Article

Extending the Private Prosecution Provisions of the Criminal Procedure Act 51 of 1977 to Cover Private Prosecution in the Public Interest

Phindile Raymond Msaule
University of Limpopo, South Africa
raymond.msaule@ul.ac.za

Abstract

Criminal prosecution is generally the preserve of the state. However, there are legislated exceptions that allow for private prosecution. For example, section 7 of the Criminal Procedure Act 51 of 1977 entitles individuals who satisfy certain criteria to prosecute in their own names. Section 8 of the Act, on the other hand, provides for statutory private prosecution. Statutory private prosecutions are limited to certain bodies and certain types of offences. In this article, it is submitted that private prosecution must be extended beyond the realm of sections 7 and 8 of the Act or the currently statutory sanctioned private prosecution. It is contended that section 7 of the Act must be amended to include the prosecution of corruption and related offences, on the one hand, and money laundering and related offences, on the other, in the public interest. It is submitted that there are safeguards to avoid private prosecution being abused. Furthermore, the allowance of private prosecution in the private interest would not impinge on the status of the National Prosecuting Authority (NPA) as the constitutional body mandated to institute prosecutions on behalf of the state. This is because a prospective private prosecutor may institute proceedings only in the event that the NPA declines to prosecute or on the basis of unreasonable delay on the part of the NPA to institute prosecutions.

Keywords: individually suffered; *nolle prosequi*; private prosecution; public interest; substantial and peculiar interest

UNISA university of south africa PRESS

Southern African Public Law
https://upjournals.co.za/index.php/SAPL
Volume 35 | Number 2 | 2020 | #7027 | 23 pages

https://doi.org/10.25159/2522-6800/7027
ISSN 2522-6800 (Online), 2219-6412 (Print)

Introduction

In the recent past, AfriForum indicated that it intended to privately prosecute Mr Julius Malema, the leader of the second largest opposition party in the National Assembly, for corruption and related charges.[1] This announcement created a lot of media frenzy. However, what was missing in the media commentary in relation to this 'developing' story is that AfriForum said it would charge Mr Malema in the event the NPA declines to prosecute.[2] The importance of this caveat is that private prosecution may only arise when the National Prosecuting Authority (NPA) has refused to prosecute. There is a proliferation of groups with intentions to institute private prosecutions.[3] However, as in the AfriForum case, these groups tend to deliberately ignore or conveniently forget that prosecution is the preserve of the state, except in certain circumscribed circumstances. According to section 7 of the Criminal Procedure Act 51 of 1977 (the Act), an individual would qualify to institute private prosecution in the event the state declines to prosecute. The individual, in the context of section 7 of the Act, is limited to natural persons.[4] Even in this regard, the entitlement is not automatic upon the refusal by the state to prosecute. In addition, section 7(1)(a) states that the individual must prove that he or she has 'substantial and peculiar interest in the issue of the trial arising out of some injury which he individually suffered.' Section 8 extends the right to private prosecution to bodies or persons upon which the law has expressly conferred this right.[5]

However, in a modern, highly industrialised society, a plethora of offences do not, at least in the ordinary sense of the phrase, affect any person individually in a substantial and peculiar manner. For instance, corruption and related offences[6] on the one hand and money laundering and related offences[7] on the other do not always affect one individual more than they affect any other member of the public.[8] However, these offences have the potential to erode the fabric of society and undermine democracy and the fulfilment

1 Marelie Greef, 'Gerrie Nel and AfriForum Plan to Privately Prosecute Malema for Corruption' (AfriForum, 19 April 2018) <https://www.afriforum.co.za/gerrie-nel-afriforum-plan-privately-prosecute-malema-corruption/> accessed 8 May 2018. AfriForum describes itself as '[a] civil rights organisation that mobilises Afrikaners, Afrikaans-speaking people and other minority groups in South Africa and protects their rights.' This organisation has a unit dedicated to private prosecutions. See <https://www.afriforum.co.za/en/> accessed 25 October 2019.

2 Amanda Khoza, 'Afriforum to Privately Prosecute Malema' (*News24*, 19 April 2018) <https://www.news24.com/SouthAfrica/News/breaking-afriforum-to-privately-prosecute-julius-malema-20180419> accessed 23 May 2018.

3 Simnikiwe Hlatshaneni, 'SARS Bigwigs Facing Private Prosecution' (*The Citizen*, 22 March 2018) <https://citizen.co.za/news/south-africa/1863691/sars-former-hot-shots-face-private-prosecution/> accessed 8 May 2018.

4 See *Barclays Zimbabwe Nominees (Pvt) Ltd v Black* 1990 (2) All SA 576 (A) 580; *Telecel Zimbabwe (Pvt) Ltd v Attorney-General, Zimbabwe NO* Civil Appeal SC 254/11 2014 ZWSC 1 (28 January 2014) contrasts the South African and Zimbabwean positions in this regard.

5 See *National Society for the Prevention of Cruelty to Animals v Minister of Justice* 2017 (1) SACR 284 (CC).

6 Prevention and Combating of Corrupt Activities Act 12 of 2004.

7 Prevention of Organised Crime Act 121 of 1998.

8 *Levy v Benatar* 1987 4 SA 693 (Z) 700.

of the rights enshrined in the Bill of Rights.[9] It is undeniable that corruption is endemic in this country and prosecutions are few and far between.[10] Despite this, when the state declines to prosecute such offences, no private prosecution may be instituted against the alleged offenders. Clearly, the prosecution of such offences lie beyond the scope of private prosecution as envisaged by the Act, and other legislation that provide for private prosecution do not go far enough to cover these offences.[11] This has the potential to undermine the rule of law, accountability, and the achievement of equality, some of the founding values of our constitutional enterprise as well as the rights enshrined in the Bill of Rights.[12] Given the perceived outside influence on the prosecuting authority, there is a need for a counterweight to the prosecutorial authority's perceived inaction or deliberate bias in its decisions to prosecute.[13] This position would not affect prosecutorial discretion in any way, because at this stage the prosecution would have already taken the decision not to prosecute; instead, it would ensure that the prosecuting authority takes rational decisions. Lord Wilberforce has described private prosecution as 'a valuable constitutional safeguard against inertia or partiality on the part of the authority.'[14]

As will be shown below, there have been allegations of inertia on the part of the NPA to prosecute high-ranking individuals accused of involvement in a plethora of offences, in particular corruption, that do not affect any individual substantially and peculiarly directly and, therefore, could not be privately prosecuted. The power of private prosecution to spur the NPA into action has been brought to the fore in the case involving Mr Duduzane Zuma, the son of former president Mr Jacob Zuma.[15] Initially, even after an inquest had held that Mr Zuma be prosecuted for culpable homicide, the

9 In *Glenister v President of the Republic of South Africa* 2011 (3) SA 347 (CC) para 57, the Constitutional Court held as follows in relation to the crime of corruption: 'Corruption has become a scourge in our country and it poses a real danger to our developing democracy. It undermines the ability of the government to meet its commitment to fight poverty and to deliver on other social and economic rights guaranteed in our Bill of Rights.'

10 See François van Schalkwyk, 'Open Data and the Fight Against Corruption in South Africa' (Transparency International) <https://www.transparency.org/en/publications/open-data-and-the-fight-against-corruption-in-south-africa> accessed 28 November 2020.

11 For instance, s 35 of the National Environmental Management Act 107 of 1998 (NEMA) and s 63(1)(i) of the Legal Practice Act 28 of 2014.

12 See, among others, Chuks Okpaluba, 'The Constitutional Principles of Accountability: A Study of Contemporary South African Law' (2018) 33(1) SAPL 1–38; Anita Ramasastry, 'Is There a Right to Be Free from Corruption?' (2015) 49(2) University of California Davis LR 703–739.

13 See WP de Villiers, 'Is the Prosecuting Authority under South African Law Politically Independent? An Investigation into the South African and Analogous Models' (2011) 74(2) THRHR 263.

14 *Gouriet v Union of Post Office Workers* [1978] 3 All ER 70 79.

15 *City Press*, 'The NPA Declines to Prosecute Duduzane Zuma' (*News24*, 29 April 2018) <https://www.news24.com/Archives/City-Press/NPA-declines-to-prosecute-Duduzane-Zuma-20150429> accessed 23 May 2018.

NPA declined to prosecute; however, it made an about-turn when AfriForum, on behalf of the family of the deceased, indicated that it intended to charge Mr Zuma privately.[16]

Against this background, this article seeks to investigate whether it would be appropriate to extend private prosecution to other persons or bodies to enable them to privately prosecute alleged perpetrators in the public interest in the event the state declines to prosecute.

Private Prosecution: A Brief Overview

The state is not under an obligation to institute and proceed with criminal prosecutions at all costs once a complaint of the commission of an offence has been made.[17] There are times when the state may refuse to institute criminal prosecution in its name for whatever lawful reason, most often for lack of sufficient evidence.[18] Such decision will, obviously, not be acceptable to all concerned, especially the complainant. The question then is this: What recourse is available to the complainant who is not satisfied by the decision not to prosecute?

Section 7 of the Act provides for private prosecution if the state declines to prosecute.[19] This provision is a bulwark against individuals taking the law into their hands upon the refusal by the state to prosecute.[20] However, in terms of section 7(2) of the Act, before a private prosecution can be instituted, the person who intends to institute prosecution must obtain a certificate from the DPP certifying that the DPP declines to prosecute. No service commencing the proceedings could be effected on the would-be accused unless and until the prospective private prosecutor produces such certificate. It is a requirement that the certificate be signed by the DPP, confirming that the DPP has seen the statements and documents upon which the charge is based and that the DPP declines to prosecute at the instance of the state.[21] In addition, section 9 of the Act requires that the prospective private prosecutor deposit security with the magistrate's court in whose area of jurisdiction the offence was committed before commencing with prosecution. In terms of section 10 of the Act, the prosecution must be conducted in the name of the private prosecutor.[22] This is to identify the private prosecutor for purposes of imposing

16 Clement Manyathela, 'NPA Says It Can Successfully Prosecute Duduzane Zuma' (*Eyewitness News*, 19 April 2018) <http://ewn.co.za/2018/04/19/npa-says-it-can-successfully-prosecute-duduzane-zuma> accessed 23 May 2018.

17 See s 6 of the Act. See also clause 3 and part C of NPA, 'Prosecution Policy' (June 2013) <https://www.npa.gov.za/sites/default/files/Library/Prosecution%20Policy%20%28Final%20as%20Revised%20in%20June%202013.%2027%20Nov%202014%29.pdf> accessed 7 September 2015.

18 See clause B of the Prosecution Policy (n 17).

19 See, in general, JJ Joubert (ed), *Criminal Procedure Handbook* (12th edn, Juta 2017) 85–91; Jamil Ddamulira Mujuzi, 'The History of and Nature of the Right to Institute a Private Prosecution in South Africa' (2019) 25(1) Fundamina 131–169.

20 *Attorney-General v Van der Merwe* 1946 OPD 197 201.

21 Section 7(2)(a) of the Act.

22 The provisions of s 10 of the Act are peremptory. In *Claymore Court (Pty) Ltd v Durban City Council* 1986 (4) SA 180 (N) the court dismissed the conviction of the appellant because the process and

costs in the event the prosecution fails or the accused proceeds with a civil claim for damages.[23]

The statements and documents referred to in section 7(2) may not necessarily refer to those that were in possession of the state when the decision not to prosecute was taken. This could be deduced from the wording '[t]hat the [DPP] has seen the statements or affidavits on which *the charge is based*' [own emphasis]. The phrase 'on which the charge is based' seemingly refers to the charge as formulated by the private prosecutor. The purpose of this section is to ensure that when taking the decision not to prosecute at the instance of the state, the DPP has the benefit of all the information that the prospective private prosecutor had before him or her. This is possible. For instance, if the police decide not to follow the leads given to them by the prospective private prosecutor, he or she might undertake his or her own investigation and uncover evidence that may lead to the conviction of the accused.

In addition to the above reading, section 7(2) is also susceptible to another reading. It may mean that the DPP has seen the statements or affidavits that were relied upon by the public prosecutor when the public prosecutor refused to proceed with the charge(s). This is the more plausible reading, as the provision does not oblige the DPP to consider the charges as formulated by the private prosecutor. At this stage, the prospective private prosecutor does not have the title to prosecute and it is, therefore, inconceivable that he or she would have formulated the charge against the accused.

Nevertheless, for the purpose of this article, it is not necessary to determine the correct interpretation from the above possible readings. Regardless of which reading is correct, it is common cause that the application for the certificate from the DPP will stem from the public prosecutor's decision not to prosecute. In many cases, only when an application for the certificate is made will the DPP have knowledge and sight of the disputed docket and the impugned decision.

Any person who has a general interest (as opposed to a substantial and peculiar interest) may approach courts to review the decision of the prosecution not to institute or to discontinue prosecution on the basis of it being irrational or violating the principle of legality;[24] however, this is not sufficient. Nor is it in the interests of the public, as will become clear below. Review does not amount to internal review as provided for by section 22 of the National Prosecuting Authority Act 32 of 1998 (the NPA Act). Such right is insufficient basis to argue against private prosecution in the public interest.

summons instituting the private prosecution bore the caption 'state' instead of the private prosecutor's name. Although the prosecution will be private, the execution of the service relating to the prosecution is done by state officials. See Albert Kruger, *Hiemstra's Criminal Procedure* (April 2015, loose-leaf) 1–18.

23 Jamil Ddamulira Mujuzi, 'Private Prosecutions in Hong Kong: The Role of the Magistrates and State Intervention to Prevent Abuse' (2016) 4(2) The Chinese Journal of Comparative Law 256.

24 See *Democratic Alliance v Acting National Director of Public Prosecutions* 2012 (3) SA 486 (SCA) paras 38–47.

Reviews, by their very nature, take some time to finalise, and this may lead to delays in the prosecution of the matter.[25] However, with the issuing of the *nolle prosequi* certificate, the matter would take off as soon as the *nolle prosequi* is granted to the prospective private prosecutor, but not later than three months from the issue of the certificate.[26] This would ensure that the would-be-accused's right to a speedy trial, in accordance with section 35(3)(d) of the Constitution of the Republic of South Africa, 1996, is guaranteed.

Even after issuing the certificate, the DPP maintains interest in the private prosecution. In terms of section 13 of the Act, the court must, on application by the DPP, stop proceedings (private prosecution) in order that the prosecution may be instituted or continued at the instance of the state. Unlike in other jurisdictions, the DPP may not discontinue private prosecution.[27] This is to ensure that private prosecution is not dependent on the predilection of the prosecuting authorities, which would defeat the very purpose of private prosecution. If the private prosecutor fails to appear on the day scheduled for trial, the court must dismiss the charge against the accused unless the court believes that the private prosecutor has been prevented by reasons beyond his or her control. Where the charge is so dismissed, the accused shall never again be charged privately, but the state is not prohibited from instituting prosecution against such accused.[28] Furthermore, should the accused plead guilty to the charge by the private prosecutor, the proceedings shall be continued at the instance of the state.[29] Strangely, the Act is silent on the position of the DPP where the accused is found guilty at the subsequent trial by the private prosecutor. It is submitted that if the DPP does not intervene in terms of section 13 of the Act, the private prosecutor will proceed with prosecution to its finality.

Requirements for the Issuance of the *Nolle Prosequi* Certificate

The issuance of the certificate is dependent on the DPP being satisfied that the prospective private prosecutor has proved 'substantial and peculiar interest' arising out of some injury which the prospective private prosecutor has individually suffered as a

25 For instance, in the matter involving the decision to withdraw charges against Mr Richard Mdluli, the applicant's (Freedom Under Law [FUL]) decision to review the decision taken by the prosecuting authority was launched on 15 May 2012 and the High Court handed down judgment on 23 September 2013. See *Freedom Under Law v National Director of Public Prosecutions* 2014 (1) SA 254 (GNP). The NDPP appealed to the SCA, which handed down its judgment on 17 April 2020. See *National Director of Public Prosecutions v Freedom Under Law* 2014 (4) SA 298 (SCA). Mdluli was ultimately found guilty for some of the offences in July 2019. See Greg Nicolson, 'Richard Mdluli Gets Jail Time and Leave to Appeal Denied' (*Daily Maverick,* 29 September 2020) <https://www.dailymaverick.co.za/article/2020-09-29-richard-mdluli-gets-jail-time-but-intends-to-appeal/> accessed 2 December 2020.

26 Section 11(1) of the Act.

27 See, for instance, *R (on the application of Gujra) v Crown Prosecution Service* [2012] UKSC 52; Mujuzi (n 19) 151–153.

28 See s 11 of the Act.

29 See s 12(2) of the Act.

consequence of the commission of the said offence.[30] In *Mullins v Pearlman*,[31] the court held that in order for 'substantial and peculiar interest' to exist, the prospective private prosecutor must have had redress in civil law. In *Phillips v Botha*,[32] the Supreme Court of Appeal (SCA) rejected the notion of equating substantial and peculiar interest to the availability of civil redress. The phrase 'substantial and peculiar interest' was aptly described in *Attorney-General v Van der Merwe*[33] as encompassing an injury that does not affect the prospective private prosecutor any differently than it affects any other member of society. In *Levy v Benatar*,[34] the court held that the offence of contempt of court affected every right-thinking member of society and was thus not particular to the respondent. If the requirements of substantial and peculiar interest that the complainant has individually suffered are satisfied, then the DPP is bound to issue the certificate even if the DPP might not be satisfied about the strength of the case. What this implies is that in the opinion of the DPP, no prima facie case exists.[35] As stated before, only natural persons who have proven substantial and peculiar interest in the matter are competent to apply and receive the certificate in terms of section 7 of the Act. In *Nudandal v Director of Public Prosecutions*,[36] the court held that the prospective private prosecutor need not prove substantial and peculiar interest that the complainant has individually suffered. The court found:

> Erroneously, the applicant and his counsel conflate the jurisdictional prerequisites for a private prosecution with the circumstances in which the DPP may decline to prosecute. A certificate is quite 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.[37]

Although the phrase *nolle prosequi* is generally used to indicate the state's refusal to prosecute, the reading ascribed to *nolle prosequi* in *Nudandal* is bizarre, to say the least. The bizarreness of this reasoning is underlined by the fact that, firstly, the certificate is not for the asking. If the reading propagated in *Nudandal* is correct, then any person without interest in the matter would be entitled to request and receive the certificate. Section 7(1) of the Act clearly circumscribes the categories of persons entitled to the certificate. Secondly, the mere fact that the state declines to prosecute does not in itself entitle an individual to the right to prosecute privately; he or she must apply for the *nolle prosequi* certificate. Such certificate is issued by the DPP and not the public prosecutor, who might have indicated, at the first instance, that the state declines to prosecute. The issuance of this certificate not only evinces the DPP's decision not to prosecute but also

30 See s 7(1) of the Act.
31 1917 TPD 639 643.
32 1999 (1) SACR 1 (SCA) 12.
33 *Van der Merwe* (n 20) 201.
34 *Levy* (n 8) 700.
35 See s 7(1)(a)–(d) of the Act; Mujuzi (n 19) 153.
36 (KZN) Case No AR 723/14 delivered on 8 May 2015 paras 20–21.
37 ibid, para 19.

confers on the holder of that certificate the right to institute private prosecution. Thus, the DPP must be satisfied that the criteria in section 7(1) of the Act are satisfied before issuing the certificate.[38] In *Singh v Minister of Justice and Constitutional Development*[39] the court, relying on *Fourie v Resident Magistrate of Worcester*,[40] held: 'The unrestricted meaning contended for by Mr Blomkamp [that the private prosecutor need not prove substantial and peculiar interest in the case] is also inconsistent with the recognition that private prosecutions are unusual and a departure from the basic law that criminal prosecutions must be conducted by a public prosecutor.' The court concluded: 'By reason of the aforegoing I find against Mr Blomkamp's main contention that the second respondent was obliged to issue to the applicant a certificate *nolle prosequi* once there had been a decision that the second respondent had declined to prosecute.'[41]

The CC has confirmed that the certificate is a requirement for the institution of private prosecution.[42] Furthermore, in *Phillips v Botha*[43] the SCA held that not every injury that an individual suffers is cognisable under section 7 of the Act. In *Levy v Benatar*[44] the court found that the injury must be substantial and peculiar to the private prosecutor. Section 7(2) of the Act makes obtaining the certificate a prerequisite for the institution of private prosecution. Subsection 2(c) of the latter section provides that the certificate would lapse unless the prospective private prosecutor institutes private prosecution within three months from the date of the certificate.

The judiciary has also pronounced that the interest to be absolved by the prospective private prosecutor need not necessarily be pecuniary. In *Makhaya v Bailey NO*,[45] the court held that the infringement of the complainant's legal right by the alleged offence was sufficient proof of substantial and peculiar interest.[46] Furthermore, in *National Society of the Prevention of Cruelty to Animals v Minister of Justice*,[47] the SCA held that substantial and peculiar interest in the context of section 7(1) of the Act relates to

38 See *Ellis v Visser* 1954 (2) SA 431 (T) 434E-G; *Nedcor Bank Ltd v Gcilitshana* 2004 (1) SA 232 (SE) paras 30–31.

39 2009 (1) SACR 87 (N) 92.

40 (1897) 14 SC 54 at 57.

41 *Singh* (n 39) 93.

42 *NSPCA* CC (n 5) para 6; see also *National Society for the Prevention of Cruelty to Animals v Minister of Justice* 2016 (1) SACR 308 (SCA) paras 9 and 25.

43 *Phillips* (n 32) 12.

44 *Levy* (n 8) 700. In this case, the private prosecutor had received the certificate from the Attorney General and wished to prosecute the accused for, among others, contempt of court. The court held that the injury caused by contempt of court affected every right-thinking member of society and was not particular to the respondent; the respondent was therefore not entitled to the certificate. See also *Ellis* (n 38) 437; *Nedcor Bank* (n 38) paras 30–31. In *Nedcor Bank* (n 38), para 36 et seq, the court held that prosecution by proxy is not permitted by the provision. Inconvenience suffered or frustration experienced does not entitle a person to the certificate, nor does an attempt to achieve objectives other than justice. See *Phillips* (n 32).

45 1980 (4) SA 713 (T) 717.

46 See *Levy* (n 8) 699; *Solomon v Magistrate, Pretoria North* 1950 (3) SA 603 (T) 609E-H.

47 *NSPCA SCA* (n 42) para 28.

the direct infringement of the right to human dignity. In a further appeal to the CC, the CC held that the National Society of the Prevention of Cruelty to Animals (NSPCA) qualified as a public body and could therefore institute private prosecutions in terms of section 8 of the Act.[48] Thus, the CC did not consider this issue.[49]

Where there is a relationship between the prospective private prosecutor and the person against whom the offence was committed, the DPP is bound to issue the certificate.[50] In this instance, the prospective private prosecutor need not prove any substantial and peculiar interest arising from the offence, as that interest is foreshadowed by the relationship he or she has or had with the victim. As already stated, private prosecution is a departure from the general rule, but in South Africa the need for private prosecution is made profound by the seemingly dysfunctional NPA. Over and above this, De Villiers is of the view that the political nature of the process in which the top structure of the NPA is appointed and dismissed opens them to considering politics in their decisions to prosecute or not. He sums up this proposition by stating that '[e]ven the best prosecutors have biases that must be kept in check.'[51] Extending the scope of private prosecution, as proposed in this article, would guard against political considerations and biases as suggested above coming into play when prosecutors make decisions.

Private Prosecution in the Public Interest: Should It Be Allowed?

The Meaning of Public Interest

In relation to offences where there are identifiable individuals who have suffered substantial and peculiar interest, section 7 of the Act provides a bulwark against alleged offenders not being subjected to prosecution. This is on the basis that, in the event the state refuses to prosecute, the affected individuals may prosecute privately. However, in relation to offences where there are no identifiable persons who individually suffered from such offences, there is no equivalent of section 7 of the Act, except where other legislation confers this right. The shortcomings of sections 7 and 8 of the Act are recognised by Mujuzi, who argues that the failure to extend the right to private prosecution to companies that have suffered 'substantial and peculiar interest' as a result of the commission of an offence against them is discriminatory *vis-à-vis* natural persons on the one hand and public bodies on the other.[52] However, even if Mujuzi's position is correct, it does not go far enough, because his contention is that only those companies that have suffered directly must be allowed to prosecute privately. Jeffery, on the other hand, bemoans the ease with which those who intend to prosecute environmental

48 *NSPCA* CC (n 5) paras 26–48.

49 ibid, para 63.

50 See s 7(1)(b)–(d) of the Act; for historical patriarchal position see Mujuzi (n 19) 139.

51 De Villiers (n 13).

52 Jamil Ddamulira Mujuzi, 'Private Prosecution 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 and Another'* (2015) 15(2) AHRJ 580–595. For the position in Zimbabwe, see *Telecel* (n 4).

offences in terms of section 33 of the National Environmental Management Act 107 of 1998 (NEMA) are allowed to do so privately, while those who seek to prosecute other offences for which no legislation confers such a right are denied that opportunity.[53] In her view, the legislation conferring the right to privately prosecute environmental offences incentivises those who engage in these prosecutions by granting them a portion of the fine paid by the offender when such is found guilty and sentenced to a fine.[54] This shortcoming may be overcome by allowing private prosecution in the public interest for certain serious offences, such as money laundering and related offences on the one hand and corruption and related offences on the other.

Public interest is a term that does not accept a precise definition.[55] Hoexter, although in a different context, defines 'public interest' as involving the bringing of 'legal issues of public significance to the courts.'[56] Put differently, public interest refers to a situation that affects the general public and is worthy of recognition and protection by the courts.[57] Section 34 of the Constitution provides for the right to have disputes that can be resolved by application of the law decided in a fair public hearing before a court. Furthermore, insinuations that an individual is guilty of an offence without affording that person an opportunity to answer to the allegations levelled against him or her impinge on that individual's right to have their dignity respected and protected.[58] Private prosecution may obviate this situation where the state declines to prosecute by ensuring that the cloud created by accusations of criminality are cleared. A private prosecutor is duty bound to institute proceedings within three months of the date of the certificate.[59] This guarantees that the accused's right to a speedy trial, provided for in section 35(3)(d) of the Constitution, is observed. In this regard the constitutional rights that accrue to an accused person are not diminished by the fact that prosecution is instituted by a private prosecutor, nor is the standard of proof in criminal matters in any way affected.[60]

It is common cause that the prosecuting authority has a constitutional duty to act for the greater good of the entire society by protecting the rights of individuals. In terms of

53 Anthea Jeffery, 'How Some Private Prosecutions in SA Are "More Equal" Than Others' (*BizNews*, 25 April 2018) <https://www.biznews.com/thought-leaders/2018/04/25/private-prosecutions-anthea-jeffery/> accessed 7 June 2018.

54 ibid; see also Jamil Ddamulira Mujuzi, 'Private Prosecution of Environmental Offences Under the South African National Environmental Management Act: Prospects and Challenges' (2016) 29(1) SACJ 24–43.

55 David Cote and Jacob van Garderen, 'Challenges to Public Interest Litigation in South Africa: External and Internal Challenges to Determining the Public Interest' (2011) 27(1) SAJHR 178; Okpaluba (n 12) 7; African Criminal Justice Reform, 'NPA Accountability, Trust and Public Interest' (February 2019) <https://acjr.org.za/resource-centre/npa-accountability-trust-public-interest.pdf> accessed 28 November 2020.

56 Cora Hoexter, *Administrative Law in South Africa* (Juta 2016) 504.

57 Bryan A Garner (ed), *Black's Law Dictionary* (West 2009) 1350.

58 See s 10 of the Constitution of South Africa; Mervyn Bennun, 'The Mushwana Report and Prosecuting Policy' (2005) 18(3) SACJ 281.

59 See s 7(2)(c) and s 11 of the Act.

60 Mujuzi (n 19) 156–157.

section 179(4) of the Constitution, the prosecuting authority has an obligation to exercise its functions without fear, favour, or prejudice.[61] When the prosecuting authority fails to fulfil this hallowed obligation, it is not acting in the public interest.[62] African Criminal Justice Reform postulates that if the independence of the prosecuting authority stays unchecked, it may open public prosecutors to making 'arbitrary, capricious and unjust decisions. It also creates a real risk of corruption at the highest level.'[63] According to Marumoagae, the prosecuting authority is bedevilled by numerous issues: 'Failure to prosecute, selective prosecution and political interference are well documented.'[64] These unpalatable observations were confirmed by the findings of the Mokgoro Commission.[65] Strange as it may be, the prosecution authority has at least on two occasions declined to prosecute highly placed individuals. Instead, the prosecuting authority actively opposed measures to have it institute these prosecutions. The SCA, in both instances, held that the conduct of the prosecuting authority was irrational.[66] Such refusal is tantamount to undermining the role of criminal law in deterring the commission of crime.

Permitting private prosecution, as contended herein, would positively impact the prosecuting authority in that it would reduce the work pressure suffered by public prosecutors[67] and, at the same time, ensure that individuals are held to account for their misdeeds.[68] Section 1(d) of the Constitution lists among the founding values of the Republic accountability, responsiveness, and openness. Put differently, private prosecution, contrary to what its opponents argue, has the potential to legitimise the decision making of the prosecuting authority. The availability of private prosecutions would enhance public confidence and trust in the decisions of the prosecuting authority. As already indicated, private prosecution would boost the accountability obligation of the prosecuting authority. Okpaluba, after surveying the dictionary meaning, posits that accountability means 'an obligation that one is bound in law or justice to perform' and that 'the functionary is liable in terms of the law of the Constitution, in both delict and criminal law.'[69] Private prosecution would ensure that the members of the prosecuting authority make defensible decisions—a hallmark of accountability. In the context of this discussion, the meaning of public interest is restricted to instances involving the

61 This obligation is given effect to in s 32 of the NPA Act.

62 ACJR (n 55) 2.

63 ACJR (n 55) 1.

64 Clement Marumoagae, 'Prosecute or We Will! Is the Single Prosecuting Authority Under Threat?' (2018) De Rebus 36.

65 Yvonne Mokgoro, 'Enquiry In Terms of s 12(6) of the National Prosecuting Authority Act 32 of 1998' (1 April 2019) <http://www.thepresidency.gov.za/content/mokgoro-commission-enquiry-report> accessed 1 December 2020.

66 See *National Director of Public Prosecutions* (n 25); *Zuma v Democratic Alliance* 2018 (1) SA 200 (SCA).

67 Jens Christian Keuthen, 'The South African Prosecution Service: Linchpin of the South African Criminal Justice System' (LLM minor dissertation, University of Cape Town 2007) 72 and 74.

68 Mujuzi (n 19) 161.

69 Okpaluba (n 12) 7.

enforcement of criminal law. Transparency International has held that in South Africa, it is 'unequivocal that corruption and a lack of accountability are endemic and evident across government and that the private sector is often complicit.'[70] Thus, by declaring war against this scourge the private prosecutor, as the CC suggested, 'is not vindicating a private right, but is invoking the power of the State to punish crime.'[71] In *S v Shaik*, Squires J held that corruption is punished in the private sphere because it distorts lawful competition, whereas in the 'public sector it is punished because society has an interest in the transparency and integrity of public administration.'[72]

Why the Need for Private Prosecution?

Prominent persons are mostly involved in white-collar crimes that involve the state as opposed to individual resources—at least those cases that involve large sums of money. This means that, in the event the NPA declines to prosecute the alleged offenders, they would escape justice. In *National Society for the Prevention of Cruelty to Animals v Minister of Justice*,[73] the CC read section 6(2)(e) of the Society for the Prevention of Cruelty to Animals Act 169 of 1993 with section 8 of the Act to allow the NSPCA to institute private prosecution against those who commit offences against animals. This judgment should not be read as giving the stamp of approval to the extension of private prosecution to bodies beyond those envisaged in section 8 of the Act. Nonetheless, the facts of this case prove that in certain circumstances, the NPA may need assistance in carrying out its mandate. The NSPCA argued that despite presenting to the prosecuting authority dockets with overwhelming evidence of cruelty to animals on several occasions, the latter refused to prosecute. The NSPCA argued that this impeded it from fulfilling its mandate.[74] The basis for this may be prioritisation of cases owing to staff shortages. As Tracey-Temba reports, in addition to budget cuts, the NPA is currently experiencing a brain-drain of unacceptable proportions. The author posits:

> Critical staff shortages, a halt on the recruitment of additional prosecutors, and limited operational resources are just some of the challenges facing the NPA according to its 2016/2017 Annual Report. During that reporting period, the NPA lost 157 officials. The rate of staff attrition since then appears to have increased with a further 55 staff leaving in the first three months of the current financial year. Moreover, 239 critical positions are standing vacant.[75]

70 Van Schalkwyk (n 10).

71 *Du Plessis v De Klerk* 1996 (3) SA 850 (CC) fn 87 at 881; see also *S v De Freitas* 1997 (1) SACR 180 (C) as referred to by Mujuzi (n 19) 146.

72 *S v Shaik* 2007 (1) SACR 142 (D) 156–157.

73 *NSPCA* CC (n 5).

74 ibid, paras 4–9.

75 Lauren Tracey-Temba, 'Leadership Is Not the NPA's Only Challenge' (Institute for Security Studies, 16 February 2018) <https://issafrica.org/iss-today/leadership-is-not-the-npas-only-challenge> accessed 23 May 2018. The 2020 NPA Annual Report indicates that the position has improved somewhat. NPA, 'Annual Report 2019/2020' (11 September 2020)

To placate this situation, complainant companies make funds available to the NPA to engage the services of private lawyers to carry out prosecution on behalf of the NPA. Section 38 of the NPA Act caters for this eventuality. However, the constitutionality of this provision has been challenged in a number of cases. In *Moussa v S*,[76] the SCA found section 38 of the NPA Act to be constitutional, and no challenge of this provision has been brought before the CC. This conduct is akin to private prosecution.

The framers of private prosecution provisions in the Act did not foreclose the right to private prosecution where the legislature deemed it appropriate to extend the scope of private prosecution. For instance, a number of laws confer the right to private prosecution.[77] This line of legislation does not replace the primary power of the NPA to prosecute on such issues, but limits the scope of private prosecutions to identifiable offences. In my view, there is a need for the extension of private prosecutions beyond the identifiable victims of the criminal offences and the current legislation that confer the right to private prosecution. Before the CC judgment in *National Society for the Prevention of Cruelty to Animals v Minister of Justice*,[78] the NSPCA laboured under the impression that it did not have the authority to institute private prosecution as a public body. It limited its functions to investigating cruelty to animals. The NPSCA alleged that every time they brought fully investigated matters to the NPA, the latter declined to prosecute, with the result that those who allegedly committed cruelty against animals went unpunished. The relevance of this issue is that had private prosecution been extended, this confusion would never have arisen. This, therefore, highlights the need to extend private prosecution beyond what the law presently caters for.

Arguments For and Against Allowing Private Prosecution

It is important to mention that private prosecution is not without its critics. Arguments against private prosecution are largely predicated on, among other things, the need to protect the independence of the prosecutor, the floodgate argument, and the abuse of the process.

In relation to the objection that the private prosecutor would not act without fear, favour, or prejudice, the argument goes that a private prosecutor would be unabashedly partisan. Even where the private prosecution is conducted by a professional, this partisanship would not disappear. A private prosecutor, as an interested party, is in no position to avoid a conflict of interest.[79] In simple terms, a private prosecutor would not be

<https://www.npa.gov.za/content/media-releases/npa-annual-report-20192020> accessed 3 December 2020.

76 2015 2 SACR 537 (SCA).

77 See, for instance, s 35 of the NEMA.

78 *NSPCA* CC (n 5).

79 See Murdoch Watney, 'Prosecuting Without Fear, Favour or Prejudice: State v Phillips case no 41/1899/2000 (Johannesburg regional court) (unreported); Beulah Evelyn Bonugli v Deputy National Director of Public Prosecutions case no 17709/2006 (T) (unreported)' (2009) 3 TSAR 583; B Tshehla, 'Engagement of Prosecutors Not in the Employ of the NPA' (2016) 41(1) JJS 44, 59–60.

objective in undertaking the prosecution. This goes against the principle that those who are in charge of prosecution of criminal offences must be disinterested in the outcome of those proceedings. The mere fact that a person may be viewed as partisan in the prosecution of an offence violates the principle that justice must not only be done but must be seen to be done.[80] Private prosecution violates the principle that a prosecutor must be guided by a sense of public responsibility for the attainment of justice.[81] This assumption is not always on point. As one commentator, writing in the American context, has highlighted: 'The virtually conclusive presumption of propriety now accorded to the district attorney's decisions should be abandoned. The extent to which district attorneys have abused their discretion demonstrates that this presumption is thoroughly unwarranted.'[82] The sentiment expressed in this quotation is very relevant to South Africa's NPA,[83] given its refusal to prosecute cases, decisions which the courts have overturned.[84] In any event, legal practitioners are bound by ethics.

The sentiments against private prosecution are not convincing. In relation to partisanship, it is not a convincing argument that public prosecutors are completely non-partisan.[85] Firstly, had that been the case, public prosecutors would not pursue cases with the vigour they are renowned for; further, it would not be expected of them to show compassion to the victims of crime, especially child victims and victims of sexual offences.[86] Secondly, the fact that a public prosecutor has the power of discretion regarding whether or not to prosecute supports the notion that public prosecutors would not approach the matters they have enrolled in a lackadaisical fashion. The fact that a prosecutor believes that, at least prima facie, there is a case that the accused must answer would surely invigorate him or her towards that case. Obviously, there are limitations to the conduct of the public prosecutor in the prosecution of the case. Nevertheless, it is improbable to expect complete neutrality from the public prosecutor in the conduct of the prosecution.[87] In an adversarial system such as South Africa's, the accused and the state, the latter being represented by the NPA, are at diametrically opposed ends, with the former fighting for an acquittal whilst the latter fights for a conviction.[88] In emphasising this point, the SCA held as follows in *Van der Westhuizen v S*: 'I pause to emphasise that the concept of impartiality in the South African code, the UN Guidelines and the Standards of the International Association of Prosecutors is not used in the sense

80 Watney (n 79) 585, 589; Tshehla (n 79).
81 'Permitting Private Initiation of Criminal Contempt Proceedings' (April 2011) Harvard LR 1489.
82 'Private Prosecution: A Remedy for District Attorneys Unwarranted Inaction' (December 1955) Yale LJ 218.
83 See Mokgoro (n 65).
84 See *FUL SCA* (n 25); *Democratic Alliance* (n 24).
85 See *Van der Westhuizen v S* 2011 (2) SACR 26 (SCA) para 11.
86 See KD Müller and IA van der Merwe, 'The Sexual Offences Prosecution: A New Specialisation' (2004) 29(1) JJS 135–151; Loraine Townsend, Samantha Waterhouse and Christina Nomdo, 'Court Support Workers Speak Out: Upholding Children's Rights in the Criminal Justice System' (2014) 48(June) SA Crime Quarterly 75–88.
87 See *Van der Westhuizen* (n 85) para 11.
88 ibid.

of not acting adversarially, but in the sense of acting even-handedly, ie avoiding discrimination; and the duty to act impartially is therefore part of the more general duty to act without fear, favour or prejudice.'[89] After having quoted the famous Canadian case of *Boucher v The Queen*,[90] the SCA noted:

> 'The initial remarks of Rand J in Boucher in the passage quoted above must not, however, be misunderstood. In our practice it is not the function of a prosecutor disinterestedly to place a hotchpotch of contradictory evidence before a court and then leave the court to make of it what it wills. On the contrary, it is the obligation of a prosecutor firmly but fairly and dispassionately to construct and present a case from what appears to be credible evidence, and to challenge the evidence of the accused and other defence witnesses with a view of discrediting such evidence, for the very purpose of obtaining a conviction. That is the essence of a prosecutor's function in an adversarial system and it is not peculiar to South Africa[.]'[91]

The case of *National Society for the Prevention of Cruelty to Animals v Minister of Justice*[92] clearly indicates that it is not complete neutrality that is expected of prosecutors. Had that been the case, the CC would not have found for the NSPCA. In this matter, the NSPCA was intimately involved in the conducting of the investigation, yet the CC held that it was eligible to institute private prosecution. The question of bias did not arise. It is submitted that it is the duty of the court to oversee that the trial is conducted fairly.[93] In *Porritt v National Director of Public Prosecutions*,[94] the SCA held that the independence and impartiality of all prosecutors is not a prerequisite of a fair trial. The fact that a prosecutor has an interest in the outcome of the case could not in and of itself determine the fairness of the trial. To this end, the SCA pointed to section 8 of the Act, which allows statutory private prosecution. In this regard, the SCA posited that despite the fact that section 8 allows a municipality to institute private prosecution, whilst being entitled to all the fines pursuant to that prosecution, this could not be said to be an impediment in the individual accused receiving a fair trial.[95] Relying on an English case, namely *R (on application of Haase) v Independent Adjudicator*,[96] the SCA held that '[t]he right to a fair trial 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.'[97]

89 ibid para 9.
90 [1955] SCR 16 23–24.
91 *Van der Westhuizen* (n 85) para 10.
92 *NSPCA* CC (n 5).
93 *Moussa v S* (n 76) para 29.
94 2015 (1) SACR 533 (SCA) para 14.
95 ibid, para 15.
96 [2008] EWCA Civ 1089 para 24.
97 *Porritt* (n 94) para 16. See also *Certification of the Constitution of the Republic of South Africa, 1996* 1996 (4) SA 744 (CC) paras 140–146.

What the above passage illustrates is that, by its very nature, prosecution is partisan and that such partisanship is not sufficient to render a trial unfair if the court trying the matter is independent and impartial. The only positive duty on a prosecutor in relation to guaranteeing that the accused receives a fair trial is to make available and not conceal information favourable to the accused's case.[98] However, it is ultimately the duty of the court to ensure that the accused receives a fair trial. The inclusion of the phrase 'without fear, favour or prejudice' in section 179(4) of the Constitution is directed at public prosecutors. The reason for that is simply to avoid selective prosecutions; the same rationale cannot be applied to private prosecutions.

Secondly, the 'floodgate' argument is not persuasive. Mujuzi has reported that the permission given by section 33 of the NEMA has not resulted in a spike in the private prosecution of environmental offences.[99] However, even this argument has no basis. The SCA has held that 'it may sometimes be necessary to open the floodgates in order to irrigate the arid ground below them.'[100] Marumoagae argues that permitting private prosecution as advocated in this discussion will result in the establishment of a parallel prosecuting authority, culminating in interest groups carrying out private prosecutions targeting their opponents. This, he argues, would lead to anarchy.[101] In this regard, Harms ADP, writing in the context of arrests, counsels us that a bad motive does not render an otherwise lawful arrest unlawful, nor does a good motive render an otherwise unlawful arrest lawful.[102]

Allowing private prosecution in the public interest would yield more pros than cons. To illustrate, it would relieve pressure on scarce state resources and free up the personnel of the NPA to concentrate on other cases.[103] As stated above, the NPA is experiencing a high turn-over of experienced prosecutors. Private prosecution can ensure that justice is achieved where otherwise it would not have been.[104] As observed in some cases, 'the decision not to prosecute can be implemented by inaction.'[105] Therefore, something is needed to spur the prosecution to action. Private prosecution, as illustrated in Mr Duduzane Zuma's case, has the effect of spurring prosecution to action where otherwise that would not have been the case. This surely has the general effect of enhancing public trust in the administration of the criminal justice system. In *Gujra, R (on the application*

98 See the Code of Conduct for Members of the National Prosecuting Authority Chapter D item 2(g), quoted in *Van der Westhuizen* (n 85) para 13.

99 See Mujuzi (n 54) 27.

100 *Democratic Alliance* (n 24) para 47, quoting *Wildlife Society of Southern Africa v Minister of Environmental Affairs and Tourism* 1996 (3) SA 1095 (TKS) 1106D-G.

101 Marumoagae (n 64) 36.

102 *National Director of Public Prosecutions v Zuma* 2009 (2) SA 277 (SCA) para 37.

103 Keuthen (n 67) 74.

104 Tamlyn Edmonds and David Jugnarian, 'Private Prosecution: A Potential Anticorruption Tool in English Law' (Open Society Foundation, May 2016) (pages unnumbered) <https://www.justiceinitiative.org/publications/private-prosecutions-potential-anticorruption-tool-english-law> accessed 28 November 2020.

105 'Private Prosecution: A Remedy' (n 82) 209.

of) v Crown Prosecution Service, the UK Supreme Court held that '[p]rivate prosecution is, and I think always has been, a safeguard against feelings of injustice that can arise when, in the eyes of the public, public authorities do not pursue criminal investigations and proceedings in the manner which leads to culprits being brought before a criminal court. The impunity which offenders appear to enjoy can be socially detrimental.'[106] Failure by the authorities to charge prominent individuals for corruption and related offences, coupled with the fact that in such eventuality there is no alternative remedy, would breed impunity and disrespect for the criminal justice system. Public trust would be enhanced by the knowledge that even those who pass through the cracks of the prosecuting authorities may still be brought to justice.

What may militate against private prosecution is that it is susceptible to abuse. Individuals and lobby groups may use the threat of private prosecution to harass their enemies in order to achieve some nefarious ends. This is why Mujuzi posits that mechanisms exist to ensure that the right to private prosecution is not abused.[107] The investigation of corruption and money laundering is not only expensive, but also a complex exercise, as illustrated by the formation of the Investigating Directorate in the Office of the NDPP.[108] It is submitted in this regard that the costs of instituting private prosecution, coupled with the fact that the prosecuted individual may claim the legal costs for defending him- or herself, would act as a deterrent to the institution of vexatious and unmeritorious prosecutions. Secondly, the individual has the civil remedy of claiming damages against the private prosecutor. In addition to these punitive deterrents, an accused may apply to court to permanently stay the proceedings in the event the private prosecutor abuses court processes.[109] Lastly, the DPP reserves the right to intervene in private prosecution. Oversight on proceedings by the DPP is sufficient to ensure that private prosecution is conducted in line with the Prosecuting Policy, issued in terms of section 21(1), read with section 22(2)(b) of the NPA Act.[110] It is submitted that where a private prosecution does not comply with the Prosecuting Policy, the DPP may advise the NDPP to intervene in the proceedings.[111] Despite this, it is submitted that such intervention does not include the discontinuance of the prosecution, but is an indication that it will be proceeded with at the instance of the state.[112] Therefore, there are enough safeguards to ensure that private prosecution is not abused. The benefits of private prosecution far outweigh its potential disadvantages. In order to

106 Quoted by Mujuzi (n 23) 269.

107 Mujuzi (n 52) 592.

108 See Proclamation No 20 of 2019 by the President, Government Gazette No GG 42383 of 4 April 2019.

109 *Phillips* (n 32).

110 See also 'Permitting Private Initiation of Criminal Contempt Proceedings' (n 81) 1486.

111 See s 22(2)(b) of the NPA Act. It is submitted that this provision, read with s 13 of the Act, is broad enough to allow for such intervention in private prosecution. This is so because the provision refers broadly to 'prosecution process', whilst s 24(4)(c)(ii)(bb) expressly prohibits the Director from giving directions or guidelines to a private prosecutor.

112 See s 13 of the Act.

ensure that private prosecution is not abused, it should be limited to certain serious offences, as already indicated above. To this end, a new provision must be inserted in the Act, which must read as follows:

> 7(A)(a) Notwithstanding the provisions of any other law, a person who shows that he or she or it intends to undertake private prosecution in the public interest may apply to the Director of Public Prosecutions for a *nolle prosequi* certificate in the event the National Prosecuting Authority indicates that it does not intend to proceed with prosecution against the accused person; or
>
> (b) An unreasonable time has lapsed since the time the charge was laid by any person against the accused person and no proceedings have commenced.
>
> (2) The *nolle prosequi* certificate in terms of this section must be issued only if the private prosecutor intends to undertake prosecutions for offences in terms of the Prevention of Organised Crime Act and the Prevention and Combating of Corrupt Activities Act.
>
> (3) Where the DPP issues the *nolle prosequi* certificate, the DPP must share with the private prosecutor any relevant information in his or her possession relating to the case.
>
> (4) In the event of a successful prosecution, the state must be ordered to reimburse the private prosecutor all the expenses incurred and necessary for the institution of private prosecution.
>
> (5) If the court finds, on application by the accused, that the prosecution was not made in good faith, the court may order that the private prosecutor reimburse the accused all expenses incurred and necessary for his or her defence.
>
> (6) A person desiring to institute private prosecutions in terms of this section shall not be required to furnish any security as envisaged in section 9.

Conclusion

In this discussion, the author argues for the allowance of private prosecution in the public interest for certain circumscribed serious offences that fit the criteria laid down in section 7 of the Act and that are not provided for in any other law. The question of what would be in the public interest has been dealt with. The rationale for this proposition is that in a number of instances, the NPA has been found wanting. This, it has been argued, has led to the NPA enjoying less than ideal levels of trust in society. Private prosecution would foster a culture of rational decision making in this organisation. Arguments against private prosecution have been dispelled as being baseless compared to the benefits that private prosecution would bring about, not only for the NPA but for the South African public. Private prosecution should still be confined to instances where the NPA declines to prosecute. The discussion has indicated that there are enough mechanisms to ensure that private prosecution is not used to harass opponents. In this regard, this article concluded that the Act must be amended to permit private prosecution.

References

African Criminal Justice Reform, 'NPA Accountability, Trust and Public Interest' (February 2019) <https://acjr.org.za/resource-centre/npa-accountability-trust-public-interest.pdf > accessed 28 November 2020.

Bennun M, 'The Mushwana Report and Prosecuting Policy' (2005) 18(3) South African Journal of Criminal Justice.

City Press, 'The NPA Declines to Prosecute Duduzane Zuma' (*News24*, 29 April 2018) <https://www.news24.com/Archives/City-Press/NPA-declines-to-prosecute-Duduzane-Zuma-20150429 > accessed 23 May 2018.

Cote D and Van Garderen J, 'Challenges to Public Interest Litigation in South Africa: External and Internal Challenges to Determining the Public Interest' (2011) 27(1) South African Journal on Human Rights <https://doi.org/10.1080/19962126.2011.11865010>

De Villiers WP, 'Is the Prosecuting Authority under South African Law Politically Independent? An Investigation into the South African and Analogous Models' (2011) 74(2) Tydskrif vir Hedendaagse Romeins-Hollandse Reg.

Edmonds T and Jugnarian D, 'Private Prosecution: A Potential Anticorruption Tool in English Law' (Open Society Foundation, May 2016) (Open Society Foundation, May 2016) (pages unnumbered) <https://www.justiceinitiative.org/publications/private-prosecutions-potential-anticorruption-tool-english-law> accessed 28 November 2020.

Garner BA (ed), *Black's Law Dictionary* (West 2009).

Greef M, 'Gerrie Nel and AfriForum Plan to Privately Prosecute Malema for Corruption' (AfriForum, 19 April 2018), <https://www.afriforum.co.za/gerrie-nel-afriforum-plan-privately-prosecute-malema-corruption/> accessed 8 May 2018.

Hlatshaneni S, 'SARS Bigwigs Facing Private Prosecution' (*The Citizen*, 22 March 2018) <https://citizen.co.za/news/south-africa/1863691/sars-former-hot-shots-face-private-prosecution/> accessed 8 May 2018.

Hoexter C, *Administrative Law in South Africa* (Juta 2016).

Jeffery A, 'How Some Private Prosecutions in SA Are "More Equal" Than Others' (*BizNews*, 25 April 2018) <https://www.biznews.com/thought-leaders/2018/04/25/private-prosecutions-anthea-jeffery/> accessed 7 June 2018.

Joubert JJ (ed.), *The Criminal Procedure Handbook* (12 edn, Juta 2017).

Keuthen JC, 'The South African Prosecution Service: Linchpin of the South African Criminal Justice System' (LLM minor dissertation, University of Cape Town 2007).

Khoza A, 'Afriforum to Privately Prosecute Malema' (*News24*, 19 April 2018) <https://www.news24.com/SouthAfrica/News/breaking-afriforum-to-privately-prosecute-julius-malema-20180419> accessed 23 May 2018.

Kruger A, *Hiemstra's Criminal Procedure* (April 2015, loose-leaf).

Manyathela C, 'NPA Says It Can Successfully Prosecute Duduzane Zuma' (*Eyewitness News*, 19 April 2018) <http://ewn.co.za/2018/04/19/npa-says-it-can-successfully-prosecute-duduzane-zuma> accessed 23 May 2018.

Marumoagae C, 'Prosecute or We Will! Is the Single Prosecuting Authority Under Threat?' (2018) De Rebus.

Mokgoro Y, 'Enquiry in Terms of s 12(6) of the National Prosecuting Authority Act 32 of 1998' (1 April 2019) <http://www.thepresidency.gov.za/content/mokgoro-commission-enquiry-report> accessed 1 December 2020.

Mujuzi JD, 'Private Prosecution 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 and Another*' (2015) 15(2) African Human Rights Law Journal <https://doi.org/10.17159/1996-2096/2015/v15n2a17>

Mujuzi JD, 'Private Prosecutions in Hong Kong: The Role of the Magistrates and State Intervention to Prevent Abuse' (2016) 4(2) The Chinese Journal of Comparative Law <https://doi.org/10.1093/cjcl/cxw013>

Mujuzi JD, 'Private Prosecution of Environmental Offences under the South African National Environmental Management Act: Prospects and Challenges' (2016) 29(1) South African Journal of Criminal Justice.

Mujuzi JD, 'The History of and Nature of the Right to Institute a Private Prosecution in South Africa' (2019) 25(1) Fundamina <https://doi.org/10.17159/2411-7870/2019/v25n1a6>

Müller KD and Van der Merwe IA, 'The Sexual Offences Prosecution: A New Specialisation' (2004) 29(1) Journal of Juridical Science <https://doi.org/10.4314/jjs.v29i1.27161>

National Prosecuting Authority (NPA), 'Annual Report 2019/2020' (11 September 2020) <https://www.npa.gov.za/content/media-releases/npa-annual-report-20192020> accessed 3 December 2020.

NPA, 'Prosecution Policy' (June 2013) <https://www.npa.gov.za/sites/default/files/Library/Prosecution%20Policy%20%28Final%20as%20Revised%20in%20June%202013.%2027%20Nov%202014%29.pdf> accessed 7 September 2015.

Nicolson G, 'Richard Mdluli Gets Jail Time and Leave to Appeal Denied' (*Daily Maverick*, 29 September 2020) <https://www.dailymaverick.co.za/article/2020-09-29-richard-mdluli-gets-jail-time-but-intends-to-appeal/> accessed 2 December 2020.

Okpaluba C, 'The Constitutional Principles of Accountability: A Study of Contemporary South African Law' (2018) 33(1) Southern African Public Law <https://doi.org/10.25159/2522-6800/2955>

'Permitting Private Initiation of Criminal Contempt Proceedings' (April 2011) Harvard Law Review.

'Private Prosecution: A Remedy for District Attorneys Unwarranted Inaction' (December 1955) Yale Law Journal.

Ramasastry A, 'Is There a Right to Be Free from Corruption?' (2015) 49(2) University of California Davis Law Review.

Townsend L, Waterhouse S, and Nomdo C, 'Court Support Workers Speak Out: Upholding Children's Rights in the Criminal Justice System' (2014) 48 South African Crime Quarterly <https://doi.org/10.4314/sacq.v48i1.7>

Tracey-Temba L, 'Leadership Is Not the NPA's Only Challenge' (Institute for Security Studies, 16 February 2018) <https://issafrica.org/iss-today/leadership-is-not-the-npas-only-challenge> accessed 23 May 2018.

Tshehla B, 'Engagement of Prosecutors Not in the Employ of the NPA' (2016) 41(1) Journal for Juridical Science <https://doi.org/10.18820/24150517/JJS41.v1.3>

Van Schalkwyk F, 'Open Data and the Fight against Corruption in South Africa' (Transparency International) <https://www.transparency.org/en/publications/open-data-and-the-fight-against-corruption-in-south-africa> accessed 28 November 2020.

Watney M, 'Prosecuting Without Fear, Favour or Prejudice: State v Phillips Case No 41/1899/2000 (Johannesburg Regional Court) (Unreported); Beulah Evelyn Bonugli v Deputy National Director of Public Prosecutions Case No 17709/2006 (T) (Unreported)' (2009) 3 Tydskrif vir die Suid-Afrikaanse Reg.

Cases

Attorney-General v Van der Merwe 1946 OPD 197.

Barclays Zimbabwe Nominees (Pvt) v Ltd v Black 1990 (2) All SA 576 (A).

Boucher v The Queen [1955] SCR 16.

Certification of the Constitution of the Republic of South Africa, 1996 1996 (4) SA 744 (CC).

Claymore Court (Pty) Ltd v Durban City Council 1986 (4) SA 180 (N).

Democratic Alliance v Acting National Director of Public Prosecutions 2012 (3) SA 486 (SCA).

Du Plessis v de Klerk 1996 (3) SA 850 (CC).

Ellis v Visser 1954 (2) SA 431 (T).

Fourie v Resident Magistrate of Worcester (1897) 14 SC 54.

Freedom Under Law v National Director of Public Prosecutions 2014 (1) SA 254 (GNP).

Glenister v President of the Republic of South Africa 2011 (3) SA 347 (CC).

Gouriet v Union of Post Office Workers (1978) 3 All ER 70.

Levy v Benatar 1987 (4) SA 693 (Z).

Makhaya v Bailey NO 1980 (4) SA 713 (T).

Moussa v S 2015 2 SACR 537 (SCA).

Mullins v Pearlman 1917 TPD 639.

National Director of Public Prosecutions v Freedom Under Law 2014 (4) SA 298 (SCA).

National Director of Public Prosecutions v Zuma 2009 (2) SA 277 (SCA).

National Society for the Prevention of Cruelty to Animals v Minister of Justice 2016 (1) SACR 308 (SCA).

National Society for the Prevention of Cruelty to Animals v Minister of Justice 2017 (1) SACR 284 (CC).

Nedcor Bank Ltd v Gcilitshana 2004 (1) SA 232 (SE).

Nudandal v Director of Public Prosecutions (KZN) Case No AR 723/14 delivered on 8 May 2015.

Phillips v Botha 1999 (1) SACR 1 (SCA).

Porritt v National Director of Public Prosecutions 2015 (1) SACR 533 (SCA).

R (on the application of Gujra) v Crown Prosecution Service [2012] UKSC 52.

R (on application of Haase) v Independent Adjudicator [2008] EWCA Civ 1089.

S v De Freitas 1997 (1) SACR 180 (C).

S v Shaik 2007 (1) SACR 142 (D).

Singh v Minister of Justice and Constitutional Development 2009 (1) SACR 87 (N).

Solomon v Magistrate, Pretoria North 1950 (3) SA 603 (T).

Telecel Zimbabwe (Pvt) Ltd v Attorney-General, Zimbabwe NO Civil Appeal SC 254/11 2014 ZWSC 1 (28 January 2014).

Van der Westhuizen v S 2011 (2) SACR 26 (SCA).

Wildlife Society of Southern Africa v Minister of Environmental Affairs and Tourism 1996 (3) SA 1095 (TKS).

Zuma v Democratic Alliance 2018 (1) SA 200 (SCA).

Legislation

Constitution of the Republic of South Africa, 1996.

Criminal Procedure Act 51 of 1977.

Legal Practice Act 28 of 2014.

National Environmental Management Act 107 of 1998.

National Prosecuting Authority Act 32 of 1998.

Prevention and Combating of Corrupt Activities Act 12 of 2004.

Prevention of Organised Crime Act 121 of 1998.

Proclamation No 20 of 2019 (4 April 2019) GG 42383.

Society for the Prevention of Cruelty to Animals Act 169 of 1993.