

Ask Pollex



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Legal column

Private Prosecutions

QUESTION

A reader has asked Pollex to explain the concept of **private prosecution** in South Africa and whether **case law** of such cases is available.

ANSWER

Introduction

A **private prosecution** must **NOT be confused with civil proceedings** because a **private prosecution** is adjudicated/heard/tried (Afrikaans: "bereg/verhoor") in terms of "**criminal proceedings**", namely in terms of provisions referred to in sections 6 to 18 of the Criminal Procedure Act 51 of 1977 ("the CPA"). Note that wherever the words "attorney-general" and/or "deputy attorney-general" appear in the CPA and/or in this discussion, it must be construed as a reference to a "Director or Deputy Director of Public Prosecutions" (DPP). See **section 45 of the National Prosecuting Authority Act 32 of 1998**.

To illustrate, the case of **Polovin v The Director of Public Prosecutions in Cape Town and Others, Case No 1230/2022, Supreme Court of Appeal, dated 17 October 2024 (SCA)**, will be discussed.

This is an application for leave to appeal against the judgment and order of the High Court, Cape Town, delivered on 12 July 2022. The High Court **dismissed** with costs an application for a **frontal*** challenge to the institution of a private prosecution against the **applicant*** and **refused** to grant the **applicant*** leave to appeal. On 28 March 2023, the Supreme Court of Appeal in Bloemfontein ("the SCA") issued an order in terms of **section 17(2)(d) of the Superior Courts Act 10 of 2013**, that the application for leave to appeal be referred for **oral argument***.

Accordingly, the matter was then referred to the SCA for adjudication, where a full bench of five judges presided.

This matter concerns a **long** history of disputes between two neighbours, namely the **applicant***, **Mr David Neville Polovin**, a senior admitted attorney (hereinafter referred to as "**Polovin**"), and **Ms Liesel Jane Green** (hereinafter referred to as **Liesel**).

The DPP in Cape Town is the **first** respondent; **Liesel** is the **second** respondent; the regional court president, Cape Town is the **third** respondent; and the clerk of the regional court, Cape Town, is the **fourth** respondent.

Liesel is the **protagonist*** in this application. She and Polovin are next door neighbours, resident in Kloof Road, Bantry Bay, Cape Town. **Liesel** had been residing with her family in a property in Kloof Road, since 2005. In 2010, **Polovin's** company, Cotton Wood Technologies Inc, purchased the property adjacent to that of **Liesel**. According to **Liesel**, at the time when **Polovin** moved into the next door property, she had commenced with renovations of her house following building plans, duly approved by the Cape Town municipality. Disputes concerning the renovations ensued between **Liesel** and **Polovin**, resulting in an **acrimonious relationship*** between them. Note that the primary issues to be decided by the SCA are **the application for leave to appeal to the SCA, and, if successful, the adjudication of the appeal**.

Proceedings before the SCA

The events that triggered this round of **litigation*** occurred during May 2012 when **Polovin** accessed **Liesel's** confidential credit records, which he later admitted to doing. This is, legally speaking, not allowed without the consent and knowledge of the victim. Accordingly, **Liesel** laid a criminal charge of contravening **section 86(1)(sic) of the Electronic Communications and Transactions Act 25 of 2002*** against Polovin. Following representations of Polovin, and after several court appearances by Polovin, the DPP, Cape Town (the first respondent) **declined to prosecute Polovin** at the instance of the State.

On 4 December 2019, **Liesel** requested from the said DPP copies of correspondence between **Polovin** and the DPP on the representations made on behalf of **Polovin**, and a copy of the police case docket in the matter and the **certificate of nolle prosequi*** (hereinafter referred to as the "**certificate**"). In due course, **Liesel** received all the requested documents.

At that stage, the issues that fall to be decided by the SCA, as **Polovin** submits, are narrowed from those raised in the High Court in Cape

Town, to the following, together with the response of the SCA, namely -

- (1) whether leave to appeal should be granted in terms of section 17(2)(b) read with section 17(1)(a)(i) and (ii) and section 17(6)(a)(i) and (ii) of the **Superior Courts Act 10 of 2013**; and
- (2) concerning the **merits**, whether an appeal should succeed against **the findings** of the High Court and its orders concerning, and another few issues.

The response by the SCA regarding issues (1) and (2) **supra**, appears in paragraphs [16] to [21] of the SCA judgment, where reference is made to the certificate issued in terms of section 7 of the CPA. According to the SCA in paragraph [20] of its judgment, the certificate is a document of a formal nature, which may be produced as evidence of a decision that the DPP declines to prosecute. Therefore, a distinction should be drawn between a decision not to prosecute, which is **reviewable** on the principle of legality or rationality, and a document evidencing that decision, which is not a decision and thus **not reviewable**. The certificate is the latter and is neither a decision nor an administrative action that is **reviewable** in terms of the **Promotion of Administrative Justice Act 3 of 2000 (PAJA)**, nor as **incorrectly held in Nundalal v DPP KZN [2015] JOL 33232 (KZP)**, an exercise of a **discretion**. The facts of this case (**Polovin**) illustrate the difference. The DPP decided not to prosecute, on 8 November 2019, which is **reviewable** on the principle of legality or irrationality. The certificate was initially issued on 20 May 2020, six months after the decision was taken, and is **not reviewable**. On the lapsing of the period of validity of the initial certificate, which occurred on 19 August 2020, three months after its issue in terms of section 7(2)(c) of the CPA, **Liesel** requested its re-issue, which occurred on 14 October 2020. **Liesel** instituted **private prosecution** by **serving summons** on **Polovin** on 30 November 2020, which is a decision to prosecute.

Were the jurisdictional requirements for the issue of the certificate in terms of section 7 of the CPA met?

This question is discussed per paragraphs [22] to [29] of the SCA judgment. At the end of paragraph [29], the SCA concluded that there is no merit in **Polovin's** attack on **Liesel's** alleged lack of compliance with the jurisdictional requirements in terms of section 7(1)(a) of the CPA.

Was the DPP in Cape Town entitled to re-issue the certificate?

Polovin initially raised an inquiry on the re-issue of the certificate in a letter dated 7 December 2020 addressed to the DPP in Cape Town. In a **reply** dated 25 January 2021, the DPP replied as follows:

"REPRESENTATIONS: THE STATE VERSUS D POLOVIN [CAPE TOWN CAS 1480/06/2014]

Your letter dated 7 December 2020 refers.

A second certificate **nolle prosequi** was issued on request of the complainant [**Liesel**] as the validity of the **first certificate** was to expire before the matter could be enrolled. The additional charge of defeating the administration of justice was added on request of the complainant, who was of the view that the evidence contained in the docket justified such a charge. The same is applicable to the charge of fraud. No additional statements have been obtained in the matter.

The charge-sheet in this matter is drafted by the **private prosecutor** and this office is therefore not involved in the contents, nor the validity thereof.

I am proceeding to close my file. **Kindly pursue any further issues with the private prosecutor.**

Yours faithfully

DIRECTOR OF PUBLIC PROSECUTIONS: WESTERN CAPE"

(Emphasis added and word in square brackets inserted by Pollex.)

According to **Polovin**, this re-issue was irregular as the DPP was **functus officio***. According to him further, it was likewise irregular for the DPP to include the following **additional** charges in the re-issued certificate, namely -

- (a) one count of common law fraud, for the act of accessing the information on TransUnion, on the basis of misrepresentations;
- (b) one count of common law defeating or obstructing the administration of justice, due to **Polovin's** responses to the TransUnion investigators; and
- (c) three counts of contravening the **Electronic Communications and Transactions Act 25 of 2002** for assessing private information without permission, unlawfully overcoming measures and unauthorised use of data.

To this question, the SCA responded that "there is **no** merit in **Polovin's** contention that it was impermissible for the DPP to include **additional** charges in the certificate. See the end of paragraph [37] of the SCA judgment.

Declaratory relief that the private prosecution is inspired by malice and is vexatious*, and that Liesel be interdicted* from further proceeding with the private prosecution of Polovin as it is against public policy

In paragraph [39] of the SCA judgment, the SCA, **inter alia**, held that **Liesel** had in fact **locus standi*** to institute this private prosecution.

About the question of whether **Liesel** has prospects of success with the private prosecution, the SCA **refrained*** from speculating. See paragraph [40].

Regarding an **interdict*** being issued **against Liesel** that her private prosecution is **vexatious***, the SCA held that "**Liesel's** case comes **nowhere close** to establishing the requirements for an **interdict***. See paragraph [41] of the SCA judgment.

Regarding the financial risk taken by any person who institutes a private prosecution, the SCA, in paragraph [43] of its judgment, referred to section 16 of the CPA, which provides as follows, namely -

"[43] On the other hand, **Liesel** assumes enormous **financial risk** by instituting private prosecution. **Section 16 of the CPA**, which in addition to any civil claim **Polovin** may choose to institute, provides:

- (1) Where in a private prosecution, other than a prosecution contemplated in **section 8** of the CPA, the charge against the accused is dismissed or the accused is acquitted or a decision in favour of the accused is given **on appeal**, the court dismissing the charge or acquitting the accused or deciding in favour of the accused **on appeal**, may order the private prosecutor to pay to such accused the whole or any part of the costs and expenses incurred in connection with the prosecution or, as the case may be, the appeal.
- (2) Where the court is of the opinion that a private prosecution was **unfounded and vexatious**, it shall award to the accused at his

request such costs and expenses incurred in connection with the prosecution, as it may deem fit."

(Emphasis added by Pollex.)

Conclusion

In paragraph [44] of the SCA judgment, the SCA unanimously (all five judges concurring), concluded that "in weighing up the scale of balance between the two rights, ie **Polovin's** right not to be subjected to unfounded and vexatious private prosecution, **against** the right of **Liesel**, to have her dispute resolved by application of the law and decided in a fair public hearing before a court, as provided for in section 34 of our Constitution, **the scale tilts in her favour**".

In paragraph [45], the SCA's conclusion continues by stating the following, namely -

"[45] I [the SCA] therefore conclude that this appeal has **no merit and falls to be dismissed, with costs following the result.**

It is undoubtedly a **frontal* challenge** intended to delay the instituted private prosecution. The full court in the **President v Zuma**, relying on the Constitutional Court's decisions in **Thint (Pty) v National Director of Public Prosecution and Others; Zuma and Another v National Director of Public Prosecution and Others** and **Moyo and Another v Minister of Police and Others**, summarised the approach thus:

'There is no absolute rule against a **frontal* challenge** to a prosecutor's title to prosecute. **A frontal challenge ought to be discouraged and pertinent issues left to the trial court, where it lacks merit and only mainly serves to delay the commencement of the criminal trial.** It ought to be allowed where a litigant wishes to challenge a clearly unlawful process in order to enforce his or her fundamental rights".

(Emphasis is that by the SCA.)

Orders made by SCA

The following orders were made by the SCA:

1. The application by **Polovin** for leave to appeal is **granted**.
2. The appeal by **Polovin** is **dismissed** with costs.

General comments by Pollex

1. The negotiations regarding whether or not a private prosecution is to be instituted will usually take place between the aggrieved person and the State/prosecution in the person of the DPP for the area concerned. Accordingly, the SAPS investigation officer must obey all instructions in this regard received from the DPP concerned.
2. Apparently, the DPP need **not** give reasons to anyone why he or she declined to prosecute ("**nolle prosequi**"). That's why the reasons "given" in this matter are, so to speak, meaningless. See paragraph [25] of the SCA judgment.
3. Where a private prosecution is instituted in terms of section 7(1) of the CPA and the accused **pleads guilty** to the charge, the **prosecution shall be continued at the instance of the State** (in Afrikaans text: "word die vervolging van staatsweë voortgesit"). See section 12(2) of the CPA.
4. In the event of a judgment following upon a private prosecution, it becomes a "reported case" (also referred to as a "decided case") and it is reported in the names of the parties and **NOT** in the name of (for example) "**S v Janse van Rensburg**".

An example of the first-mentioned case **supra** is "**Williams v Janse van Rensburg (1) 1989 (4) SA 485 (CPD)**".

5. Section 13 of the CPA is about possible **intervention** by a DPP in a private prosecution.

This section 13 is only aimed at prosecutions where the prosecutor is a private individual. The DPP concerned may in his or her discretion prosecute **de novo** (afresh/aneu [in Afrikaans: "opnuut/van nuuts af"]) or, **continue at the instance of the State** (in Afrikaans text: "verdere verrigtinge van verhoor voortgesit word vanaf oomblik van die DOV se tussentrede").

The provisions of this section 13 are typically used by a DPP where he or she realises that the accused concerned may be convicted (in contrast to the DPP's **nolle prosequi!**). A safety valve?

6. Section 12(1) of the CPA provides as follows:

"12. Mode of conducting private prosecution

- (1) A private prosecution shall, subject to the provisions of this Act, be proceeded with in the **same manner as if it were a prosecution at the instance of the State**: Provided that the person in respect of whom the private prosecution is instituted shall be brought before the court **only** by way of summons in the case of a lower court, or an indictment in the case of a superior court, except where he is under **arrest in respect of an offence with regard to which a right of private prosecution is vested in anybody or person under section 8.**"

Note especially the words highlighted in this section 12(1).

It is not clear how and by whom such an **arrest** takes place. Bear, however, in mind that an ordinary private prosecutor acts in terms of **section 7** of the CPA, while a public body with private prosecution authority, like a municipality, acts in terms of section 8 of the CPA. Accordingly, it appears that an accused person in a private prosecution shall only be brought before a lower court (regional and district court) by way of **summons** or an **indictment** (Afrikaans: "akte van beskuldiging") in the case of a superior court (High Court) (see section 144 of the CPA). A word of caution to SAPS members. Note the words "**in the same manner**" as they appear in section 12 of the CPA, which means that offences committed **during** such a private prosecution must, as always, be referred to the SAPS for investigation. Like common law perjury and/or common law contempt of court **in facie curiae** and/or contempt **ex facie curiae**. In other words, "in the face of the court" and/or "**outside** the face of the court". "In the same manner" also means that a convicted accused at such private prosecution may appeal against it (see section 16(1) of the CPA). If aspects such as arrest (with or without a warrant); search and seizure; forfeiture; disposal of property (**inter alia** exhibits); and/or bail are issues, **consult with the PUBLIC prosecutor (DPP)** before taking action.

7. **May a child - a person under the age of 18 years** - be a private prosecutor (the aggrieved person), or be the wrongdoer involved? The short answer is "yes" and "no"!

The detailed answer is found in section 59(2) of the **Child Justice Act 75 of 2008**, which provides as follows:

- "(2) A private prosecution in terms of **section 7** of the CPA may **not be instituted against a child** in respect of whom the matter has been **diverted** in terms of this Child Justice Act". The "child" referred to here is the "wrongdoer". The opposite appears to be that a child may **institute** a private prosecution.

Note further that **section 7** of the CPA is amended by section 99(1) in Schedule 4 of the Child Justice Act by inserting the following words

at the end of section 7 of the CPA: "... subject to the provisions of section 9 and section 59(2) of the Child Justice Act 75 of 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".

(8) Note that **section 86(1) of the Electronic Communications and Transactions Act 25 of 2002**, referred to **supra**, has been repealed but replaced by section 2(2) of the Cybercrimes Act 19 of 2020.

Glossary of terms

- * **"Frontal"** means of or at the front or relating to the forehead or front part of the skull. In Afrikaans: "voorkant/voorhoofs".
- * **"Oral argument"** means spoken rather than written/relating to the mouth/done or taken by the mouth. In Afrikaans: "mondelings".
- * **"Protagonist"** means prominent figure in a real situation. In Afrikaans: "hoofpersoon/voorvegter".
- * **"Acrimonious relationship"** means angry and bitter relationship. In Afrikaans: "skerp/bitsig/bitter verhouding".
- * **"Litigation"** means taking a dispute to a court of law. In Afrikaans: "gedingvoering in 'n geregshof".
- * **"Nolle prosequi"** is a Latin maxim meaning a refusal to prosecute. In Afrikaans: "weier om te vervolg".

- * **"Functus officio"** is a Latin maxim meaning no longer in office or no longer officiating or having discharged his/her office. In Afrikaans: "nie meer diensdoende nie/nie meer in funksie nie".
- * **"Vexatious"** means causing annoyance or worry/law of an action, or the bringer of an action without sufficient grounds for winning, to annoy the defendant. In Afrikaans: "kwelsugtig vir die verweerder".
- * **"Locus standi"** is a Latin maxim meaning a right of appearance (in court as a party/standing in court). In Afrikaans: "bevoegdheid as gedingvoerder (met voldoende belang in die geding om as party erken te word)".
- * **"Refrain/refrained"** means to stop oneself from doing something. In Afrikaans: "jou weerhou daarvan om iets te doen".
- * **"Interdict"** means an authoritative prohibition/prohibit/forbid. In Afrikaans: "verbied".

List of references

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