

**IN THE HIGH COURT OF SOUTH AFRICA  
(GAUTENG DIVISION, PRETORIA)**

Case No: **29677/2013**

In the matter between:

8/10/2014

**NATIONAL SOCIETY FOR THE PREVENTION  
OF CRUELTY TO ANIMALS**

Applicant

and

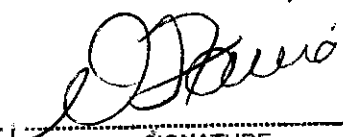
**MINISTER OF JUSTICE AND CONSTITUTIONAL  
DEVELOPMENT**

First Respondent

**NATIONAL DIRECTOR OF PUBLIC  
PROSECUTIONS**

Second Respondent

**JUDGMENT**

DELETED WHEREVER IS NOT APPLICABLE	
(1) REPORTABLE: YES/NO.	✓
(2) OF INTEREST TO OTHER JUDGES: YES/NO.	✓
(3) REVISED.	✓
8/10/14	
DATE	SIGNATURE

**FOURIE, J**

[1] The applicant seeks an order declaring section 7(1)(a) of the Criminal Procedure Act No 51 of 1977 unconstitutional insofar as it does not permit juristic persons to also institute private prosecutions. The applicant complied with the provisions of Rule 16A(1) by giving notice to the Registrar and the State Attorney. Although a notice of intention to oppose was filed on behalf of the first and second respondent, both respondents only filed explanatory affidavits setting out the submissions they wish to make. At the

hearing both respondents were represented by counsel. I appreciate the submissions put forward by all counsel.

**BACKGROUND:**

[2] The applicant's proper name is the National Council of Societies for the Prevention of Cruelty to Animals, a statutory body created by section 2 of Act No 169 of 1993. The objects of the applicant are set out in section 3 and are, *inter alia*, to prevent the ill-treatment of animals, to take cognizance of laws that affect animals and to make representations in connection therewith to the appropriate authority. The functions, powers and duties of the applicant are set out in section 6 and they include, *inter alia*, to appoint suitably qualified persons as inspectors, conferring upon them certain powers and to defend or institute legal proceedings connected with its functions.

[3] In its founding affidavit the applicant sets out the purpose of the application and facts giving rise thereto. It refers to section 7(1)(a) of the Criminal Procedure Act insofar as it permits only a private person who individually suffered from becoming a private prosecutor. The applicant, not being a private person, points out that it is frustrated in its efforts to perform its statutory duties. It maintains that over 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.

**CASE FOR THE APPLICANT:**

[4] The case pleaded for the applicant, in a nutshell, is that in terms of section 7(1)(a) of the Criminal Procedure Act only a private person is allowed to institute a private prosecution. The constitutional challenge to this section is premised on the lack of 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. The differentiation consequently fails to serve a legitimate governmental purpose and is therefore irrational and unconstitutional. In this regard reference is made to the provisions of section 9(1) and section 38(a) and (d) of the Constitution.

**STATUTORY FRAMEWORK**

[5] The impugned provision, section 7(1)(a) based within the legislative broader context of section 7(1) as a whole, reads as follows:

*"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."*

[6] To the extent that it is relevant, subsection (2) makes provision for certain requirements, such as the issuing of a certificate by the Director of Public Prosecutions to the effect that he or she has perused the statements and declines to prosecute on behalf of the State. Such a certificate is called a *nolle prosequi* (refusal to prosecute), and the Director is obliged to furnish such a certificate to someone who wishes to prosecute privately. Section 9 of the Act provides for security to be deposited by a private prosecutor, whereas section 10, read with section 12, determines the process and manner of prosecution.

[7] Section 8 of the Criminal Procedure Act makes provision for private prosecution under a statutory right. It provides in subsection (1) as follows:

*"Any body upon which or person upon whom the right to prosecute in terms of any offence is expressly conferred by law, may institute and conduct a prosecution in terms of such offence in any court competent to try that offence."*

Subsection (2) provides, to the extent that it is relevant, that such a body or person shall exercise the right to prosecute only after consultation with the Director of Public Prosecutions and after the Director has withdrawn his right of prosecution in respect of any specified offence (or any specified class or category of offences) with reference to which such body or person may by law exercise such right of prosecution. In terms of subsection (3) the Director may determine certain conditions, including a condition that the prosecution shall be subject to the approval of the Director. Subsections (2) and (3) make it clear that such body or person remains subject to the general supervision of the Director of Public Prosecutions.

[8] Section 8 of the Constitution refers to a natural and a juristic person. Subsection (2) provides that a provision of the Bill of Rights binds a natural or a juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right. In terms of subsection (4) 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.

[9] Section 9(1) of the Constitution provides that everyone is equal before the law and has the right to equal protection and benefit of the law. In terms of subsection (3) the State may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including, *inter alia*, race, gender or sex. Subsection (5) provides that the discrimination on one or

more of the grounds listed in subsection (3) is unfair, unless it is established that the discrimination is fair.

[10] Section 38 of the Constitution provides for the enforcement of rights. It refers to anyone listed in this section, alleging that a right in the Bill of Rights has been infringed or threatened, and the Court may grant appropriate relief, including a declaration of rights. The persons who may approach a Court are, *inter alia*, anyone acting in their own interest or anyone acting in the public interest.

[11] Section 6(2)(e) of the Societies for the Prevention of Cruelty to Animals Act, No 169 of 1993 refers to legal proceedings. It provides that in order to perform its functions and to achieve the objects of the council, the board may defend legal proceedings instituted against the council and also institute legal proceedings connected with its functions.

## **DISCUSSION**

[12] Section 179(1) of the Constitution provides for a single National Prosecuting Authority structured in terms of an Act of Parliament. It consists of a National and other Directors of Public Prosecutions. In terms of subsection (2) the Prosecuting Authority has the power to institute criminal proceedings on behalf of the State and to carry out any necessary functions incidental thereto. Subsection (5)(d) provides that the National Director of Public Prosecutions may review a decision to prosecute or not to prosecute, after consulting the relevant Director of Public Prosecutions and after taking

into account representations from the accused person, the complainant and any other person or party whom he or she considers to be relevant.

[13] 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 (S v Basson 2007 (1) SACR 566 (CC) at 620, par 144). 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.

[14] However, as explained by the learned authors in Commentary on the Criminal Procedure Act, Du Toit *et al*, p 1-2, a refusal to prosecute might occasionally aggrieve an individual who happens to be the victim of a crime. Therefore, some jurisdictions have in addition to their system of public prosecution also created a system of private prosecution. It may curb a propensity to resort to self-help in circumstances where an action for damages may be futile against a man of straw and "a private prosecution affords a way of vindicating those imponderable interests other than the violent and crude one of shooting the offender" (Attorney-General v Van der Merwe and Bornman 1946 OPD 197 at 201). Also in our criminal justice system, provision is made, in certain limited instances, for private prosecutions. This is first, in the case of a private person referred to in section 7 of the Criminal Procedure Act and second, where the law expressly

confers a right of private prosecution upon a particular body or person as referred to in section 8 of the Act.

[15] As far as both sections 7 and 8 of the 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. It was explained as follows in Barclays Zimbabwe Nominees (Pvt) Ltd v Black 1990 (4) SA 720 (A) at 726H:

*"The general policy of the Legislature is that all prosecutions are to be public prosecutions in the name and on behalf of the State. See ss (2) and (3) of the Criminal Procedure Act. 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 s 8(2)) and, secondly, those persons referred to in s 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."*

[16] Not all natural persons may in terms of section 7 institute a private prosecution. In terms of subsection (1)(a) such a person must prove that he or she has some substantial and peculiar interest in the issue of the trial; that such interest arises out of some injury which he or she individually suffered; and the injury was suffered in consequence of the commission of the alleged offence. The other persons referred to in subsection (1)(b), (c) and (d) need not have to prove these requirements as they flow in any event from the relationship between them. It appears that the legal policy regarding these



requirements is, as stated by Van Heerden J (as he then was) in Attorney-General v Van der Merwe and Bornman, *supra*, at 201:

*"To prevent private persons from arrogating to themselves the functions of a public prosecutor and prosecuting in respect of offences which do not affect them in any different degree than any other member of the public (or) to curb, in other words, the activities of those who would otherwise constitute themselves public busybodies."*

[17] The second exception is to be found in section 8 of the Criminal Procedure Act which provides for a private prosecution under a statutory right. This is where the law expressly confers a right of private prosecution upon a particular body or person, not being (as pointed out above) other legal persons such as companies or close corporations. Instances where bodies or persons are expressly authorised by law to institute a private prosecution, are for instance section 76 of the Attorneys Act, No 53 of 1979 and section 23(4) of the Extension of Security of Tenure Act, No 62 of 1997.

[18] Section 76 of the Attorneys Act provides that any society may, if authorised thereto by its president, institute a prosecution for any offence of this Act or any regulation made thereunder. Having regard to the provisions of section 58 (objects of society) and 59 (powers of society) it appears that the Law Societies referred to in section 56 perform, *inter alia*, a public duty. As far as section 23(4) of the Extension of Security of Tenure Act is concerned, it appears that the right of private prosecution by individuals whose rights or interests have been prejudiced by an unlawful eviction, is a

matter of public concern. In the preamble specific reference is made to unfair evictions which can lead to great hardship, conflict and social instability.

[19] In the context of the discussion above, I shall now consider the question whether the exclusion of juristic persons from the operations of section 7(1)(a) of the Criminal Procedure Act, is justified or not. From the outset it should be made clear that not 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.

[20] In 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. This approach has been articulated as follows by the Constitutional Court In re Certification of the Constitution of South Africa 1996 (4) SA 744 (CC) at 793, par 57:

*"While it is true that some rights are not appropriate to enjoyment by juristic persons, the text of NT8(4) specifically recognises this. The text also recognises that the nature of a juristic person may be taken into account by a Court in determining whether a particular right is available to such person or not."*

[21] Having regard to the objects of the applicant as well as its functions and powers, it appears that the nature of the applicant as a juristic person is

not that of a private company, but a public body. It controls and coordinates the policies and standards of societies and it shall for the purposes of section 8 of the Animals Protection Act, No 71 of 1962 be regarded as a Society for the Prevention of Cruelty to Animals (section 6 of Act 169 of 1993). In terms of section 8 of the Animals Protection Act, if authorised thereto in writing by a Magistrate, any officer of any society may, for the prevention of cruelty to animals, arrest any person who is suspected on reasonable grounds of having committed an offence in terms of that Act. It therefore appears that the applicant also has a "policing function" to be exercised in the prevention of cruelty to animals. It performs a public function and should, in my view, therefore be regarded as a public body.

[22] Section 9(1) provides for the principle of equality before the law and confers the rights of equal protection and benefit of the law. I shall assume, without deciding, that this provision also applies to a juristic person. In Harksen v Lane N.O. 1998 (1) SA 300 (CC) the Constitutional Court considered the equality clause (section 8) of the Interim Constitution (par 41 and further). The approach followed was briefly as follows: It should first be determined whether the impugned provision contains a differentiation. If it does, the next question is whether the differentiation constitutes a discrimination. If the differentiation amounts to a discrimination, then it should be determined whether that is an unfair discrimination or not (p 325, par 55 – p 328, par 63 and further).

[23] In the light of the foregoing analysis the first question to be considered is whether section 7(1)(a) of the Criminal Procedure Act contains a differentiation between natural and juristic persons. I have already indicated above that in terms of this section only natural persons may prosecute privately. Companies and other legal persons do not have this right and therefore, in my view, it amounts to a differentiation. The next question is whether the differentiation constitutes a discrimination. This is an objective enquiry. Usually a differentiation implies discrimination which, in my view, is also the position here.

[24] The final step in the enquiry is to ascertain whether the discrimination is unfair or not. Section 9 does not prohibit discrimination, it prohibits unfair discrimination (The Bill of Rights Handbook, Currie & De Waal, 6<sup>th</sup> Edition, p 222 and 223). In Harksen v Lane N.O. & Others, *supra*, Goldstone J has identified various factors which should be taken into account in determining whether discrimination is unfair (par 52). These factors should be assessed objectively and do not constitute a closed list. They are (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.

[25] 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 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.

[26] As far as (c) above is concerned, the following should be pointed out. First, in considering the effect or extend 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.

[27] It is necessary, in my view, to strictly control the right of private prosecution both in terms of section 7 and section 8 of the Criminal Procedure Act to ensure proper statutory control, to achieve criminal justice and to comply with the constitutional imperative as far as a single National Prosecuting Authority is concerned. The following dictum by Yacoob, ADCJ in Democratic Alliance v President of the Republic of South Africa & Others 2013 (1) SA 248 (CC) at 267, par 26 is apposite in this regard:

*"The final reason revolves around the importance of this portfolio in the context of our democracy. It is true that the functions of the National Director are not judicial in character. Yet, the determination of prosecution policy, the decision whether or not to prosecute and the duty to ensure that prosecution policy is complied with are, as I have said earlier, fundamental to our democracy. The office must be non-political and non-partisan and is closely related to the function of the judiciary broadly to achieve justice and is located at the core of delivering criminal justice."*

[28] In view of the above it appears that the differentiation as well as the discrimination is not unfair, but is designed to serve a legitimate governmental purpose. It also appears that there is a rational relationship between this purpose and the differentiation. The legitimate governmental purpose 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. This is why section 7(1) specifically refers to "some injury ... individually suffered" in consequence of the commission of an offence. This is a purposeful and rational limitation to serve the general policy of the Legislature and the constitutional imperative

as far as public prosecutions are concerned. In short, the requirement of "some injury ... individually suffered" cannot sensibly be applied to a juristic person as that requirement relates to human existence, something which a juristic person does not possess. It should therefore follow that a differentiation and discrimination premised on this requirement cannot be said to be unfair. I therefore conclude that the differentiation is not unconstitutional.

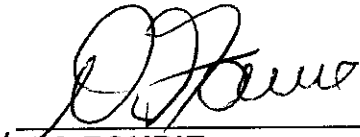
[29] It is perhaps also appropriate, in passing, to make some observation about the applicant and section 8 of the Criminal Procedure Act. I have already indicated above that the applicant appears to be a public body. Section 8 specifically provides for a private prosecution by a public body (or person) under a statutory right expressly conferred by law. As far as this limitation is concerned, it appears that the legal policy behind it is to allow only public bodies or persons to institute a private prosecution in instances where offences have been committed which concern the public interest as determined by legislation. To put it differently, a wider public interest is at stake. It is unfortunate that section 6(2)(e) of the Societies for the Prevention of Cruelty to Animals Act, No 169 of 1963 does not specifically confer the right of a public prosecution upon the applicant. If such a right were to be conferred upon the applicant, it would enable the applicant to more effectively execute its functions. Perhaps this is a matter for the Legislature to consider.

[30] In the result it should follow that the application falls to be dismissed. As far as costs are concerned, counsel for both respondents

indicated that whatever the result, no order with regard to costs should be made. I agree.

**ORDER**

I grant the following order: The application is dismissed and there shall be no order with regard to costs.

  
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**D S FOURIE**  
JUDGE OF THE HIGH COURT  
PRETORIA

Date: 8 October 2014