted to institute private prosecutions although natural persons have a right to institute private prosecutions. In National Society for the Prevention of*

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*Cruelty to Animals v Minister of Justice and Constitutional Development & Another*, the applicant argued that the law which permitted natural persons to institute private prosecutions and prevented companies and associations from doing so violated section 9 of the Constitution which protects the right to equality. The court held that the discrimination in question was not unfair. In this note, the author assesses the court's reasoning and recommends that there may be a need to empower companies to institute private prosecutions in South Africa.

**Key words:** Private prosecution; juristic person; companies; discrimination; South Africa

## 1 Introduction

Textbooks on discrimination law and practice are littered with court cases dealing with companies which were alleged to have discriminated against their employees or which have been found by judicial or quasi-judicial bodies to have discriminated against their employees. It is on rare occasions that one finds a company alleging that a given piece of legislation is discriminatory against it. This could explain why some of the leading textbooks on discrimination law in the United Kingdom do not have any reference to a court case dealing with discrimination against companies.<sup>1</sup> Leading textbooks on company law in the United Kingdom are also silent on the issue of discrimination against companies.<sup>2</sup> Where the issue of discrimination is discussed, the authors of some of these books deal with issues such as the company's legal obligation not to discriminate against people with disabilities;<sup>3</sup> corporate criminal liability;<sup>4</sup> discriminatory articles of association;<sup>5</sup> discrimination against some members of the company;<sup>6</sup> and discrimination against shareholders.<sup>7</sup> In South Africa, as in the United Kingdom, there are cases in which companies have been found by judicial or quasi-judicial bodies to have discriminated against their employees.<sup>8</sup> In October 2014, the High Court of South Africa, in *National Society for the Prevention of Cruelty to Animals v Minister of Justice and Constitutional Development & Another*,<sup>9</sup> dealt with the issue of whether a law which allowed natural persons to institute private

1 See eg M Connolly *Townshend-Smith on discrimination law: Text, cases and materials* (2004); M Sargeant (ed) *Discrimination law* (2004); C Palmer et al *Discrimination law handbook* (2007); and A McColgan *Discrimination: Text, cases and materials* (2005).

2 B Hannigan *Company law* (2012); D Kershaw *Company law in context: Text and materials* (2012).

3 C Wild & S Weinstein *Smith and Keenan's company law* (2013) 484.

4 A Dignam *Hicks and Goo's cases and materials on company law* (2011) 131.

5 Dignam (n 4 above) 234.

6 Dignam 432.

7 Dignam 446 482.

8 See, generally, I Currie & J de Waal *The Bill of Rights handbook* (2013) 209-243.

prosecutions but barred companies from doing so, was discriminatory. The Court held that the law did not unfairly discriminate against companies because, *inter alia*, the relevant legislative provision could not be interpreted to accommodate juristic persons (companies). The purpose of the article is to highlight the judgment and to argue that, in light of the practice in some countries in Europe, Africa, Asia, Australasia and North America, where companies are permitted to institute private prosecutions, there is a need for the law in South Africa to be amended to allow companies to institute private prosecutions. The author argues that the fear expressed by the South African High Court that allowing many people, including companies, to institute private prosecutions would be tantamount to creating an alternative prosecuting system, is not supported by evidence from countries where companies are empowered to institute private prosecutions. The author concludes the article by recommending that the law, as it stands in South Africa, needs to be amended to expressly empower companies to institute private prosecutions. The author highlights the law on private prosecutions in South Africa (including the provision that that was challenged by the applicant) before dealing with the facts of the case, the arguments by counsel and the court's finding.

## 2 Private prosecutions in South Africa

In South African law there are three categories of private prosecutions: private prosecutions by individuals on the basis of a certificate *nolle prosequi* (the focus of this article); private prosecutions by statutory bodies; and private prosecutions conferred on individuals by certain legislation. I briefly highlight these categories by starting with the last two.

### 2.1 Private prosecutions by statutory bodies

The first category of private prosecutions is governed by section 8 of the Criminal Procedure Act,<sup>10</sup> which states:

- (1) Anybody upon which or person upon whom the right to prosecute in respect of any offence is expressly conferred by law, may institute and conduct a prosecution in respect of such offence in any court competent to try that offence.
- (2) A body which or a person who intends exercising a right of prosecution under subsection (1), shall exercise such right only after consultation with the [Director of Public Prosecutions] concerned and after the [Director of Public Prosecutions] has withdrawn his right of prosecution in respect of any specified offence or any specified class

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9 *National Society for the Prevention of Cruelty to Animals v Minister of Justice and Constitutional Development & Another* (29677/2013) [2014] ZAGPPHC 763 (8 October 2014).

10 Criminal Procedure Act 51 of 1977.

or category of offences with reference to which such body or person may by law exercise such right of prosecution.

- (3) [A Director of Public Prosecutions] may, under subsection (2), withdraw his right of prosecution on such conditions as he may deem fit, including a condition that the appointment by such body or person of a prosecutor to conduct the prosecution in question shall be subject to the approval of the [Director of Public Prosecutions], and that the [Director of Public Prosecutions] may at any time exercise with reference to any such prosecution any power which he might have exercised if he had not withdrawn his right of prosecution.

It has been argued that private prosecutions under section 8 are not private prosecutions in the true sense of word.<sup>11</sup> This is because they remain under the control of the Director of Public Prosecutions (DPP) who may not authorise the person or body to prosecute or who may at any time withdraw the private prosecutor's right to prosecute. The DPP also imposes the conditions that have to be followed if the private prosecutor under section 8 is to retain his right to prosecute. Section 8 has been invoked mainly by municipalities to prosecute individuals and companies that break municipal laws.<sup>12</sup>

## 2.2 Private prosecutions under pieces of legislation other than the Criminal Procedure Act

The second category of private prosecutions is found in different pieces of legislation that authorise individuals to institute private prosecutions against people who are alleged to have committed offences under these laws. For example, section 33 of the National Environmental Management Act (NEMA)<sup>13</sup> provides:

- (1) Any person may
- (a) in the public interest; or
  - (b) in the interest of the protection of the environment,

institute and conduct a prosecution in respect of any breach or threatened breach of any duty, other than a public duty resting on an organ of state, in any national or provincial legislation or municipal bylaw, or any regulation, licence, permission or authorisation issued in terms of such legislation, where that duty is concerned with the protection of the environment and the breach of that duty is an offence.

- (2) The provisions of sections 9 to 17 of the Criminal Procedure Act, 1977 (Act 51 of 1977) applicable to a prosecution instituted and conducted under section 8 of that Act must apply to a prosecution instituted and conducted under subsection (1): Provided that if –

11 JJ Joubert *Criminal procedure handbook* (2013) 81.

12 See eg *Amalgamated Beverage Industries Natal (Pty) Ltd v City Council of the City of Durban* 1994 (3) SA 170 (AD); [1994] 2 All SA 222 (A); *Claymore Court (Pty) Ltd & Another v Durban City Council* 1986 (4) SA 180 (N).

13 National Environmental Management Act 107 of 1998. This section is referred to in *Le Sueur & Another v Ethekwini Municipality & Others* (9714/11) [2013] ZAKZPHC 6 (30 January 2013) para 36.

- (a) the person prosecuting privately does so through a person entitled to practise as an advocate or an attorney in the Republic;
  - (b) the person prosecuting privately has given written notice to the appropriate public prosecutor that he or she intends to do so; and
  - (c) the public prosecutor has not, within 28 days of receipt of such notice, stated in writing that he or she intends to prosecute the alleged offence,
    - (i) the person prosecuting privately shall not be required to produce a certificate issued by the Attorney-General stating that he or she has refused to prosecute the accused; and
    - (ii) the person prosecuting privately shall not be required to provide security for such action.
- (3) The court may order a person convicted upon a private prosecution brought under subsection (1) to pay the costs and expenses of the prosecution, including the costs of any appeal against such conviction or any sentence.
- (4) The accused may be granted an order for costs against the person prosecuting privately, if the charge against the accused is dismissed or the accused is acquitted or a decision in favour of the accused is given on appeal and the court finds either:
- (a) that the person instituting and conducting the private prosecution did not act out of a concern for the public interest or the protection of the environment; or
  - (b) that such prosecution was unfounded, trivial or vexatious.
- (5) When a private prosecution is instituted in accordance with the provisions of this Act, the Attorney-General is barred from prosecuting except with the leave of the court concerned.

Other pieces of legislation, such as the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act<sup>14</sup> and the Extension of Security of Tenure Act 1997,<sup>15</sup> similarly empower individuals to institute private prosecutions against persons who have allegedly committed offences under those Acts. One of the major differences between private prosecutions, for example, under section 33 of the National Environmental Management Act, and those under section 7 of the Criminal Procedure Act (discussed below), is that, should the public prosecutor refuse to prosecute, the private prosecutor would not need a certificate *nolle prosequi* from the DPP to institute such a prosecution. Also, unlike under section 7 of the Criminal Procedure Act, in terms of which a private prosecution has to be brought by a victim or a victim's close relative or legal representative, a private prosecution under section 33 of NEMA may be brought in the public interest. Finally, unlike private prosecutions under section 7 of the Criminal Procedure Act which, as this article illustrates, can only be instituted by natural persons, private prosecutions under section 33 of

<sup>14</sup> Sec 8 Act 9 of 1998.

<sup>15</sup> Sec 23 Extension of Security of Tenure Act 1997. See *Crookes v Sibisi & Others* 2011 (1) SACR 23 (KZP); 2011 (1) SA 491 (KZP), in which the High Court dealt with this section in detail.

NEMA may be instituted by juristic persons such as corporations. This is because section 1(1)(xiii) defines a 'person' as including 'a juristic person'. Although section 33(2) of NEMA provides that the provisions of the Criminal Procedure Act, which apply to private prosecutions under section 8, must be applicable to the private prosecutions under section 33(1), the private prosecutions under section 33(1) have some of the features of private prosecutions under section 7 of the Criminal Procedure Act. These features include the fact that, in the event of a successful private prosecution, the court may order the offender to reimburse the private prosecutor the costs incurred in the prosecution and, in the event of an unsuccessful private prosecution, the court may order the private prosecutor to reimburse the accused the costs incurred in defending himself. In other words, private prosecutions under section 33 of NEMA are a hybrid form of those under sections 7 and 8 of the Criminal Procedure Act.

### 2.3 Private prosecutions on the basis of a certificate *nolle prosequi*

A private prosecution on the basis of a certificate *nolle prosequi*, the focus of this article, is provided for in section 7 of the Criminal Procedure Act. This section provides:

- (1) In any case in which a Director of Public Prosecutions declines to prosecute for an alleged offence –
  - (a) any private person who proves some substantial and peculiar interest in the issue of the trial arising out of some injury which he individually suffered in consequence of the commission of the said offence;
  - (b) a husband, if the said offence was committed in respect of his wife;
  - (c) the wife or child or, if there is no wife or child, any of the next of kin of any deceased person, if the death of such person is alleged to have been caused by the said offence; or
  - (d) the legal guardian or curator of a minor or lunatic, if the said offence was committed against his ward,

may, subject to the provisions of section 9 and section 59(2) of the Child Justice Act, 2008, either in person or by a legal representative, institute and conduct a prosecution in respect of such offence in any court competent to try that offence.

- (2)
  - (a) No private prosecutor under this section shall obtain the process of any court for summoning any person to answer any charge unless such private prosecutor produces to the officer authorised by law to issue such process a certificate signed by the [Director of Public Prosecutions] that he has seen the statements or affidavits on which the charge is based and that he declines to prosecute at the instance of the state.
  - (b) The [Director of Public Prosecutions] shall, in any case in which he declines to prosecute, at the request of the person intending to prosecute, grant the certificate referred to in paragraph (a).
  - (c) A certificate issued under this subsection shall lapse unless proceedings in respect of the offence in question are instituted

by the issue of the process referred to in paragraph (a) within three months of the date of the certificate.

Many private prosecutions have been instituted on the basis of section 7.<sup>16</sup> The question of whether section 7 may be invoked by a company to institute a private prosecution first arose in the case of *Barclays Zimbabwe Nominees (Pvt) Ltd v Black*.<sup>17</sup> The question for the Supreme Court of Appeal to decide was whether a company was 'entitled to bring a private prosecution'.<sup>18</sup> The Director of Public Prosecutions (then known as the Attorney-General) declined to prosecute the defendant for perjury and fraud and invoked section 7 to grant a certificate to the appellant, a company incorporated in Zimbabwe, to prosecute the defendant. The respondent argued that the company had no title to prosecute because it was not a person within the meaning of section 7 of the Criminal Procedure Act. The appellant argued that the Interpretation Act defines a 'person' to include a company unless the context otherwise requires. The Court observed that the appellant's argument was 'attractive' but that it could not 'succeed'.<sup>19</sup> The appellant also argued that the word 'private' under section 7 of the Criminal Procedure Act was of no significance 'other than to contrast such a person with a person holding public office or an official person'.<sup>20</sup> The Court referred to the dictionary meaning of the word 'person' and to the words 'substantial and peculiar interest' and to the phrase 'he individually suffered' in section 7 to observe that the person referred to in this section is a natural person as opposed to a company.<sup>21</sup> The Court added that the word 'he' in the section could not be applied to companies. The Court further held that<sup>22</sup>

[s]ection 7(1) provides that any person referred to in (a), (b), (c) or (d) may institute and conduct a prosecution 'either in person or by a legal representative' and it would ... be straining [the] language to speak of a company instituting and conducting a prosecution 'in person'.

The Court added that if the word 'private' also applied to companies, that would mean that section 7 'would apply only to private companies. This would create an anomaly since there would seem to be no reason in principle why a private company should be able to

16 See eg *Nundalal v Director of Public Prosecutions KZN & Others* (AR723/2014) [2015] ZAKZPHC 28 (8 May 2015); *Tsholo v Kgafela & Others* (1244/2004) [2004] ZANWHC 36 (9 December 2004); *Phillips v Botha* 1999 (2) SA 555 (SCA); [1999] 1 All SA 524 (A) (26 November 1998); and *Bothma v Els & Others* 2010 (2) SA 622 (CC); 2010 (1) SACR 184 (CC); 2010 (1) BCLR 1 (CC).

17 [1990] ZASCA 92; 1990 (4) SA 720 (A).

18 *Barclays Zimbabwe* (n 17 above) 721.

19 *Barclays Zimbabwe* 722.

20 As above.

21 As above.

22 *Barclays Zimbabwe* (n 17 above) 724.

prosecute and a public company should not.<sup>23</sup> The Court concluded:<sup>24</sup>

The general policy of the legislature is that all prosecutions are to be public prosecutions in the name and on behalf of the state ... The exceptions are firstly where a law expressly confers a right of private prosecution upon a particular body or person (these bodies and persons being referred to in section 8(2)) and secondly, those persons referred to in section 7. There may well be sound reasons of policy for confining the right of private prosecution to natural persons as opposed to companies, close corporations and voluntary associations such as, for example, political parties or clubs.

It should be noted that this case was decided before the 1996 Constitution of South Africa which, as the discussion below shows, provides, inter alia, for the right to equality. It is the above interpretation of section 7 of the Criminal Procedure Act that the applicant in *National Society for the Prevention of Cruelty to Animals*<sup>25</sup> challenged. Our attention now turns to that judgment.

### **3 *National Society for the Prevention of Cruelty to Animals v Minister of Justice and Constitutional Development & Another***

The applicant, the National Council of Societies for the Prevention of Cruelty to Animals, a statutory body<sup>26</sup> with the objectives, inter alia, 'to prevent the ill-treatment of animals, to take cognisance of laws that affect animals and to make representations in connection therewith to the appropriate authority',<sup>27</sup> petitioned the High Court for 'an order declaring section 7(1)(a) of the Criminal Procedure Act ... unconstitutional insofar as it does not permit juristic persons to also institute private prosecutions'.<sup>28</sup> Section 6(2)(e) of the legislation establishing the applicant states that in order to perform its functions, it may

institute legal proceedings connected with its functions, including such proceedings in an appropriate court of law or prohibit the commission by any person of a particular kind of cruelty to animals, and assist a society in connection with such proceedings against or by it.

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23 As above.

24 *Barclays Zimbabwe* (n 17 above) 726. This principle was also emphasised in *Reynolds v Beinash* 1998 JDR 0510 (W).

25 *National Society for the Prevention of Cruelty to Animals* (n 9 above).

26 Established under sec 2 of the Societies for the Prevention of Cruelty to Animals Act 169 of 1993.

27 *National Society for the Prevention of Cruelty to Animals* (n 9 above) para 2.

28 *National Society for the Prevention of Cruelty to Animals* (n 9 above) para 1.

The applicant argued that its inability to institute private prosecutions made it difficult for it to undertake some of its statutory duties, in that:<sup>29</sup>

[O]ver the past few years it has attempted on several occasions to privately prosecute individuals in circumstances where the state has declined to do so. In each instance it has been met with the same response, namely that the prosecutor cannot issue it with a certificate *nolle prosequi* because, according to section 7(1)(a) of the Act, only a private person can institute a private prosecution.

The applicant submitted that section 7 of the Criminal Procedure Act was contrary to section 9(1) of the Constitution which guarantees the right to equality. Section 9(1) of the Constitution provides that '[e]veryone is equal before the law and has the right to equal protection and benefit of the law'. They added that section 7 lacked<sup>30</sup>

any apparent rational basis for treating juristic persons differently to natural persons with the consequent result that juristic persons do not, for all intents and purposes, enjoy the equal protection of the law, nor do juristic persons get the equal benefit of the law.

It submitted further that the 'differentiation ... fails to serve a legitimate governmental purpose and is therefore irrational and unconstitutional'.<sup>31</sup>

The Court referred to the legislation establishing the National Prosecuting Authority and its functions,<sup>32</sup> and held:<sup>33</sup>

It flows from the state's power to institute criminal proceedings that the prosecution of crime is a matter of importance to the state. It enables the state to fulfil its constitutional obligations to prosecute those offences that threaten or infringe the rights of citizens ... This indicates that the general point of departure in terms of our Constitution is that all prosecutions are to be public prosecutions in the name and on behalf of the state.

The Court further held that private prosecutions were an exception to the general rule that it is the prerogative of the state to prosecute crime.<sup>34</sup> The Court referred to the case of *Barclays Zimbabwe Nominees*<sup>35</sup> and held as follows:<sup>36</sup>

As far as both sections 7 and 8 of the [Criminal Procedure] Act are concerned, it appears that only natural persons and public bodies may prosecute privately. Companies and other legal persons, also voluntary associations, do not have this right.

Thereafter the Court discussed the requirements that a person or body has to meet before a private prosecution is instituted under

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29 *National Society for the Prevention of Cruelty to Animals* para 3.

30 *National Society for the Prevention of Cruelty to Animals* para 4.

31 As above.

32 *National Society for the Prevention of Cruelty to Animals* (n 9 above) para 12.

33 *National Society for the Prevention of Cruelty to Animals* para 13.

34 *National Society for the Prevention of Cruelty to Animals* para 14.

35 *Barclays Zimbabwe* (n 17 above).

36 *National Society for the Prevention of Cruelty to Animals* (n 9 above) para 15.

sections 7 and 8 of the Criminal Procedure Act and other pieces of legislation.<sup>37</sup> The Court observed:<sup>38</sup>

[N]ot all rights in the Bill of Rights are for the benefit of juristic persons. Section 8(4) of the Constitution provides that a juristic person is entitled to the rights in the Bill of Rights to the extent required by the nature of the rights and the nature of that juristic person. For example, rights to life and to human dignity cannot sensibly be applied to juristic persons.

The Court added that '[i]n order to decide whether a particular right is available to a juristic person, two factors should be taken into account: the nature of the right in question and the nature of the juristic person'.<sup>39</sup> The Court referred to the legislation establishing the applicant and observed that 'the nature of the applicant as a juristic person is not that of a private company, but a public body'.<sup>40</sup> The Court assumed 'without deciding' that section 9(1) of the Constitution applied to juristic persons. It then referred to the criteria developed by the Constitutional Court that must be followed to determine whether a legislative provision is discriminatory.<sup>41</sup>

It should first be determined whether the impugned provision contains a differentiation. If it does, the next question is whether the differentiation constitutes ... discrimination. If the differentiation amounts to ... discrimination, then it should be determined whether that is an unfair discrimination or not.

The Court held that the fact that natural persons are allowed to institute private prosecutions but companies are not allowed to amounts to both differentiation and discrimination.<sup>42</sup> It further held that what the Constitution prohibits is unfair discrimination and, in order to determine whether the discrimination in question is unfair, the following factors should be considered:<sup>43</sup>

(a) the position of the complainants in society and whether they have been victims of past patterns of discrimination; (b) the nature of the provision and the purpose sought to be achieved by it; and (c) the extent to which the discrimination has affected the interests or rights of the complainant.

Assessing the applicant's position in light of the above factors, the Court held:<sup>44</sup>

Taking into account these guidelines, it appears that (a) above more appropriately applies to natural persons. However, insofar as it may be applicable to the applicant I have already indicated above that the applicant should be regarded as a public body. I am not aware whether the applicant is a victim of past patterns of discrimination. As far as (b) above is

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37 *National Society for the Prevention of Cruelty to Animals* paras 16-18.

38 *National Society for the Prevention of Cruelty to Animals* para 19.

39 *National Society for the Prevention of Cruelty to Animals* para 20.

40 *National Society for the Prevention of Cruelty to Animals* para 21.

41 *National Society for the Prevention of Cruelty to Animals* para 22.

42 *National Society for the Prevention of Cruelty to Animals* para 23.

43 *National Society for the Prevention of Cruelty to Animals* para 24.

44 *National Society for the Prevention of Cruelty to Animals* paras 25-26.

concerned, the nature of section 7 and the purpose thereof have already been considered above. It constitutes an exception to the constitutional imperative stipulated in section 179 of the Constitution. The purpose is, *inter alia*, to afford a way of vindicating 'imponderable interests' and to curb the propensity to resort to self-help if there is a refusal by the Director of Public Prosecutions to institute a prosecution. To put it differently, the purpose of section 7 is to allow a private prosecution only where private or personal interests are at stake, but to prevent other natural persons, as well as juristic persons, not having such interests from doing so. To allow all persons to undertake a private prosecution would be contrary to the constitutional imperative and would effectively create an alternative prosecuting system. As far as (c) above is concerned, the following should be pointed out. First, in considering the effect or extend [*sic*] of section 7(1)(a) one must take into account that not only juristic persons are excluded, but also other natural persons not referred to in the section. The right to institute a private prosecution is determined by a limitation clause which does not only differentiate between juristic and natural persons, but also between natural persons. Second, the criteria applied to achieve this differentiation are not arbitrary, but to serve a particular purpose, i.e. to exclude persons not having a personal interest linked to some injury individually suffered.

The Court added that, in order to ensure that there was a single prosecuting authority in the country, it was necessary 'to strictly control the right of private prosecution'.<sup>45</sup> The Court suggested that, maybe, parliament should consider amending section 6 of the Societies for the Prevention of Cruelty to Animals Act to expressly empower the applicant to institute private prosecutions.

#### 4 Analysis

It has been illustrated above that section 6(2)(e) of the Societies for the Prevention of Cruelty to Animals Act provides that in order to carry out its functions, the applicant may 'institute legal proceedings connected with its functions, including such proceedings in an appropriate court of law'. By holding that the applicant does not have a right to institute a private prosecution, it means that it is rendered incapable of performing one of the duties it was established to perform - to 'institute legal proceedings connected with its functions'. The drafting history of the Societies for the Prevention of Cruelty to Animals Act is silent on whether the applicant is empowered to institute private prosecutions.<sup>46</sup>

As mentioned above, the Court held that '[t]o allow all persons to undertake a private prosecution would be contrary to the constitutional imperative and would effectively create an alternative prosecuting system'. Although private prosecutions, as provided for in section 7 of the Criminal Procedure Act, are allowed in many parts of the world, not all persons are permitted to institute private prosecutions. For any person to institute a private prosecution, he or

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<sup>45</sup> *National Society for the Prevention of Cruelty to Animals* para 27.

<sup>46</sup> Debates of the National Assembly (Hansard) 25 November 1993 14064-14089.

she must be a victim or must be representing the victim. This is the case in countries such as Tonga,<sup>47</sup> the Republic of Ireland,<sup>48</sup> the Cook Islands,<sup>49</sup> Vanuatu,<sup>50</sup> Canada<sup>51</sup> and China.<sup>52</sup> It is, therefore, not possible for everyone, including the victims, to institute private prosecutions. This principle is applicable to natural persons and juristic persons where such prosecutions are allowed. Private prosecutions by companies are allowed in different parts of the world. For example, the Supreme Court of the United Kingdom (*per* Lord Wilson) in *Gujra, R (on the application of) v Crown Prosecution Service*<sup>53</sup> observed that private prosecutions by individuals 'are still frequently instituted' in the United Kingdom and that private prosecutions are also conducted by public bodies, such as the Office of Fair Trading, the Transport for London, and the Royal Society for the Prevention of Cruelty to Animals.<sup>54</sup> Lord Wilson observed that '[r]etail companies often prosecute shop-lifters' and the Crown Prosecuting Service 'seems not to intervene and, indeed, to be more than content thus to be spared entry into that sphere of prosecution'.<sup>55</sup> In *Virgin Media Ltd, R (on the application of) v Zinga*<sup>56</sup> the United Kingdom Court of Appeal observed:<sup>57</sup>

It is now also evident that commercial organisations regularly undertake private prosecutions. This type of private prosecution is undertaken not only by trade organisations ... but also ordinary commercial companies.

There is also evidence from countries in Africa, Asia, Australia/Oceania and North America that companies or corporations institute private prosecutions. This is the case, for example, in Singapore,<sup>58</sup> New

47 *Pohiva v Tu'ivakano* [2014] TOSC 1; AM20.2013 (17 January 2014) para 31.

48 *Kelly & Another v District Judge Ann Ryan* [2013] IEHC 321 (9 July 2013) paras 11 & 16.

49 *Pera v Tangiiti* [2010] CKHC 5; CRC 115-116 of 2010 (10 September 2010) para 5.

50 See *Jessop v Public Prosecutor* [2010] VUSC 134; Civil Case 114 of 2009 (2 July 2010) para 16.

51 *Bowman & Others v Zibotics* 2010 ONSC 4422 (CanLII) para 22. See also *Johnson v Saskatchewan (Attorney-General)* 1997 CanLII 11117 (SK QB); *Hall v Jakobek* 2003 CanLII 45521 (ON SC) para 24.

52 Art 88 of the Criminal Procedure Law of the People's Republic of China [1996].

53 [2012] UKSC 52 (14 November 2012); [2013] 1 Cr App R 12, [2012] 3 WLR 1227, [2013] 1 All ER 612, [2013] 1 AC 484, [2012] WLR(D) 330, [2012] UKSC 52.

54 *Gujra* (n 53 above) para 33.

55 As above.

56 [2014] 1 WLR 2228, 178 JP 105, [2014] EWCA Crim 52, [2014] 3 All ER 90, [2014] 1 Cr App R 27, (2014) 178 JP 105, [2014] 2 Cr App R (S) 30, [2014] WLR 2228, [2014] WLR(D) 29.

57 *Virgin Media* (n 56 above) para 16.

58 *Odex Pte Ltd v Pacific Internet Ltd* [2008] SGHC 35 (7 March 2008) para 52; *Vicplas Holdings Pte Ltd v Allfit International Market Pte Ltd & Others* [2010] SGHC 370 para 9. See sec 133(1) of the Criminal Procedure Code (Cap 68, 1985 Ed); and secs 11(10), 12 & 13 of the Criminal Procedure Code 2010 (15 of 2010).

Zealand,<sup>59</sup> Canada,<sup>60</sup> Kenya,<sup>61</sup> Zimbabwe<sup>62</sup> and Vanuatu.<sup>63</sup> In Singapore, Kenya, Vanuatu and Zimbabwe, as in South Africa, the law does not provide expressly that juristic persons have the right to institute private prosecutions. However, courts in these countries, unlike in South Africa, have held that they may institute private prosecutions, or the accused have not contested the juristic person's right to institute private prosecutions. In Canada, the right of a corporation to institute a private prosecution is not expressly provided for in national or provincial legislation, but it is derived from English common law.<sup>64</sup> In New Zealand, the Criminal Procedure Act provides specifically that a private prosecution may be brought by an individual or an organisation.<sup>65</sup> The above examples reveal that South Africa is not the only country where legislation does not specifically provide for the right of juristic persons to institute private prosecutions.

In the author's opinion, allowing companies to institute private prosecutions does not mean that there will be no control mechanism to ensure that they do not abuse their right. There is evidence that private prosecutions under section 7 have been abused by some

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59 See *Banks v District Court at Auckland* [2013] NZHC 3221 (3 December 2013) para 14; and *Haines v Waikato District Law Society Hc Ham Civ-2006-419-426* [2006] NZHC 963 (23 August 2006) para 8.

60 *United Brotherhood of Carpenters and Joiners of America, Local 1072 v Universal Showcase/idX Company* 2006 CanLII 1614 (ON LRB) para 15; and *Letourneau v Clearbrook Iron Works Ltd* 2005 FC 333 (CanLII) para 7.

61 *Lois Holdings Limited v Ndiwa Tamboi & 184 Others* [2014] eKLR 1 para 7.

62 In *Telecel Zimbabwe (Pvt) Ltd v AG of Zimbabwe NO* Civil Appeal SC 254/11 [2014] ZWSC 1 (28 January 2014), the Supreme Court of Zimbabwe held that, like natural persons, juristic persons also have a right to institute a private prosecution. In arriving at this conclusion, the Court distinguished the relevant South African case law and legislation on this issue, in particular the case of *Barclays Zimbabwe Nominees* (n 17 above) and sec 7 of the Criminal Procedure Act. However, in October 2015, notwithstanding serious opposition from especially the opposition members of parliament, the Zimbabwean National Assembly passed the Criminal Procedure and Evidence [HB 2, 2015] which, inter alia, provides that juristic persons shall not have a right to institute private prosecutions. The Zimbabwean Minister of Justice argued that there was a need to expressly prohibit juristic persons from instituting private prosecutions as they could abuse that right and prosecute especially poor people. See National Assembly Hansard 14 October 2015 Vol 42 No 13, <http://www.parlzim.gov.zw/national-assembly-hansard/national-assembly-hansard-14-october-2015-vol-42-no-13> (accessed 29 October 2015).

63 *Lauto v Public Prosecutor* [2003] VUSC 75; Criminal Case 010 of 2003 (21 April 2003). (The appellant, as employee of BP, was convicted in a private prosecution filed by BP after misappropriating some of its money. The private prosecution was instituted on the basis of a certificate issued by the public prosecutor.) *Etmat Bay Estate Ltd v Magna Ltd* [2014] VUSC 79; Civil Case 101 of 2010 (4 July 2014). See secs 1, 35(2), 98, 99 & 103 of the Criminal Procedure Code, ch 136.

64 See, generally, P Burns 'Private prosecutions in Canada: The law and a proposal for change' (1975) 21 *McGill Law Journal* 269-297.

65 Sec 16(2)(e) of the Criminal Procedure Act 2011. See also sec 6(c) of the Criminal Disclosure Act 2008, which recognised the right to private prosecution in New Zealand.

individuals and courts have stepped in to put an end to such abuse.<sup>66</sup> Companies would not be prosecuting the accused in private courts. These prosecutions would be conducted in public courts and the accused would be entitled to all the rights of an accused under section 35(3) of the Constitution.<sup>67</sup> Judicial officers would be able to prevent or stop any abuse. It should also be noted that there is nothing in the Constitution or the Criminal Procedure Act which would prevent the Director of Public Prosecutions from intervening and discontinuing a private prosecution by a company should the company abuse the process. Private companies that institute frivolous or vexatious prosecutions against individuals or other companies should also be prepared to compensate the accused for the trouble he has been put through and the costs incurred should the accused be acquitted.<sup>68</sup> Such mechanisms would ensure that a company only institutes a private prosecution when it has a strong case against the accused. Another mechanism would be to allow private companies to

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66 Eg, *Phillips v Botha* (591/96) [1998] ZASCA 105; 1999 (2) SA 555 (SCA); [1999] 1 All SA 524 (A) (26 November 1998) (using a private prosecution to enforce the payment of an illegal gambling debt); *Nundalal v Director of Public Prosecutions KZN & Others* (AR723/2014) [2015] ZAKZPHC 28 (8 May 2015) (summons in a private prosecution not signed by the private prosecutor, instituting a private prosecution without lodging a certificate *nolle prosequi* with the clerk of the magistrate's court, and without paying the required security deposit).

67 This section provides that '[e]very accused person has a right to a fair trial, which includes the right (a) to be informed of the charge with sufficient detail to answer it; (b) to have adequate time and facilities to prepare a defence; (c) to a public trial before an ordinary court; (d) to have their trial begin and conclude without unreasonable delay; (e) to be present when being tried; (f) to choose, and be represented by, a legal practitioner and to be informed of this right promptly; (g) to have a legal practitioner assigned to the accused person by the state and at state expense, if substantial injustice would otherwise result, and to be informed of this right promptly; (h) to be presumed innocent, to remain silent, and not to testify during the proceedings; (i) to adduce and challenge evidence; (j) not to be compelled to give self-incriminating evidence; (k) to be tried in a language that the accused person understands or, if that is not practicable, to have the proceedings interpreted in that language; (l) not to be convicted for an act or omission that was not an offence under either national or international law at the time it was committed or omitted; (m) not to be tried for an offence in respect of an act or omission for which that person has previously been either acquitted or convicted; (n) to the benefit of the least severe of the prescribed punishments if the prescribed punishment for the offence has been changed between the time that the offence was committed and the time of sentencing; and (o) of appeal to, or review by, a higher court'.

68 Sec 16 of the Criminal Procedure Act provides: '(1) Where in a private prosecution, other than a prosecution contemplated in section 8, the charge against the accused is dismissed or the accused is acquitted or a decision in favour of the accused is given on appeal, the court dismissing the charge or acquitting the accused or deciding in favour of the accused on appeal, may order the private prosecutor to pay to such accused the whole or any part of the costs and expenses incurred in connection with the prosecution or, as the case may be, the appeal. (2) Where the court is of the opinion that a private prosecution was unfounded and vexatious, it shall award to the accused at his request such costs and expenses incurred in connection with the prosecution, as it may deem fit.' In *Solomon v Magistrate, Pretoria, & Another* 1950 (3) SA 603 (T), the court held that '[t]he legislature ... must have contemplated that private prosecutors might in

prosecute minor offences and to leave the prosecution of serious offences to the state.

There are also some advantages in allowing private companies to institute private prosecutions. One, the government will be saving some of its resources as companies may be able to instruct their own investigators to collect the evidence needed to prosecute the accused. One should not lose sight of the fact that, if an offence is committed against a company, it is the company that has an interest in ensuring that the accused is prosecuted and punished. This is because the company is the victim. Case law from South African courts shows that the fact that companies cannot institute private prosecutions could explain why some of them are now making funds available to the National Prosecuting Authority to engage private lawyers to prosecute those who are alleged to have committed offences against them.<sup>69</sup> This should be understood against the background that crimes against businesses, including companies, have been on the rise in South Africa

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many cases have weak grounds for prosecution – a decision by the Attorney-General not to prosecute would indicate this – but the policy of parliament, no doubt, was to allow prosecution even in weak cases, in order to avoid the taking of the law by the complainant into his own hands. The Act contains no provision requiring that the private prosecutor shall satisfy anyone that he has a *prima facie* case. The penalty for vexatious and unfounded prosecution is liability for costs.’ See 613.

69 This is done on the basis of sec 38 of the National Prosecuting Authority Act 38 of 1998, which provides: ‘(1) The National Director may in consultation with the Minister, and a Deputy National Director or a Director may, in consultation with the Minister and the National Director, on behalf of the state, engage, under agreements in writing, persons having suitable qualifications and experience to perform services in specific cases. (2) The terms and conditions of service of a person engaged by the National Director, a Deputy National Director or a Director under subsection (1) shall be as determined from time to time by the Minister in concurrence with the Minister of Finance. (3) Where the engagement of a person contemplated in subsection (1) will not result in financial implications for the state (a) the National Director; or (b) a Deputy National Director or a Director, in consultation with the National Director, may, on behalf of the state, engage, under an agreement in writing, such person to perform the services contemplated in subsection (1) without consulting the Minister as contemplated in that subsection. (4) For purposes of this section, “services” include the conducting of a prosecution under the control and direction of the National Director, a Deputy National Director or a Director, as the case may be.’ In *Bonugli & Another v Deputy National Director of Public Prosecutions & Others* 2010 (2) SACR 134 (T), the charges of fraud against the applicants in respect of company UZ had been withdrawn by the Director of Public Prosecutions. Later, the Deputy National Director of Public Prosecutions allowed an application by UZ’s attorney that the applicants should be prosecuted for defrauding the company. In that application, UZ indicated that it would pay for the costs involved in the prosecution of the applicants by engaging its own advocates. UZ transferred the money that was meant to pay for the advocates’ services into a bank account controlled by the DPP. In theory, the advocates’ bills were being paid by the office of the DPP. The applicants argued that their trial was not fair because the circumstances surrounding their prosecution made it impossible for the private prosecutors to prosecute without fear, favour or prejudice. The court held that ‘[s] 38(3) of the

for some years now.<sup>70</sup> Allowing companies to launch their investigations and to use the evidence obtained through these investigations in prosecutions enables the police to concentrate on other cases the outcome of which is not the concern, at least directly, of companies. Two, companies will instruct their own lawyers to prosecute the accused. The advantage here is that state prosecutors will concentrate on prosecuting those cases they need to prosecute. Allowing companies to instruct their lawyers to prosecute those who have committed offences against them will not violate the accused's right to a fair trial. This fact was emphasised by the South African Supreme Court of Appeal when it held that<sup>71</sup>

the right to a fair and public hearing by an independent and impartial tribunal did not include a right to an independent and impartial prosecutor, *inter alia*, because such a right would be incompatible with prosecutions by statutory and private prosecutors.

In conclusion, allowing companies to institute private prosecutions in South Africa would not threaten the accused's right to a fair trial and would allow some state institutions, such as the police and the National Prosecuting Authority, to concentrate on those offences that do not serve the interests of companies.

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NPA Act envisages that the fees of prosecutors appointed under s 38 may be paid by someone other than the state. Accordingly, the mere fact that someone else funds the prosecution cannot be objectionable. In this case, however, the advocates are paid by the complainant who urged the prosecution after it had been withdrawn ... In my view, a reasonable and informed person would on the basis of these facts already reasonably apprehend that the advocates would not throughout, albeit subconsciously, act without fear, favour or prejudice. In the course of a criminal prosecution the prosecutor must, virtually on a daily basis, take decisions that might seriously impact on the rights and interests of the accused. The potential for a prosecutor paid by the complainant who had urged the prosecution, subconsciously to have undue regard to the interests of the complainant who foots the bill, is self-evident.' See 145. In *S v Tshotshoza & Others* 2010 (2) SACR 274 (GNP) para 14, the court held that '[i]t follows that the argument that the appointment is not in accordance with s 38 of the Act cannot be sustained. As to what the right-minded objective person would make of the mode of payment, it is evident that this matter differs totally from the *Bonugli* matter. That was a matter where the prosecution was based on fraudulent conduct of the accused. The complainant tried to minimise its losses, as caused by the fraud ...The complainant was conducting what in fact was a private prosecution as if it were a public prosecution. In this matter the individual banks do not have much hope of getting redress for their losses in the case of a successful prosecution. They are not directly involved in the prosecutions, and cannot and do not prescribe to the prosecutor to prosecute, and, if a prosecution commences, how to conduct the prosecution. Their contributions are more of a self-imposed tax and the payment of the prosecutor is much more akin to the payment of public prosecutors who get paid from public funds. A right-minded objective person will not have a perception of possible prejudice.' See also *Porrirt & Another v National Director of Public Prosecutions & Others* [2015] 1 All SA 169 (SCA); 2015 (1) SACR 533 (SCA).

70 See South African Police Service Crime Statistics Report (2014/2015) [http://www.saps.gov.za/resource\\_centre/publications/statistics/crimstats/2015/crime\\_stats.php](http://www.saps.gov.za/resource_centre/publications/statistics/crimstats/2015/crime_stats.php) (accessed 29 October 2015).

71 *Porrirt* (n 69 above) para 16.