IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL DIVISION, PIETERMARITZBURG

CASE NO: AR 723/2014

In the matter between:

ARNOLD DENZIL NUNDALAL	APPLICANT
and	
THE DIRECTOR OF PUBLIC PROSECUTIONS KZN	FIRST RESPONDENT
PRIVATE PROSECUTOR, NIEMESH SINGH	SECOND RESPONDENT
THE REGIONAL MAGISTRATE, A MAHARAJ NO	THIRD RESPONDENT
THE CLERK OF THE "U" REGIONAL COURT, DURBAN	FOURTH RESPONDENT

JUDGMENT

Date of hearing: 27 March 2015 Date of judgment: 8 May 2015

D. PILLAY J

Constitution of the Court

[1] This application for review serves before a full court of three judges by order of the erstwhile judge president granted on 28 November 2014. As a review of the administrative decisions of the first respondent, Director of Public Prosecutions KZN (DPP), and of the fourth respondent, Clerk of 'U' Regional Court (the clerk), it should serve before a single judge sitting as a court of first instance.[1] It should take the form of an application on notice of motion.[2]

[2] As a purported review of the decision of the third respondent regional magistrate, it should also follow r 53 read with r 6 of the Uniform Rules of Court. However, if it is not a review but a criminal or civil appeal, then it must serve before a full bench of not fewer than two judges.[3]

[3] Two or more judges constitute a full bench and three judges make up a full court.[4] This terminology is often used interchangeably[5] creating unnecessary confusion as might also have happened in this case. In terms of s 1 of the Superior Courts Act 10 of 2013 'full court' means a Division of the High Court

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[1] Section 14 (1) of the superior Courts Act 10 of 2013. Nevertheless the Judge President, inter alia, has discretion to direct that a matter be heard by a court consisting of not more than three judges.
[2] Uniform Rule 53 read with PAJA Rule 8 in Rules of Procedure for Judicial Review of Administrative Action published by Government Notice R. 966 of 9 October 2009 in Government Gazette No. 32622.
[3] Section 14(3) Superior Courts Act 10 of 2013 read with ss1 and 83 of Magistrates' Courts Act 32 of 1944.
[4] Section 16(1)(a) of the Superior Courts Act.
[5] See e.g the reference to 'full bench' constituted under s 14 of the Superior Courts Act 10 of 2013 in *Ronald Bobroff & Partners Inc v De La Guerre* 2014 (3) SA 134 (CC) 134 para 3; *De La Guerre v Ronald Bobroff & Partners Inc and Others* (22645/2011) [2013] ZAGPPHC 33 (13 February 2013.)

consisting of three judges.[6] Why after representation by the parties to the erstwhile judge president this matter now serves before a full court is unclear. Be that as it may both parties confirmed at the outset of the hearing that the court is properly constituted.

Background

[4] The second respondent private prosecutor, Niemesh Singh, seeks to prosecute the applicant, Arnold Denzil Nundalal, privately on charges of defeating the ends of justice and making a false statement. The private prosecutor obtained a certificate of *nolle prosequi* from the DPP. He caused the clerk to issue a criminal summons. The regional magistrate who presided at the criminal trial dismissed *in limine* challenges to the certificate, the non-payment of security in terms of s 9(1)(b) of the Criminal Procedure Act 51 of 1977 (CPA) and the validity of the summons. In this application the applicant seeks to review and set aside the *nollle*, the summons and the ruling of the regional magistrate. Do these reviews fall under the Promotion of Administrative Justice Act 3 of 2000 (PAJA) or the common law exclusively, read with r 53? This application was brought exclusively under the common law read with the review provisions in s 22 of the Superior Courts Act and r 53 of the Uniform Rules of Court.

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[6] 14. Manner of arriving at decisions by Divisions.—(1) (a) Save as provided for in this Act or any other law, a court of a Division must be constituted before a single judge when sitting as a court of first instance for the hearing of any civil matter, but the Judge President or, in the absence of both the Judge President and the Deputy Judge President, the senior available judge, may at any time direct that any matter be heard by a court consisting of not more than three judges, as he or she may determine.
(b) A single judge of a Division may, in consultation with the Judge President or, in the absence of both the Judge President and the Deputy Judge President, the senior available judge, at any time discontinue the hearing of any civil matter which is being heard before him or her and refer it for hearing to the full court of that Division as contemplated in paragraph (a).' (my underlining)

Reviews under PAJA

[5] *Bato Star Fishing (Pty) Ltd V Minister Of Environmental Affairs And Others* 2004 (4) SA 490 (CC) offers the short answer to the question above:

> 'There are not two systems of law regulating administrative action - the common law and the Constitution - but only one system of law grounded in the Constitution. The Courts' power to review administrative action no longer flows directly from the common law but from PAJA and the Constitution itself.'

Thus it is to PAJA that I turn.

[6] Section 1 of PAJA excludes from the definition of 'administrative action' any decision taken or any failure to take a decision by an organ of state excluding:

> '(ee) the judicial functions of a judicial officer of a court…
> (ff) a decision to institute or continue a prosecution.'

[7] Subsection (ee) would exclude the regional magistrate's ruling from the definition of 'administrative action'. Therefore it is not subject to PAJA. As for the summons the clerk is not a judicial officer performing judicial functions when he or she issues a summons. Section 1 of Superior Courts Act defines 'judicial officer' to mean any person referred to in s 174 of the Constitution of the Republic of South Africa, 1996 which deals with the appointment of judicial officers. The act of issuing a summons in a private prosecution is therefore administrative action of an organ of state as defined in s 1(a) of PAJA.

[8] The converse of a decision to institute or continue with a prosecution (i.e. to refuse to prosecute) is not excluded under sub s 1(ff) of PAJA. The DPP's decision to issue a certificate is an administrative decision. Merely because the decision to issue a certificate takes place in the context of criminal law does not strip it of its essential character as an administrative act. In *Buthelezi*

and Others v Attorney General, Natal 1986 (4) SA 377 (D) three judges of this division found that an accused had a right to a hearing before the prosecution issues a certificate refusing bail in term of s 30(1) of the Internal Security Act 74 of 1982. Applying the *audi alteram partem* principle the court acknowledged that the decision to issue that certificate was administrative. Issuing a *nolle* also involves prosecutorial discretion. Accordingly PAJA applies to review and set aside the certificate.

Uniform Rule 53

[9] Section 22 of the Superior Courts Act prescribes a limited range of 4 grounds of review of proceedings of any Magistrates' Court.[7] The applicant has not pleaded any ground of review. None of the 4 grounds apply to the ruling of the regional magistrate. Because the applicant challenges the reasoning and result it is at most an appeal.

[10] However, the issues before the regional magistrate are the same issues before this court. Any decision of this court will be binding on the regional court. Furthermore the record of the proceedings in that court is before a full court. The respondent has not objected in terms of either r 30 or 30A to the procedure, form and non-compliance with the Uniform Rules pertaining to reviews from the Magistrates' Court. All the issues are conveniently consolidated in one application and can be disposed of simultaneously.

The Certificate

[7] They are : ' (a) absence of jurisdiction on the part of the court;
(b) interest in the cause, bias, malice or corruption on the part of the presiding office;
(c) gross irregularity in the proceedings; and
(d) the admission of inadmissible or incompetent evidence or the rejection of admissible or competent evidence.'

[11] I deal first with the review of the certificate and the summons under PAJA before turning to consider the decision of the regional magistrate. The proper procedure for reviewing administrative action is prescribed in PAJA and its rules. Section 6(2) lists the grounds on which administrative actions may be reviewed. Section 7 prescribes a time limit of 'not later than 180 days' from which the person concerned who was informed of the administrative action, became aware of the action and the reasons for it or might reasonably have been expected to have become aware of the action and the reasons. [8]

[12] Whenever administrative action is challenged the starting point is to ascertain the reasons for the decision. Without reasons the decision cannot be tested for rationality[9] and reasonableness[10] and therefore justification, both standards being set by the CC.

[13] Additional to the reasons must be the record of the material that served before the decision-maker on the basis of which she decided to issue the certificate. Neither the DPP's reasons nor the record of the proceedings are before this court. What the court has is a copy of the certificate, and correspondence and memoranda from senior counsel and attorneys for the private prosecutor exchanged with the DPP. Without the DPP's reasons for issuing the certificate there is no clarity as to why she issued the certificate and whether these documents informed her decision.

[14] The applicant invited the DPP in his notice of motion to dispatch the record and reasons to the registrar of the high court. She did not respond. The applicant did not follow through with an application to compel the DPP to

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[8] Section 7(1)(b).
[9] *South African Police Service v Solidarity OBO Barnard* 2014 (6) SA 123 (CC) paras 94 and 141.
[10] *Bato Star Fishing Ltd v Minister of Environmental Affairs and Others* 2004 (4) SA 490 (CC) paras 43-49; *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others* 2008 (2) SA 24 (CC) paras 107-110.

produce the record with reasons to support its application to review and to set aside the certificate. If he had and it transpired that the reasons were that there was insufficient evidence or that the matter was *de minimis,* both of which are distinct possibilities in this case, the applicant would have been able to make short shrift of the private prosecution.

[15] Another defect in this review is that this application was launched on 11 October 2013. The DPP issued the certificate on 24 August 2012. This was considerably more than the 180 days prescribed in s 7(1)b of PAJA. No application for condonation for the delay accompanies this application for review.

[16] Notwithstanding the glaring procedural flaws the private prosecutor has not objected to the application on the grounds that the applicant has not complied with the above 2 procedural requirements of PAJA. In fact neither counsel seemed to be aware that PAJA would apply in an application to set aside the certificate and the summons. Counsel for the applicant doubted its application.

[17] Had the private prosecutor resisted the application with a challenge to these defects, the challenge might have been dispositive of this aspect of the application. As he failed to do so and as there are more pressing substantive considerations the application survives notwithstanding its procedural defects.

[18] Turning to the substantive complaint about the certificate the applicant's challenge is that the private prosecutor failed to satisfy the jurisdictional prerequisites for a private prosecution[11] by furnishing the DPP with proof that he had some substantial and peculiar interest in the issue of the trial arising out of some injury that he suffered as a result of the commission of the

[11] Section 7(1)(a) of the CPA.

offence.[12] The DPP failed to apply her mind to the jurisdictional prerequisites for instituting a private prosecution.[13] She hastily issued the certificate as a result of the private prosecutor threatening to obtain a mandamus against DPP.[14] So it was submitted for the applicant.

[19] Erroneously, the applicant and his counsel conflate the jurisdictional prerequisites for a private prosecution[15] with the circumstances in which the DPP may decline to prosecute. A certificate is quiet simply confirmation that the DPP declines to prosecute, nothing more nothing less. It is not a tarot foretelling that the private prosecutor has 'substantial and peculiar interests' and has been injured personally as a consequence of the offence.

[20] Du Toit interprets s 7(2)(b) of the CPA to require the prosecuting authority to issue the certificate provided that the requisites in s 7(1) are met. [16] Respectfully this is not what s 7(2)(b) states. Section 7(2)(b) states:

> 'The attorney-general[17] 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).'

[21] It merely refers to the person intending to prosecute in s 7(1). The scheme of s 7 is such that the DPP must issue the certificate before the private prosecutor can begin a prosecution. It is not as Du Toit seems to suggest that the DPP has to issue the certificate because the private prosecutor has established the requisite interest. Whether the private prosecutor has such an

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[12] Para 12.1 and 59 of the founding affidavit.
[13] Para 61 of the founding affidavit.
[14] Para 62 of the founding affidavit.
[15] *Ellis V Visser* 1954 (2) SA 431 (T) 434E-F:'The private party concerned must show (1) some substantial and peculiar interest, (2) in the issue of the trial, (3) arising out of some injury, (4) which he individually has suffered by the commission of the offence.'
[16] Du Toit et al *Commentary on the Criminal Procedure Act* 1-57.
[17] Read as Director of Public Prosecutions.

interest does not inform the DPP's decision to issue the certificate. Noting that 'private prosecutions were unusual and a departure from the basic law that criminal prosecutions must be conducted by a public prosecutor' a single judge held in *Singh v Minister Of Justice And Constitutional Development And Another* that the prosecuting authority is not obliged by the provisions of s 7(2) to issue a certificate.[18] The prosecutor's obligation is to decide whether the statements can result in a conviction for the State. The certificate in terms of s 7(2)(a) is *prima facie* proof that the DPP has seen the statements or affidavits found in the case but he declines to prosecute.[19] Whether the private prosecutor fulfills the jurisdictional requirements is not the DPP's concern. Nor is it her concern what the person requesting the certificate plans to do with it. For employment or other purposes he could request it simply as proof that he is freed from prosecution. Contrast this with the DPP's extensive powers to be consulted and to appoint the prosecutor when issuing a certificate under s 8(2) in a private prosecution under statutory right. She could instruct a local senior prosecutor to hold a watching brief to inform her if and when the prosecution is instituted. She might even intervene by way of application to stop a prosecution so that the State can commence or continue the prosecution.[20] However, the decision to institute a private prosecution under s 7 is entirely that of the private prosecutor to be properly taken only when he is able to meet the jurisdictional requirements for a private prosecution.

[22] A certificate is issued for a specific offence. It has a lifespan of three months after which it lapses.[21] This helps to enhance certainty and prevent

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[18] *Singh v Minister Of Justice And Constitutional Development And Another* 2009 (1) SACR 87 (N) at 92F

[19] Du Toit 1-57.
[20] Section 13 of the CPA.
[21] Section 7(2)(3) of the CPA.

abuse of private prosecution.[22] The court may interdict a private prosecution on various grounds including the private prosecutor's lack of *locus* and under the Vexatious Proceedings Act 3 of 1956.[23]

[23] Paragraph 4(c) of the NPA Manual Policy, a public Government Document,[24] requires a prosecutor to prosecute if there is sufficient evidence for reasonable prospects of a conviction. In exercising its discretion the prosecuting authority must have regard to the nature and seriousness of the offence, the interests of the victim and the broader community and the circumstances of the offender.[25]

[24] Du Toit summarises the circumstances in which the prosecuting authority may decline to prosecute.[26] If a prosecutor declines to prosecute a possible inference is that there is no *prima facie* case to justify the continuation of the prosecution. A *prima facie* case is one in which the allegations are supported by statements and real and documentary evidence upon which a court should convict. Even if *prima facie* evidence exists a prosecutor may refuse to prosecute on the grounds of the triviality of the offence.[27] Prosecutors are urged to distinguish between *prima facie* weak cases from stronger ones and to decline to prosecute in weak cases[28] in order to avoid congesting court rolls and to preserve public resources.[29] Not every insult to dignity that founds a civil action is necessarily serious enough to justify a criminal prosecution.[30] Persisting with a weak case in order to influence an accused to pay an

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[22] *Solomon v Magistrate, Pretoria* 1950 (3) SA 603 (T); Du Toit 1-57.
[23] Van Deven*ter v Reichenberg and Another* 1996 (1) SACR 119 (C) at 128B-C; Du Toit 1-58
[24] *S* v *Shaik* and *Others* 2008 (1) SACR 1 (CC) at 33.
[25] Du Toit 1-38.
[26] Du Toit 1-36.
[27] *S v Visagie* 2009 (2)SACR 70 (W).
[28] Van Zyl 'Pre-Trial Detention in South Africa: Trial and Error' in von Kempen (ed) *Pre-Trial Detention: Human Rights, Criminal Procedure Law and Penitentiary Law Comparative Law* (2012) 661 at 692.
[29] Du Toit 1-39
[30] Du Toit 1-37; *Ryan v Petru*s 2010 (1) SACR 274 (ECG) at 281F–G.

admission of guilt fine to be rid of the worry, inconvenience and expense of fighting a criminal charge and not because of being guilty is improper because an admission of guilt fine remains on the criminal record as a previous conviction with potentially serious consequences. Thus a prosecution for even a trivial offence is a serious matter.

[25] These are the considerations that should have informed the prosecutor's decision not to continue with the prosecution of the applicant. Whether the private prosecutor has a substantive and peculiar interest and has suffered any injury personally from the offence are neither considerations nor prerequisites for issuing a certificate. Without the DPP's reasons and the record that served before her this court can make no definitive findings on what considerations informed her decision to issue the certificate. To say that the private prosecutor's threats of a mandamus induced her to issue the certificate is pure speculation.

[26] A point not raised by either party is the right to a hearing before the prosecutor decides to issue the certificate. Prosecution policy anticipates input from both the victim and the offender in deciding on whether to prosecute or not.[31] There is no evidence that the applicant participated in the production of the DPP's decision to issue the certificate. Ordinarily he should have been pleased not to be facing a public prosecution. He seeks to set aside the certificate because it is a jurisdictional prerequisite for a private prosecution. Setting it aside would spare him of that prosecution.

[27] Without the reasons and the record serving before the DPP being filed in this application the court finds that the applicant has failed to set up the legal

[31] See item 3.A. of the Prosecution Policy.

and evidential basis for reviewing and setting aside the certificate in terms of s 7(2) of the CPA. The certificate stands.

The Summons

[28] The applicant challenges the issuing of the summons on formal, procedural and substantive grounds.[32] They are:

a) The summons was not issued in the name of the private prosecutor.[33]
b) The summons does not describe the private prosecutor with certainty and precision.[34]
c) The summons is not signed.[35]
d) The summons was issued before the private prosecutor produced the certificate to the clerk.[36]
e) The summons was issued before the private prosecutor deposited with the Magistrates Court, Durban an amount determined by that court as security for the costs which may be incurred in respect of the applicant's defence to the charge.[37]
f) The summons was issued without the private prosecutor proving some substantial and peculiar interest in the issue of the trial arising out of some injury that he individually suffered in consequence of the commission of the offence.[38]

[29] The first three grounds attack the private prosecutor's non-compliance with the formalities of a validly issued summons. The latter three grounds

[32] Para 12 of the founding affidavit.
[33] Section 10(1) of the CPA.
[34] Section 10(1) of the CPA.
[35] Section 10(2) of the CPA.
[36] Section 7(2)(a) of the CPA.
[37] Section 9(1)(b) of the CPA.
[38] Section 7(1)(a) of the CPA.

attack the private prosecutor's non-compliance with the jurisdictional requirements for a private prosecution. Sections 7 and 9 prescribe these jurisdictional prerequisites that must exist before the clerk issues a summons. Whether a private prosecutor has a substantial and peculiar interest and has suffered an injury personally as a result of the offence is not only the most important substantive statutory prerequisite for a private prosecution but also the crux of the dispute between the parties. Without it the private prosecution collapses altogether. I will return to the jurisdictional requirements after disposing of the formal procedural challenges.

Procedural challenges to summons

[30] Constitutionally established under s 179 of the Constitution the prosecuting authority's importance in the administration of justice is entrenched. It has the potential to trench on rights in the Bill of Rights. Subsection 2 entrenches its power to institute criminal proceedings on behalf of the State. Foreshadowed in subsection 3 is national legislation to detail the implementation of the exercise by the prosecuting authority of its powers and its functions. National legislation prescribes its obligations when a person seeks a private prosecution. The statutory requirements for a private prosecution in s 7 seek to avoid frivolous and vexatious prosecutions for the same reasons discussed above that public prosecutors may decline to prosecute. Usually they must be adhered to strictly to ensure a fair trial. A criminal prosecution, private or public, has consequences potentially invasive and destructive of an accused's substantive rights to, amongst other things, personal freedom and security and the rights to a fair trial, of which the right to be informed of one's accuser[39] and the nature of the accusations[40] are paramount. As a general proposition the obligation to provide an accused with

[39] *S v Stefaans* 1999 (1) SACR 182 (C) at 188A.
[40] *S v Essop* 2014 (2) SACR 495 (KZP) para 12.

the name, description and signature of the private prosecutor would be fundamental to the rights of an accused to a fair trial, not least because the CPA prescribes them.

[31] Section 10 of the CPA provides:

> **'10. Private prosecution in name of private prosecutor**
>
> (1) A private prosecution shall be instituted and conducted and all process in connection therewith issued in the name of the private prosecutor.
>
> (2) The indictment, charge-sheet or summons, as the case may be, shall describe the private prosecutor with certainty and precision and shall, except in the case of a body referred to in section 8, be signed by such prosecutor or his legal representative'

[32] Manifestly, the name, description and signature of the private prosecutor must be evident from the summons. The use of the word 'shall' in s 10(1) and 10(2) is imperative and peremptory. Reasons for such statutory prescription becomes obvious with reference to s 35 of the Constitution and s 20 of the National Prosecuting Authority Act 32 of 1998. Section 35 of the Constitution lists the rights of everyone who is arrested for allegedly committing an offence, who is detained and who is an accused person facing a trial. The right to fair trial in subsection 3 of the Constitution includes the rights to be informed of the charge with sufficient detail to answer it.

[33] The face of the summons does not disclose who the prosecutor is but that it is a private prosecution. The only reference to private prosecution and the identity of the private prosecutor emerges in an addendum to the charge sheet. Neither the charge sheet nor the addendum to it provides any description of the private prosecutor. Given that the parties knew each other these defects in the summons are not fatal, notwithstanding the

peremptoriness of s 10. Besides, the non-compliance can be cured with a request for further particulars.

[34] The private prosecutor concedes that he did not sign the summons but contends that this was not a material defect. The signature to the charge sheet could be a material requirement. Without it a private prosecutor could disassociate himself from the prosecution e.g. if an applicant sued for malicious prosecution. The signature indicates that the process is valid, serious and that the accused's attendance in court is required. An accused may justifiably ignore an unsigned summons resulting in inconvence to the court and the administration of justice. However the private prosecutor's failure to issue and serve a signed summons can be remedied by him signing and having it re-served on the applicant. This defect too is not fatal in the circumstances of this case.

Production of Certificate

[35] Did the private prosecutor lodge a certificate when he lodged his summons for issue by the clerk? Section 7(2)(a) of the CPA states:

> '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 authorized by law to issue such process a certificate signed by the attorney-general 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.'

[36] Manifestly, production of the certificate is a peremptory statutory prerequisite for a private prosecution.

[37] On 21 November 2012 the applicant received the summons directing him to appear in 'U' Regional Court Durban. At his first appearance on 12 December 2012 he established that the private prosecutor had not lodged a certificate with the clerk when issuing the summons.

[38] When the hearing commenced in the regional court on 24 June 2013 the applicant's counsel invited the private prosecutor to disclose the process he had followed in having the summons issued against the applicant. The legality of the process was already in issue. His counsel declined to provide the information despite the fact that his client bore the onus of proving that he had complied with all the jurisdictional prerequisites for a private prosecution.

[39] The private prosecutor bore the onus of proving that he had lodged the certificate with the clerk when he sought to have his summons issued against the applicant. In rebuttal the applicant filed an affidavit by the clerk of the court denying any knowledge of the summons in the case against the applicant.[41] The private prosecutor's defence that the clerk would never have issued the summons without seeing the certificate is speculation. To discharge his obligation all he had to do was produce the certificate bearing the clerk's stamp. If he had a stamped certificate he would have produced it. Clearly he did not have it. He would have ensured that the certificate bore the clerk's stamp if he was mindful that lodging the certificate was a statutory requirement in terms of s 7(2)(b). He was unable and refused to produce a certificate stamped by the clerk or some other proof that he had lodged the certificate prior to or simultaneously with having the summons issued.

[40] The private prosecutor's failure to lodge the certificate is non-complainace with a jurisdictional requirement amounting to a material defect in the private prosecution of the applicant.

[41] Annexure ADN7 page 154 of the pleadings.

Security Deposit

[41] Did the private prosecutor deposit security with the court? At his appearance on 12 December 2012 the applicant established that the private prosecutor had not deposited any amount as security for costs as required under s 9(1)(b) of the CPA. His attorney agreed with the attorney for the private prosecutor that the latter would secure an amount of R90 000 privately for costs. The applicant persisted that the private prosecutor had to lodge security in the magistrate's court prior to issuing a summons, with that court determining the amount of the security for costs.

[42] Again failing to appreciate his statutory obligation the private prosecutor vented that by their agreement the applicant had waived this statutory provision which was permissible. Haranguing on that the applicant was making a mockery of his own agreement, thus demonstrating how desperate he was to avoid the merits of the prosecution at all costs, the private prosecutor irrelevantly questioned how the applicant had ascertained that security had not been determined by the court and that the moneys had not been paid into court.

[43] If the private prosecutor had obtained a determination by the court and paid the moneys into the court before issuing the summons as he was statutorily obliged to there would have been no need for any extra curial agreement between the attorneys after the summons had been issued. Correspondence commencing on 24 January 2013 and continuing until 8 April 2013 illustrate the negotiations between the attorneys to settle the amount of the security for costs. Finally reserving all the applicant's rights his attorney

accepted an undertaking that the funds would be retained in the trust account of the private prosecutor's attorney.[42]

[44] On the facts the private prosecutor failed to lodge security as prescribed in s 9(1)(b) of the CPA. The negotiations between the attorneys was a stopgap measure to safeguard the interests of the applicant who would otherwise have no security at all.

[45] The private prosecutor's failure to lodge security in the magistrate's court is non-compliance with a jurisdictional requirement amounting to a material defect in the private prosecution of the applicant. [43]

Substantial and peculiar interest and injury

[46] What is the meaning of substantial and peculiar interest in the context of s 7(1) which provides as follows?

> '**7. Private prosecution on certificate *nolle prosequi***
>
> (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

[42] Annexure PP1-PP4 pages 92 – 97 of the pleadings.
[43] *Van Deventer v Reichenberg and Another* 1996 (1) SACR 119 (C) at 128I-129D

(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. '

[47] The Concise Oxford English Dictionary defines 'substantial' to mean 'of considerable importance, size, or worth'.[44] '[S]ubstantial' occurs in many statutes. It is unhelpful to suggest as counsel for the applicant did that 'substantial' means the same as it does in 'substantial and compelling circumstances' to avoid the imposition of a prescribed minimum sentence. 'Substantial' must garner its meaning from the particular context in which it is used. In the context of s 7 'substantial' must refer to the interest being such as to be capable of resulting in a conviction. A public prosecution will not commence or continue unless a conviction is possible.[45] There is no rational basis for setting a different threshold for a private prosecution. [46] Irrespective of whether the prosecution is public or private, for a fair trial an accused cannot be expected to mount any defence other than to stave of a conviction. Anything else would amount to shifting the goal posts in a private prosecution thus creating uncertainty about what standard an accused must meet. A standard that differs between public and private prosecution and from one private prosecution to the next will not be a foundation for a fair trial.

[48] Correlatively, if the private prosecutor fails to prove that he has a substantial interest then no private prosecution can ensue. An example of an insubstantial interest is, if the issue is *de minimis* or frivolous and vexatious.[47]

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[44] (2011) 12th ed.
[45] See item 3.A. of the Prosecution Policy.
[46] *Ellis V Visser* 1954 (2) SA 431 (T) at 436D-E;
[47] Van Deven*ter v Reichenberg and Another* 1996 (1) SACR 119 (C) at 125D and cases cited there.

The interest does not have to be of such a nature as to give rise to a civil claim.[48]

[49] 'Peculiar' in the context could mean 'unusual', 'abnormal', 'atypical', 'different', 'distinctive' and 'unique', some of the meanings given in the Thesaurus.[49] Reinforced by the words 'private person' and 'individually suffered', 'peculiar' must mean 'unique' in s 7(1)(a). The close personal relationships for which private prosecutions are permitted in subsections (b) to (d) bolster the uniqueness and exclusivity of the private prosecutor in subsection (a). Only private prosecutors in sub-sec (a) have to prove the interest and personal injury; for all other private prosecutors in s 7 their relationships to the victims qualify them.

[50] In *Mullins and Meyer v Pearlman* the full court of the TPD opined that the private prosecutor must show actual damages suffered. [50] In *Ellis v Visser* the full court in the TPD opined in 1953 that 'injury …must be construed in its legal sense' [51] to mean 'an invasion of a legal right', [52] 'an actionable injury'. [53] If all that the private prosecutor can say 'amounts to little more than that 'his feelings have been outraged and his good name injured,' it should be interpreted restrictively.[54] If the private prosecutor has no civil remedy, if he has suffered no actionable wrong then he has no title to prosecute, even if he has suffered prejudice.[55] Furthermore 'interest in the issue of the trial' means

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[48] *Makhanya v Bailey* NO 1980 (4) SA 713 (T); *Mullins and Meyer v Pearlman* 1917 TPD 639 and *Ellis v Visser* 1954 (2) SA 431 (T) which were wrongly decided.
[49] www.thesaurus.com.
[50] *Mullins and Meyer v Pearlman* 1917 TPD 639 at 640

[51] *Ellis V Visser* 1954 (2) SA 431 (T) at 436F-G.
[52] *Ellis V Visser* 1954 (2) SA 431 (T) at 43D-E.
[53] *Ellis V Visser* 1954 (2) SA 431 (T) at 438B-C.
[54] *Ellis V Visser* 1954 (2) SA 431 (T) at 437E-G, and cases cited there.
[55] *Ellis V Visser* 1954 (2) SA 431 (T) at 437C-D and cases cited there.

a direct interest.' [56] If the private prosecutor's reputation has suffered there is no assurance that it will not continue to suffer if the applicant is convicted. [57]

[51] On the facts in *Ellis v Visser* the accused and the private prosecutor were members of a trade union committee responsible for procuring a property for the union. The accused fraudulently obtained the private proscutor's consent to proceed with a purchase that a commission of enquiry subsequently found was tainted by secrecy and corruption. [58]

[52] Twenty-seven years later the TPD differently constituted in *Makhanya v Bailey* and confronting a different set of facts but the same legal question concluded:

> '(W)here it is clear that a legal right of a person is infringed by an offence of this nature, or any nature, then the question of a civil remedy arising from it is no longer a relevant consideration and that the provisions of s 7 (1) *(a)* would then be satisfied.' [59]
>
> And
>
> 'The question of whether a civil remedy which sounds in money, or any other civil remedy would exist, is irrelevant in my view.'[60]

On the facts the private prosecutor was an employee who alleged that her employer committed an offence under s 25 of the Wage Act 5 of 1957 by victimising and dismissing her for her trade union membership.[61]

[53] Respectfully the later opinion should prevail regarding the relevance of a civil remedy. As the private prosecutor bears the onus of proving that he has

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[56] *Ellis V Visser* 1954 (2) SA 431 (T) at 437G-H.
[57] *Ellis V Visser* 1954 (2) SA 431 (T) at 437H.
[58] *Ellis V Visser* 1954 (2) SA 431 (T) at 433E-4E.
[59] *Makhanya v Bailey No* 1980 (4) SA 713 (T) at 717C;
[60] *Makhanya v Bailey No* 1980 (4) SA 713 (T) at 718A;
[61] *Makhanya v Bailey No* 1980 (4) SA 713 (T) at 715A-6A;

met all the requirements for a private prosecution he has to show that he has a substantial and peculiar interest and that he 'individually' suffered some injury personally as a consequence of the commission of the offence.[62] There must be a causal connection between the injury he suffered and the offence.[63] These prerequisites found a private prosecutor's *locus standi* to prosecute. As such they must exist when the summons is issued. The private prosecutor must be ready to prove his interest and injury at any stage once he decides to cause a summons to be issued. Nothing in s 7 calls for a more restrictive meaning than the text itself. Having a civil or any other remedy is not a requirement under s 7. That the private prosecutor must have 'individually suffered' must mean nothing less than having actually suffered an injury. A person whose feelings and good name are injured has the right to prosecute privately if he actaullay suffers an injury. It should be obvious or at least prima facie the charges when the summons is issued that the private prosecutor meets all the requirements of s 7.

[54] Usually an accused would raise non-compliance with the jurisdictional requirements under s 106(1)(h) of the CPA as a plea to the prosecution's lack of title to prosecute.[64] As jurisdictional prerequisites and matters of standing, non-compliance can be raised at any stage of the prosecution. The court may determine the issue of title in limine or after hearing evidence. However, a decision to deny a private prosecutor the right to prosecute should be taken cautiously not least because it implicates the right to access to the court under s 34 of the Constitution. If he meets all the requirements for a private prosecution under the CPA and the right to prosecute is not hit by the

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[62] Du Toit 1-56; *Singh v Minister of Justice and Constitutional Development* and *Another* 2009 (1) SACR 87 (N) at 94; *Mweuhanga* v *Cabinet* of *Interim Government of South West Africa and Others* 1989 (1) SA 976 (SWA) at 982F in which a wife had an interest in the prosecution of soldiers who allegedly killed her husband; Du Toit 1-57.

[63] *Phillips v Botha* 1999 (1) SACR 1 (SCA) at 9F

[64] *Makhanya v Bailey No* 1980 (4) SA 713 (T) at 714H-I; Du Toit 1-56.

limitation in s 36, the private prosecution should be allowed to proceed. Regretably neither party raised this vital constitutional question.

[55] Surving since its origins in the Cape Ordinance 40 of 1828, a creature of statute and not the common law, [65] s 7 jealously guards the state's right to prosecute in criminal matters. Section 7 offers a safety valve for the prosecution of crimes in which the public prosecutor has declined to prosecute but in which an individual who has suffered an injury arising from the offence has a substantial, personal, private, individual and exclusive interest. Countervailingly it balances the interests of an accused by protecting him from private prosecutions from all and sundry who have the means, time and inclination to prosecute but not a substantial and peculiar interest. It also aims

> 'to curb, in other words, the activities of those who would otherwise constitute themselves public busybodies.'.[66]

[56] The CPA does not prescribe the form of summons for a private prosecution. However, the clerk must be satisfied that the private prosecutor complies with the requirement in s 7(1)(a) in that he has some substantial and peculiar interest in the trial and the personal injury he suffered arising from the commission of the offence which he seeks to prosecute. Usually the interest and injury would be apparent from the nature of the charges. Given the low level discretion the clerk would exercise when issuing a summons, the charges could prima facie present as meeting the interest and injury requisites. However, it would be open to an accused to challenge the private prosecutor's purported compliance with s 7(1)(a) from the outset.

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[65] *Mullins and Meyer v Pearlman* 1917 TPD 639 at 642

[66] Van Deven*ter v Reichenberg and Another* 1996 (1) SACR 119 (C) at 127G

[57] In count 1 the private prosecutor alleges that the applicant exerted improper pressure on Eugene Ramnarayan 'in an attempt to secure an affidavit' from the latter stating that he witnessed the private prosecutor tampering with the access control mechanism to a property in La Lucia. Subsequently the applicant induced Mr Ramnarayan to depose to such an affidavit. The applicant relied on this affidavit in litigation concerning an insurance claim in the High Court. Arising from count 1, count 2 relates to making a false declaration knowing it to be false in contravention of the Justice of the Peace and Commissioners of Oaths Act, 1963. The charge of defeating the ends of justice in count 3 relates to the applicant obstructing the course of justice. The private prosecutor alleges that the applicant tendered, referred to and relied on an unsigned and corroborating affidavit of Johnathan Perumal, another witness on the list of witnesses, knowing that Mr Perumal sought to corroborate Mr Ramnarayan's affidavit which the applicant knew was false. Neither Messrs Perumal nor Ramnarayan are co-accused in the private prosecution.

[58] The background to the charges were the following: The applicant on behalf of Aon, his erstwhile employer allegedly procured the false testimony in an application for a spoliation order against the private prosecutor's company. As a substantial property owner with tenants such as Toyota South Africa and Delta Motors South Africa the damage to his good name and reputation is allegedly incalculable. He would not be able to face his tenants if they believed that he surreptitiously and clandestinely broke into his own property. The applicant procured false evidence that the private prosecutor was on the property at a time when the closed circuit television evidence clearly demonstrated that he only attended hours later.[67] So it was alleged.

[67] para 95 of the answering affidavit

[59] Without any information about the spoliation order the court may reasonably infer that the private prosecutor is saddled with the spoliation order that he did not challenge successfully or at all on the grounds that it was improperly obtained with false evidence. If his version is demonstrably true as the closed circuit television evidence would allegedly show he fails to attest to why his version was not before the court hearing the spoliation order. If he presented his version fully in the spoliation proceedings and the court hearing that matter erred or misdirected itself then the applicant's remedy lies in an appeal.[68] On appeal s 19(b) and (c) of the Superior Courts Act allows him to introduce new evidence.[69]

[60] Although he has another remedy that is no reason to deny him his right to also privately prosecute the applicant on criminal charges if he meets all the jurisdictional requirements.[70] However, the applicant also has rights as an accused under s 35 of the Constitution irrespective of whether he is prosecuted privately or publicly. The first right implicated in this instance is the right to have the trial commence and conclude without unreasonable delay.[71]

[61] The DPP issued the certificate only after a protracted attempt to prosecute the applicant.[72]The applicant was arrested on 31 December 2009 on charges of defeating the ends of justice and making false statements. He appeared in the district court, Durban on various occasions incurring substantial legal costs which were paid by Aon and costs to his health. Notwithstanding the passage of more than two and a half years the public prosecutor withdrew the charges against him on 28 August 2012 by direction of the DPP issued on 2

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[68] Van Deven*ter v Reichenberg and Another* 1996 (1) SACR 119 (C) at 126A-C
[69] *Rail Commuters Action Group and Others v Transnet Ltd t/a Metrorail and Others* 2005 (2) SA 359 (CC), *S v Shaik and Others* 2008 (1) SACR 1 (CC) and *S v Romer* 2011 (2) SACR (SCA) paras 3-10.
[70] *Solomon v Magistrate, Pretoria, And Another* 1950 (3) SA 603 (T)
[71] *Wild and Another v Hoffert NO And Others* 1998 (3) SA 695 (CC).
[72] Para 14–17 of the founding affidavit.

July 2012. If the evidence against the applicant was sufficient the prosecution would have been done and dusted without the delay of two and a half years let alone it ending with the prosecutor withdrawing the charges. The reasons for the delay will become aparent.

[62] A list of witnesses apparently attached to the charge sheet feature names that also appear in the addendum to the charge sheet in the private prosecution. One would expect to see statements or affidavits from the witnesses attached to the pleadings as documents that ought to have served before the DPP. There are no such statements. On 7 August 2012 the prosecutor called for the names of witnesses and their statements.[73] The following day the private prosector declined to supply them saying through his attorneys that he was not aware of any law that required him to submit such information but nevertheless advised that he would rely on nothing more than the witnesses and the statements already in the prosecutor's docket. [74]

[63] The public prosecutors were frustrated 'in trying to close the apparent gaps in the matter through further investigation'.[75] They had 'some … reservations linked to a successful prosecution'. Having regard to the charges the private prosecutor should have been able to produce the evidence such as the closed circuit television recordings which were allegedly decisive. Correspondence from the private prosecutor's legal team to the prosecuting authority continued throughout the public prosecution. Notwithstanding, the public prosecution failed.

[64] One of the reasons the public prosecution might have failed is because of insufficient evidence to sustain a prosecution not least because the private prosecutor as the complainant in that prosecution refused to give the DPP the

[73] Annexure PP20 page 138 of the pleadings.
[74] Annexure PP21 page 142 of the pleadings.
[75] Annexure PP8 page 117 of the pleadings.

information she asked for. Considering that the alleged offences occurred in mid-May 2009 the prospect of procuring such information let alone proving the charges would have become more remote with the passing of each day. It is now 6 years since the alleged offences were committed.

[65] On the charges Mr Ramnarayan would be the main witness for the prosecution. If Mr Ramnarayan was previously induced to testify falsely the private prosecutor would have a hard row to hoe to persuade a court that this time around Mr Ramnarayan was being truthful.

[66] Notwithstanding the fact that direct imprisonment may be imposed[76] the offences are trivial in comparison to murder, robbery and rape which fall in the jurisdiction of the regional court. Predictably, therefore, the public prosecution proceeded in the district court. By filing in the regional court the private prosecutor seeks to elevate the seriousness of the matter unjustifiably for reasons best know to himself, and at unnecessary costs to the administration of justice.

[67] As for any personal injury he may have or is likely to suffer, in the cut and thrust of the modern business world allegations and counter allegations are made by and about business men and women. Litigating over minor offences is not the core activity of successful people in business. The private prosecutor has not adduced any evidence that his reputation has actually suffered a setback. With the passage of 6 years since the offences were allegedly committed, there should be some evidence of injury if he had suffered any. By reviving memories of his failed spoliation case in a fresh round of litigation he risks injury especially as he cannot be sure of winning. Any prospects of success he might have had have dissipated altogether as

[76] *S v W* 1995 (1) SACR 606 (A); *S v Andhee* 1996 (1) SACR 419 (A).

the spectre of subjecting the applicant to an unfair trial looms large, as will emerge from the discussion below.

The right to a fair trial

[68] Every accused without distinction has a constitutional right to a fair trial. This right must apply equally to accused in public and private prosecutions. If it does not then the right to equality before the law and to equal protection and benefit of the law would be impugned. Equality includes the full and equal enjoyment of all rights and freedoms.[77] A hallmark of a fair trial is the independence of the prosecutor who must act without fear, favour or prejudice.[78] A prosecutor who does not exude these qualities cannot assure the accused of a fair trial.[79] In the nature of a private prosecution it is a hard ask of a private prosecutor to maintain the same degree of independence and impartiality as a public prosecutor who is uninvolved personally in the dispute. Not least for this reason and to overcome the awkwardness of a private prosecutor also being a witness in his prosecution he engages counsel.

[69] Professionally trained to be impartial, independent, objective and dispassionate, counsel should be able to bring these qualities to a private prosecution to ensure a fair trial. Counsel having these qualities would be able to filter the emotion and acrimony of the private prosecutor to focus dispassionately on the law and facts.

[70] The applicant turned to the DPP for her to produce the correspondence exchanged with the private prosecutor. Arising from the correspondence the

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[77] Section 9(1) and (2) of the Constitution.
[78] *S v Van Der Westhuizen* 2011 (2) SACR 26 (SCA) and see also s 32(2)(a) of the National Prosecuting Authority Act with regards to oath and affirmation.
[79] Du Toit 1-48; *Bonugli and Another v Deputy National Director of Public Prosecutions and Others* 2010 (2) SACR 134 (T) at 142I-J.

applicant contended that the private prosecutor's legal representatives improperly obtained the certificate from the DPP. The private prosecutor's bias evident in the correspondence with the DPP obscures all prospects of an impartial, objective and fair prosecution of the applicant, the applicant persisted.[80]

[71] Disconcertingly, senior counsel for the private prosecutor involved himself personally in correspondence on his letter head to the DPP proclaiming by way of introduction as follows:

> 'I am a senior counsel based at the Durban Bar. I have also been an acting judge for over 10 (ten) years and several of my stints on the bench have been in criminal sessions.'[81]

Senior counsel met the prosecuting authority at their offices in Pietermaritzburg on 30 March 2011 following the private prosecutor's offer to assist in the criminal prosecution.[82]

[72] The private prosecutor's legal team comprising of his attorney and junior and senior counsel held a watching brief over the public prosecution of the applicant.[83] They sought to persuade the DPP to engage senior counsel to prosecute the matter at the complainant's expense

> 'but without the senior counsel being told the complainant was carrying the costs'.[84] (*sic*)

The attorney urged that the senior counsel to be engaged should not be apprised

> 'of the fact that the complainant is in fact carrying his or her charges… the complainant would be amenable to entering into a binding and confidential

[80] Para 39 of the founding affidavit.
[81] Annexure PPS page 100 of the pleadings.
[82] Annexure PP8 page 116 of the pleadings.
[83] Annexure PP6 page 104 of the pleadings.
[84] Annexure PP6 page 105 of the pleadings.

> agreement with the office of the director and of lodging any and all monies necessary with the director's office before senior counsel is briefed'.[85]

Such a request is so obviously unethical especially in a constitutional democracy based on openness, accountability and transparency in which the prosecuting authority is constitutionally compelled to function 'without fear, favour or prejudice'.[86]

[73] Eventually when pleadings had to be filed in this application generous dozes of vitriol oozing from private prosecutor's affidavit dispel any hope of a fair trial for the applicant. Unembarrassed, the private prosecutor declared himself to be a wealthy man thus tainting his assertion that his pursuit of the applicant arises from his quest for justice. That the private prosecutor is using his wealth to avenge the applicant's victory in the spoliation proceedings cannot be discounted. Dragging the applicant, a man who cannot afford to pay his legal costs, through years of litigation, at costs to time, energy, expenses and most importantly, state resources are disproportionate to the alleged offences. As an allegedly successful businessman the private prosecutor should realise from a cost-benefit analysis that the costs of this litigation simply do not justify the benefits. There are other cost effective ways of clearing his name if it has been tarnished.

[74] Disappointingly his legal team has not disuaded him from persisting with this debilitating excerise. Indulging the private prosecutor because he has the means to litigate is grossly unfair and disproportionate to its impact on the public purse, the allocation of state resources and the administration of justice. As a review of administrative decisions this case should have proceeded before a single judge sitting as a court of first instance. The review or appeal from the magistrates' court would be superfluous once this court

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[85] Page 108 of the pleadings.
[86] Section 179(4) of the Constitution.

sets aside the summons. Furthermore a full bench of 2 judges would have sufficed to hear it. The parties have had the privilege of a full court of 3 judges. Whatever representations counsel made to the erstwhile judge president did not justify the matter proceeding before a full court, as they should have known.

[75] I find that the private prosecutor has a peculiar but not a substantial interest. He has also not shown that he has suffered any personal injury. He fails to discharge the onus of proving that his alleged interest and injury are such that they would result in the conviction of the applicant.

Conclusion

[76] To summarise, my findings are as follows:

i) The certificate cannot be reviewed and set aside.

ii) The private prosecutor has failed to satisfy the jurisdictional requirements for a valid private prosecution by lodging with his summons the certificate and proof of payment of security for costs. He has neither shown that he has both a substantial and peculiar interest in the issues giving rising to the trial nor that he has suffered an injury as a result of the alleged offences.

iii) The findings in the preceding paragraphs lead to the further finding that the clerk should not have issued the summons without the certificate and the security for costs. Even if the charges did present prima facie a substantial and peculiar interest and injury suffered this application proves otherwise. Consequently the summons should be reviewed and set aside.

iv) Against these substantive findings it follows automatically and for completeness that the judgment of the regional magistrate should be set aside.

v) Usually costs in a private prosecution would be no different from a public prosecution. That is the accused is not entitled to costs if he is acquitted 'save where the appeal or the prosecution, as the case may be, was unfounded and vexatious'. [87] This is not the prosecution but an application to stop it. Nevertheless the conduct of the parties leading up to this application is relevant. By prosecuting in the regional court a matter that deserved the attention of no higher a court than the magistrates' court, by doing so with out complying with the elementary statutory prerequisites of lodging a *nolle* certificate and security for costs, despite having the privilege of a legal team of no less than 3 lawyers is an abuse of process and state resources. Although these are grounds for imposing a punitive cost order, the applicant has not been prudent and strategic. He failed to comply with PAJA timeously, which might have stalled the private prosecution commencing at all. Moreover the applicant has not asked for a punitive costs order.

The order

a) The application to review and set aside the certificate of *nolle prosequi* is dismissed.
b) The summons issued by the clerk of 'U' Regional Magistrates' Court is reviewed and set aside.
c) The ruling of the regional magistrate of 'U' Regional Magistrates' Court is set aside.
d) The private prosecutor, Niemesh Singh, shall pay the applicant's costs.

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D Pillay J

[87] *Ellis V Visser* 1954 (2) SA 431 (T) at 441D-F.

I agree :

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T Sishi J

I agree:

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B Mnguni J

It is so ordered.

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