THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case no: 1230/2022

In the matter between:

DAVID NEVILLE POLOVIN	**APPLICANT/APPELLANT**
and	
THE DIRECTOR OF PUBLIC PROSECUTIONS, WESTERN CAPE	**FIRST RESPONDENT**
LIESEL JANE GREEN	**SECOND RESPONDENT**
THE REGIONAL COURT PRESIDENT, CAPE TOWN	**THIRD RESPONDENT**
THE CLERK OF THE REGIONAL COURT, CAPE TOWN	**FOURTH RESPONDENT**

Neutral Citation: *Polovin v The Director of Public Prosecutions and Others* (1230/2022) [2024] ZASCA 140 (17 October 2024)

Coram: MOTHLE, WEINER and SMITH JJA and COPPIN and NAIDOO AJJA

Heard: 21 August 2024

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email, publication on the Supreme Court of Appeal website and released to SAFLII. The date and time for hand-down of the judgment is deemed to be 17 October 2024 at 11h00.

Summary: Criminal law and procedure – private prosecution – review – whether leave to appeal should be granted in terms of s 17(2)*(b)* read with s 17(1)*(a)*(i) and (ii) and section 17(6)*(a)*(i) and (ii) of the Superior Courts Act 10 of 2013 in relation to the merits – whether the jurisdictional requirements for the issue of a certificate of *nolle prosequi* were met – whether the Acting Director of Public Prosecutions was entitled to reissue the certificate of *nolle prosequi* – whether the certificate of *nolle prosequi* may include further charges other than that originally charged by the State prosecutor – whether the second respondent had sufficient standing to pursue the private prosecution and whether that prosecution was in accordance with public policy.

ORDER

On appeal from: Western Cape Division of the High Court, Cape Town (Baartman J sitting as court of first instance):

1 The application for leave to appeal is granted.

2 The appeal is dismissed with costs.

JUDGMENT

Mothle JA (Weiner and Smith JJA and Coppin and Naidoo AJJA concurring)

[1] This is an application for leave to appeal the judgment and order of the Western Cape Division of the High Court, Cape Town (the high court), 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. The applicant turned to this Court on petition for leave to appeal. On 28 March 2023, this Court issued an order in terms of s 17(2)*(d*) of the Superior Courts Act 10 of 2013 (Act 10 of 2013), that the application for leave to appeal be referred for oral argument. The order further stated that the parties must be prepared, if called upon to do so, to address this Court on the merits.

[2] This matter concerns a long history of disputes between two neighbours. Mr David Neville Polovin, a senior admitted attorney (the applicant) and Ms Liesel Jane Green (the second respondent), the protagonists in this application, are next-door neighbours, resident in Kloof Road, Bantry Bay, Cape Town. The second respondent had been residing with her family in a property in Kloof Road, since 2005. In 2010, the applicant's company, Cottonwood Technologies Inc, purchased the property adjacent to that of the second respondent. According to the second respondent, at the time that the applicant moved into the next-door property, she had commenced with renovations of her house in accordance with building plans, duly

approved by the municipality. Her previous neighbour, from whom the applicant's company had purchased the property, had no objection to the renovations.

[3] Disputes concerning the renovations ensued between the second respondent and the applicant, which evolved into an acrimonious relationship between them. I will, however, refrain from pronouncing on the merits of these allegations, as they may be a subject of adjudication in another forum in due course. Suffice to say, where necessary, I will, in some instances, refer briefly to the allegations or counter-allegations, to the extent that they may have a bearing on the issues raised by the parties in this Court. The primary issues that fall to be decided in this Court are the application for leave to appeal, and, if successful, the adjudication of the appeal.

[4] The events that triggered this round of litigation occurred in May 2012, when the applicant accessed the second respondent's confidential credit records, by using a colleague's login details to the Law Data System of TransUnion. The applicant accessed this information without the consent and knowledge of the second respondent, which is a pre-requisite for obtaining such access. The applicant at first denied accessing the confidential records, but later admitted doing so. The second respondent laid a criminal charge of contravention of s 86(1) of the Electronic Communications and Transactions Act 25 of 2002, (the ECTA) against the applicant. The section provides that 'a person who intentionally accesses or intercepts any data without authority or permission to do so, is guilty of an offence.' Following representations by the applicant's counsel, and after several court appearances by the applicant, on 8 November 2019, the Director of Public Prosecutions, Western Cape (the DPP), cited as the first respondent, declined to prosecute the applicant at the instance of the State.

[5] On 4 December 2019, the second respondent, represented by counsel, requested from the DPP copies of correspondence between the applicant and the DPP on the representations made on behalf of the applicant, a copy of the docket in the matter and the certificate of *nolle prosequi* (the certificate). The certificate is issued in terms of s 7 of the Criminal Procedure Act 55 of 1977 (the CPA). On 20 May 2020, the Acting DPP issued the certificate, which the second respondent's legal representatives received on 25 June 2020. In terms of s 7(2)*(c)* of the CPA the

certificate was to lapse unless the proceedings contemplated therein were instituted by the issue of the process (including summons) referred to in s 7(2)*(a)* within three months of the date of its issue. In this certificate, the Acting DPP states that he had declined to prosecute the applicant for the offences of 'fraud, contravention of ss 86(1) and 86(3) of the ECTA, as well as [for the] contravention of the provisions of s 68 of the National Credit Act 34 of 2005.' The docket was still not available as requested. It was only on 25 August 2020 that the second respondent's attorney was able to obtain a copy of the docket from the police. By then, the certificate dated 20 May 2020 had lapsed, because the proceedings had not been instituted by the issue of the required process within the three-month period.

[6] On 9 September 2020, the second respondent's attorney applied for a re-issue of the certificate, with the inclusion of an additional charge of defeating or obstructing the administration of justice, which certificate the Acting DPP re-issued on 14 October 2020. The summons commencing the private prosecution proceedings was issued on 27 November 2020, and the applicant was served with it on 30 November 2020. The applicant made his first appearance in court in respect of the private prosecution on 27 January 2021.

[7] The applicant launched a frontal challenge to the private prosecution in the high court. The application in the high court is in two parts. In Part A, the applicant challenged the second respondent's *locus standi*, the jurisdictional requirements of s 7(1)*(a)* of the CPA, the re-issue of the certificate dated 14 October 2020, and the inclusion of additional charges. In Part B, the applicant sought relief that the summons commencing the private prosecution should be declared unfounded and vexatious, as it constituted an abuse of court processes. He further sought an order against the second respondent interdicting her from proceeding with the private prosecution, alleging that it offends public policy. The high court dismissed both Parts A and B of the application, with costs, and further dismissed an application for leave to appeal those orders. The consequence, thereof, being the petition for leave to appeal to this Court.

[8] The issues that fall to be decided by this Court, as the applicant submits, are narrowed from those raised in the high court, to the following:

(a) Whether leave to appeal should be granted in terms of s 17(2)*(b)* read with s 17(1)*(a)*(i) and (ii) and s 17(6)*(a)*(i) and (ii) of Act 10 of 2013; and

(b) In relation to the merits, whether an appeal should succeed against the findings of the high court and its orders concerning:

Part A

(i) whether the jurisdictional requirements for the issue of the certificate in terms of s 7(1)*(a)* of the CPA, were met.

(ii) whether the private prosecutor (i.e. the second respondent) had *locus standi* arising from the requirements of s 7(1)*(a)* of the CPA and whether she had 'a substantial and peculiar interest arising from an actual injury individually suffered';

(iii) whether the Acting DPP was entitled to re-issue the certificate and include additional charges; and

Part B

(v) declaratory relief that the private prosecution is unfounded and vexatious, and that the second respondent be interdicted from further proceeding with the private prosecution of the applicant as it is against public policy.

Whether leave to appeal should be granted

[9] The application before this Court is grounded on s 17(1)*(a)*(i) and (ii) and s 17(6)*(a)*(i) and (ii) of Act 10 of 2013. The relevant parts of s 17 of Act 10 of 2013 provide as follows:

'(1) Leave to appeal may only be given where the judge or judges concerned are of the opinion that-

(a) (i) the appeal would have a reasonable prospect of success; or

(ii) there is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration;

. . . .

(6)*(a)* If leave is granted under subsection (2) *(a)* or *(b)* to appeal against a decision of a Division as a court of first instance consisting of a single judge, the judge or judges granting leave must direct that the appeal be heard by a full court of that Division, unless they consider-

(i) that the decision to be appealed involves a question of law of importance, whether because of its general application or otherwise, or in respect of which a

decision of the Supreme Court of Appeal is required to resolve the differences of opinion; or

(ii) that the administration of justice, either generally or in the particular case, requires consideration by the Supreme Court of Appeal of the decision, in which case they must direct that the appeal be heard by the Supreme Court of Appeal.'

[10] In so far as there is reliance on s 17(1)*(a)*(i) of Act 10 of 2013, this Court in *Ramakatsa and Others v African National Congress and Another,*[1] stated the applicable test to be the following:

'The test of reasonable prospects of success postulates a dispassionate decision based on the facts and the law that a court of appeal could reasonably arrive at a conclusion different to that of the trial court . . .A sound rational basis for the conclusion that there are prospects of success must be shown to exist'.[2]

For reasons that appear from this judgment, I am of the view that the applicant has not met the threshold of this test. As will be demonstrated in this judgment, the envisaged appeal would not have reasonable prospects of success on the merits.

[11] The ground for leave to appeal in terms of s 17(1)*(a)*(ii) and the alternative ground under s 17(6)*(a)(i)* read with s 17(2)*(b)*, apply in an instance where there are conflicting judgments or opinions in the Divisions on a matter under consideration. In the course of the debate in the high court and this Court, both parties referred, amongst others, to the decisions in *Singh v Minister of Justice and Constitutional Development and Another* (*Singh*)[3] and the full court judgment in *Nundalal v Director Public Prosecutions KZN* (*Nundalal*).[4] Both cases were heard in the KwaZulu-Natal Division, *Singh* by a single judge and *Nundalal* by three judges. The two judgments arrived at different conclusions in their interpretation of s 7(1)*(a)* of the CPA, with *Nundalal* overruling *Singh* to some extent. *Nundalal* was in turn not followed by the

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[1] *Ramakatsa and Others v African National Congress and Another* [2021] ZASCA 31.
[2] Ibid para 10. See also *Smith v S* [2011] ZASCA 15; 2012 (1) SACR 567 (SCA) para 7; *MEC for Health, Eastern Cape v Mkhitha and Another* [2016] ZASCA 176 para 17.
[3] *Singh v Minister of Justice and Constitutional Development and Another* 2009 (1) SARC 87 (N) (*Singh*).
[4] *Nundalal v Director of Public Prosecutions KZN* [2015] JOL 33232 (KZP); 2015 JDR 0876 (KZP) (*Nundalal*).

full court of the Gauteng Division of the High Court, Johannesburg in *President of the Republic of South Africa v Zuma and Others* (*President v Zuma*).[5]

[12] There are thus conflicting judgments on the jurisdictional requirements of s 7 of the CPA, which is a ground of appeal raised by the applicant in terms of s 17(1)*(a)*(ii) and s 17(6)*(a)*(i) read with s 17(2)*(b)* of Act 10 of 2013. On either of these two grounds alone, I am of the view that the application for leave to appeal should be granted, as the decision to be appealed involves a question of law of importance, in terms of which a decision of the Supreme Court of Appeal is required to resolve differences of opinion. Henceforth, the applicant becomes the appellant, and the merits of the appeal, which were fully argued, are before this Court. I therefore turn to consider the appeal on the merits.

[13] Before I deal with the appellant's specific grounds of attack on s 7 of the CPA, it is necessary to revisit the rationale for allowing the institution of a private prosecution. As far back as 1946, this was set out succinctly by Van den Heever AJP in *Attorney-General v Van der Merwe and Bornman*,[6] as follows:

'. . . Permission to prosecute in such circumstances was conceived as a kind of safety-valve. An action for damages may be futile against a man of straw and a private prosecution affords a way of vindicating those imponderable interests other than the violent and crude one of shooting the offender. The vindication is real: it consoles the victim of the wrong; it protects the imponderable interests of those involved by the deterrent effect of punishment and it sets at nought the inroad into such inalienable rights by effecting ethical retribution. Finally it effects atonement, which is a social desideratum.'[7]

With this rationale in mind, I turn to the consideration of s 7 of the CPA.

[14] Section 7 of the CPA permits any person, who proves some substantial and peculiar interest in the issue of the trial, to institute and conduct a private prosecution by producing a certificate issued by the DPP. Instituting a private prosecution is the exercise of 'the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court . . .' as buttressed by s 34 of the

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[5] *President of the Republic of South Africa v Zuma and Others* [2023] ZAGPJHC 783; [2023] 3 All SA 853 (GJ); 2024 (1) SACR 32 (GJ) (*President v Zuma*).
[6] *Attorney-General v Van der Merwe and Bornman* 1946 OPD 197.
[7] Ibid at 201.

Constitution's[8] Bill of Rights, the right to access court. The relevant text of s 7 of the CPA provides:

'(1) In any case in which a Director of Public Prosecutions declines to prosecute for an alleged offence-

(a) any private person who proves some substantial and peculiar interest in the issue of the trial arising out of some injury which he individually suffered in consequence of the commission of the said offence;

. . . .

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

(2)*(a)* No private prosecutor under this section shall obtain the process of any court for summoning any person to answer any charge unless such private prosecutor produces to the officer authorised by law to issue such process a certificate signed by the 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.

(b) The attorney-general shall, in any case in which he declines to prosecute, at the request of the person intending to prosecute, grant the certificate referred to in paragraph *(a)*.

(c) A certificate issued under this subsection shall lapse unless proceedings in respect of the offence in question are instituted by the issue of the process referred to in paragraph *(a)* within three months of the date of the certificate.

(d) The provisions of paragraph *(c)* shall apply also with reference to a certificate granted before the commencement of this Act under the provisions of any law repealed by this Act, and the date of such certificate shall, for the purposes of this paragraph, be deemed to be the date of commencement of this Act.'

[15] The certificate issued by the DPP in terms of s 7(2)*(b)* of the CPA, would generally be worded as follows:

'I,…certify herewith in terms of section 7(2) of Act 51 of 1977 that I have seen the statements and/or affidavit upon which the charges of: [the specific charges are mentioned], Against [the name of the offender] are based, and that I decline to prosecute at the instance of the State.

Given under my hand at [name of the City] on this [date] day of [month and year.]

[Hand signature and title of office.]'

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[8] The Constitution of the Republic of South Africa, 1996.

[16] The appellant contends that the issuing of the s 7 certificate as provided for in s 7(2)*(b)* is administrative action, as defined in s1 of the Promotion of Administrative Justice Act 3 of 2000 (PAJA). He further contends that the issuing of the certificate as an administrative decision, must adhere to the prescripts of PAJA, which require the decision to be lawful, reasonable and procedurally fair. The appellant finds support for this contention partly in *Singh,* but mainly in *Nundalal*, where the court held that '[t]he DPP's decision to issue a certificate is an administrative decision . . . [i]ssuing a *nolle* involves prosecutorial discretion. Accordingly PAJA applies to the review and setting aside of the certificate.'[9] *Nundalal* thus concluded that the issuing of the certificate is reviewable in terms of PAJA. The full court in *President v Zuma*, decided in July 2023, refrained from taking a definitive stance on the issue, but accepted, with reference to the facts and dispute in that case, that the issues raised there, straddle the positions in terms of both PAJA and the Constitution, the latter based on the principle of legality or irrationality.

[17] In terms of s 1 of PAJA '"administrative action" means any decision taken, or any failure to take a decision…by an organ of state[10] *or* a natural or juristic person . . . , when exercising a public power or performing a public function in terms of an empowering provision, which adversely affects the rights of any person and which has a direct, external legal effect, but does not include[11] *. . . a decision to institute or continue a prosecution[12] . . .'* (Own emphasis)
The definition of administrative action in terms of PAJA, therefore, excluded the decision not to prosecute or to discontinue a prosecution. It begs the question whether the decision not to prosecute may be subject to review.

[18] This question was considered and answered by this Court in *National Director of Public Prosecutions and Others v Freedom Under Law (NDPP v Freedom Under Law)*.[13] There this Court reasoned and concluded as follows:
'(a) . . .
. . . .

[9] *Nundalal* para 8.
[10] Section 1*(a)* of the Promotion of Administrative Justice Act 3 of 2000 (PAJA).
[11] Section 1*(b)* of PAJA.
[12] Section 1(1)*(b)(ff)* of PAJA.
[13] *National Director of Public Prosecutions and Others v Freedom Under Law* [2014] ZASCA 58; 2014 (4) SA 298 (SCA); 2014 (4) SA 298 (SCA) (*NDPP v Freedom Under Law*) para 27.

(d) Against this background I agree with the *obiter dictum* by Navsa JA in *DA and Others v Acting NDPP* that decisions to prosecute and not to prosecute are of the same genus, and that, although on a purely textual interpretation the exclusion in s 1*(b)(ff)* of PAJA is limited to the former, it must be understood to incorporate the latter as well.
(e) Although decisions not to prosecute are – in the same way as decisions to prosecute – subject to judicial review, it does not extend in a review on the wider basis of PAJA, but is limited to grounds of legality and rationality.'[14]

[19] Caution should be exercised in deciding which administrative acts constitute a reviewable decision. Not all administrative acts, functions or clerical duties performed by officials or organs of state, would be an exercise of public power or amount to a public function in terms of any legislation or empowering provision, or would adversely affect the rights of any person, within the ambit of the definition of administrative action in terms of PAJA. All the elements of the definition of an administrative action in terms of s 1 of PAJA must be present, before an act would qualify as a reviewable decision in terms of PAJA. In *Plover's Nest Investments (Pty) Ltd v De Haan*,[15] this Court held, having examined the content of a letter produced by an official of a municipality, that such letter was neither a decision nor an action as contemplated in s 1 of PAJA.[16] Similarly, in *Gamevest (Pty) Ltd v Regional Land Claims Commissioner for the Northern Province and Mpumalanga and Others*,[17] this Court, in explaining the nature of a claim form lodged in terms of the Restitution of Land Rights Act 22 of 1994, held that 'the receipt of a claim and an acknowledgement of such receipt is a formal act, not amounting to an administrative decision or action.'[18]

[20] In *casu*, the certificate is nothing more than a document that certifies that the DPP has seen the statements or affidavits on which the charge is based, and that he/she declines to prosecute at the instance of the State, 'nothing more nothing less.'[19] It does not confer authority on anyone to do anything. Having regard to its

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[14] *Democratic Alliance and Others v Acting National Director of Public Prosecutions and Others* [2012] ZASCA 15; 2012 (3) SA 486 (SCA).
[15] *Plover's Nest Investments (Pty) Ltd v De Haan* [2015] ZASCA 193.
[16] Ibid para 27.
[17] *Gamevest (Pty) Ltd v Regional Land Claims Commissioner for the Northern Province and Mpumalanga* [2002] ZASCA 117; 2003 (1) SA 373 (SCA).
[18] Ibid para 28.
[19] *Nundalal* para 19.

content, 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 it is neither a decision nor administrative action that is reviewable in terms of PAJA, nor as incorrectly held in *Nundalal*, an exercise of a discretion. The facts of this case illustrate the difference. The DPP took the decision 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 s 7(2)*(c)*, the second respondent requested its re-issue, which occurred on 14 October 2020. The second respondent instituted private prosecution by serving summons on the appellant on 30 November 2020, which is a decision to prosecute.

[21] The acquisition of the certificate may not necessarily result in the institution of a private prosecution. Its bearer may decide not to proceed with a prosecution, in which event it will lapse after three months. As stated in the preceding paragraph of this judgment, since this Court in *NDPP v Freedom Under Law* held that the review of a decision not to prosecute must be grounded on the principle of legality and/or rationality,[20] equally so, the decision by the private prosecutor to institute a prosecution, also falls to be reviewed in terms of the principle of legality or rationality. This is so, because the decision to prosecute is expressly excluded from PAJA in terms of s 1*(b)(ff)* thereof. The full court in *Nundalal* was probably not aware of this Court's judgment in *NDPP v Freedom Under Law,* which was heard on 1 April 2014, and its judgment delivered on 17 April 2014. *Nundalal* was heard on 27 March 2015 and its judgment delivered on 8 May 2015, followed by the full court in the *President v Zuma*, where the judgment was delivered in July 2023.

There is thus no merit in the appellant's contention, based on the decision in *Nundalal*, that the issuing of the certificate is reviewable in terms of PAJA.

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[20] *NDPP v Freedom Under Law* para 27. See also *Minister of Health and Another NO v New Clicks South Africa (Pty) Ltd and Others (Treatment Action Campaign and Another as Amici Curiae)* [2005] ZACC 14; 2006 (2) SA 311 (CC); (2006) (1) BCLR 1para 614, where the Constitutional Court held that the exercise of all public power must comply with the doctrine of legality.

Whether the jurisdictional requirements for the issue of the certificate in terms of s 7 of the CPA, were met

[22] The jurisdictional requirements in terms of s 7(1)*(a)* of the CPA, were listed in *Singh* as follows*:* for any person intending to institute a private prosecution, he/she must prove that (a) he/she has an interest in the issue of the trial; (b) the interest is substantial and peculiar to him/her; (c) the interest arises from some injury individually suffered by him/her; and (d) the injury was suffered as a consequence of the commission of the alleged offence.[21] In *Singh*, the court accepted the view that private prosecutions are subjected to limitations[22] and rejected the notion that the DPP is obliged to issue the certificate, once he had declined to prosecute.[23] The court in *Singh* held the view that the DPP must study the docket and consider the evidence before deciding to issue the certificate.

[23] The view expressed in *Singh* was rejected by the full court in *Nundalal.*[24] The full court held that the DPP must issue the certificate, regardless of whether the jurisdictional requirements set out in s 7(1)*(a)* of the CPA have been established. In this regard, the full court's view is also wide and inaccurate. Not every person is entitled to be issued with the certificate. The extent of the limitation is to restrict the class or category of persons entitled to request the certificate. In issuing the certificate, the DPP only has to form a *prima facie* view*, ex facie* the statements and affidavits in the docket, that the person requesting the certificate complies with the jurisdictional requirements of s 7(1) of the CPA. 'Any person' contemplated in s 7(1)*(a)*, would include a complainant. A complainant initiates criminal charges with the police against an offender or offenders; who, consequent to their unlawful conduct, inflicted injury on the complainant's person, personality or property, and has an interest in obtaining justice and/or retribution. It appears that the limitation on the words 'any person' in s 7(1)*(a)*, is designed such that it primarily, though not exclusively, refers to complainants in criminal cases.

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[21] *Singh* at 91B.
[22] Ibid at 92G-H.
[23] Ibid at 93E-F.
[24] *Nundalal* para 21.

[24] The appellant, under the rubric of jurisdictional requirements of s 7(1)*(a)* of the CPA, contended that the Acting DPP's issuing of the certificate stands to be reviewed and set aside, as in appellant's view, the private prosecutor had no *locus standi* required in s 7(1)*(a)*, and that she had no substantial and peculiar interest arising from an actual injury individually suffered. The contention stems from the text of s 7(1)*(a)*, which provides that these requirements must be proved by the person seeking to avail him/herself of the exercise of the right to institute private prosecution. The appellant, relying on *Singh,* contends that the second respondent did not prove the jurisdictional requirements. The court in *Singh* held that the DPP must consider evidence that proves that the person requesting the certificate had met the prescribed jurisdictional requirements.[25]

[25] *Singh* was incorrectly decided on this point. The DPP does not assess and evaluate evidence or hold an inquiry in issuing the certificate. All that is required of the DPP is to peruse the statements and affidavits in the docket, in order to prima facie verify that the jurisdictional requirements of s 7(1)*(a)* have been met. In reply to a letter from the appellant's counsel dated 16 February 2021, wherein she requests the DPP to furnish her with reasons for the decision not to prosecute, as stated in the certificate dated 14 October 2020, the DPP wrote:

'Your letter dated 16 February 2021 refers.

My decision to decline to prosecute was based on your representations of 2019, read in conjunction with the contents of the docket. I am therefore of the opinion that under the circumstances there are no reasonable prospects of a successful prosecution. I did not consider any affidavits that you do not already have access to.

Yours faithfully

DIRECTOR OF PUBLIC PROSECUTIONS: WESTERN CAPE.'

[26] From the DPP's letter in reply, the affidavits which were in the docket, copies of which the appellant's counsel had in his possession, which formed the basis of the DPP's decision to decline to prosecute, is made plain, as stated in the certificate of 14 October 2020. Of importance, the DPP did not consider any additional statements or affidavits, copies of which counsel for the appellant did not

[25] *Singh at* 94C-J and 95A-D.

have. Therefore, the contents of the docket were the source of the verification of the information as to the second respondent's compliance with the prerequisites for the issue of the certificate.

[27] On a proper construction of s 7(1)*(a)* of the CPA, it therefore becomes a factual inquiry, in any given case, whether a complainant meets the threshold of the jurisdictional prerequisites of that statutory provision. In this instance, the question is whether the second respondent had *locus standi* and had a substantial and peculiar interest arising from an actual injury individually suffered. These facts would be found in the statement of the complainant and those of witnesses.

[28] What 'injury' did the second respondent suffer? The appellant raised this question in the founding affidavit, to which the second respondent in her answering affidavit, stated as follows:

'12. The nature of the application [questioning the *locus standi*] is such that it seeks to challenge my title to prosecute. I am advised that such a challenge ought to be raised by way of a special plea in terms of section 106 (1)*(h)* of the Criminal Procedure Act 51 of 1977 (the CPA).[26](Footnote added.)

13. The attempt by the applicant to raise such a challenge prematurely is an attempt to obstruct the private prosecution proceedings and thus infringes unlawfully upon my constitutional rights under section 34 of the Constitution.

. . . .

33. My actions in this matter arise from the wrongful and criminal acts of the applicant, *which caused me harm*, and my actions are justified, lawful and required to correct a wrong done not only to me but to TransUnion and the State, as I explain below. I am furthermore entitled to [*exercise my right to protect my dignity and privacy* as the applicant has trampled on those rights…]

34. I instituted a criminal case against the applicant after discovering in 2013 that he had accessed my private and personal information and data held by TransUnion. Attached hereto marked ***LG1*** *is a copy of my statement to the police* dated 20 June 2024 being A1 in the police docket. . .

. . . .

[26] Section 106(1)*(h)* provides that when an accused pleads to a charge, he may plead that the prosecutor has no title to prosecute.

[132.] . . . The applicant clearly saw what was held by TransUnion regarding all my information and records regarding financial matters and details of my life that are personal and private. No reasonable person would feel safe if a person displayed the type of enmity that the applicant did in accessing my confidential records in the covert and unauthorised manner in which he did.' (Own emphasis in italics.)

[29] In *Phillips v Botha*,[27] the court stated thus:

'As can be seen from the judgment in *Attorney-General v Van der Merwe and Bomman* (supra), the nature of the peculiar interest which may affect a private prosecutor has been given a broad interpretation. The word ''injury'' can be used in a wide sense as meaning any infraction of right or wrongful act. But its ordinary meaning is injury to property or person (including bodily or physical injury or injury to rights of personality)'.

The second respondent in her affidavit accuses the appellant of having trampled on her personality rights to dignity and privacy, by accessing her confidential and personal information without her consent, and that the appellant's conduct caused her harm. In response to that allegation, the appellant raised a bare denial. Therefore, the answer to the appellant's objection is fact-based and best addressed at trial.

I conclude that there is no merit in the appellant's attack on the second respondent's alleged lack of compliance with the jurisdictional requirements in terms of s 7(1)*(a)* of the CPA.

Whether the DPP was entitled to re-issue the certificate

[30] At the written request of the second respondent's legal representative, dated 4 December 2019, the Acting DPP initially issued the certificate on 20 May 2020, which lapsed three months later in terms of s 7(2)*(c)* of the CPA. Again, at the request of the second respondent's legal representative, the Acting DPP re-issued the certificate on 14 October 2020. The re-issue of the certificate evoked the appellant's attack, which is three-fold. First, he contends that the Acting DPP had no authority to re-issue the certificate; second, that in issuing the first and the second certificates, the Acting DPP impermissibly added charges that were not part of the

[27] *Phillips v Botha* 1995 (3) SA 948 (WLD) at 962A-B.

State's case; and third, that the second respondent was wrong in applying for the certificate without first obtaining the police docket. I turn to deal with these points of attack.

[31] The appellant's counsel initially raised an inquiry on the re-issue of the certificate in a letter dated 7 December 2020, addressed to the Acting DPP. In a reply dated 25 January 2021, the Acting DPP wrote 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 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'

[32] In her answering affidavit, the second respondent sets out in detail, the chronology of the events leading to the re-issue of the certificate, the inclusion of additional charges and the delay in obtaining the docket, as evidenced by reference to the correspondence exchanged with the Acting DPP and the appellant. Briefly, the correspondence reflects that:

(a) Through her counsel, she requested both the docket and the issue of the certificate on 4 December 2019;

(b) On 20 and 21 January 2020 the Acting DPP advised that he had requested the docket and invited counsel for the second respondent to stipulate for which offences the certificate was sought;

(c) On 3 February 2020, the second respondent's attorney wrote in response to the Acting DPP, wherein he requested the following offences to be included in the certificate: contravention of s 86(1) and 86(3) of ECTA, contravention of s 68 of the National Credit Act 34 of 2005 and fraud;

(d) The Acting DPP issued the certificate on 20 May 2020, six months after it had been requested, and the second respondent's attorney received a copy of the certificate on 25 June 2020, about five weeks after it was issued, with no docket; and

(e) The Acting DPP referred the attorney to the police to obtain the docket, a certified copy of which the second respondent's attorney received on 25 August 2020, from one Captain Kotze of the South African Police Service.

[33] The second respondent further alleged in her answering affidavit, that it was after receipt of the docket that she and her legal representatives were able to secure a re-issue of the certificate to prepare the summons. She states, in her affidavit, that the delay in receiving the docket and the certificate was caused by the fact that the country was under restrictions imposed by government, as part of regulating the containment of the spread of the COVID-19 pandemic. 'Both Captain Kotze and the DPP's office staff were still working irregular hours and alternate days or weeks.' The appellant could not provide any evidence to gainsay or rebut this version.

[34] The appellant contends that having issued the certificate on 20 May 2020, the Acting DPP was *functus officio* and thus had no authority to re-issue the certificate on 14 October 2020. But the appellant conflates the right to institute private prosecution and the lapse of the certificate. The certificate lapses three months from the date of its issue. The right to institute private prosecution in respect of an offence, except for the offences referred to in s 18 of the CPA, or unless some other period is expressly provided by law, only lapses, or prescribes 20 years from the time the offence was committed. The DPP may thus re-issue the certificate even in instances where the private prosecutor requests to include additional charges from the same statements and affidavits in the docket, which the State had initially not contemplated. There is an important caveat: Section 13 of the CPA empowers the DPP or a local prosecutor acting on his instructions, with leave of the court, to intervene in a pending or continuing private prosecution proceedings, to take over and continue the prosecution in the name of the State. In addition, s 22(2)*(c)* read

with s 23 of the National Prosecution Authority Act 32 of 1998 (NPA Act), empowers the DPP to review a decision to prosecute, or not to prosecute. Therefore, the DPP, even during a private prosecution, remains seized with the power or authority to intervene. Therefore, at no stage during the private prosecution can he/she be considered *functus officio*, as contended by the appellant.

[35] The appellant contends that it was impermissible for the Acting DPP to include additional charges in the re-issued certificate. The appellant could not refer this Court to any authority on which this submission is founded. The second respondent, in the answering affidavit, states that additional charges of fraud and defeating the administration of justice, are based on the appellant's conduct during the investigation of the offence he is charged with. The appellant gave different responses as to why he accessed the confidential credit records of the second respondent. First, he denied having accessed the data. Second, he completed an electronic field confirming that he had the second respondent's consent to initiate the credit search. On 16 September 2013, TransUnion requested him to supply proof that he had the second respondent's consent. He promised to do so but failed to supply such proof. Third, he revised his version and told TransUnion that the second respondent was his client, which was not true. When pushed for proof, he relied on attorney and client privilege, which did not exist, as the second respondent was not his client.

[36] Fourth, the appellant again changed his version and claimed that he was 'just trying out the system' and the second respondent's name was the first which came to mind. Fifth, thereafter he commented to the press that he had merely performed a credit check. He went further to make a conditional apology, admitting the unlawful conduct in the following terms:

'1. I admit that on 28 May 2012 I accessed your personal information without your consent.

2. I understand and accept that my conduct was distressing, offensive and wrongful to you, though I hasten to assure you that was not my intention, and I am truly and sincerely contrite and apologise unreservedly. . .

. . . .

6. For the sake of clarity and avoidance of doubt, I should state that I am not guilty of contravening Section 86(1) read with Sections 1, 3 and 89 of Act 25 of 2002 and nothing contained in this apology should be construed as an admission of guilt. . .'

The second respondent rejected this unsigned letter of apology.

[37] The appellant was initially charged by the State with one count of contravention of s 86(1) read with ss 1, 3 and 89 of Act 25 of 2002, unauthorised access to, interception of or interference with data. As a result of the appellant's conduct stated in the preceding paragraphs of this judgment, the second respondent requested the DPP to include the following additional charges:

(a) One count of fraud, for the act of accessing the information on TransUnion, on the basis of misrepresentations;

(b) One count of defeating or obstructing the administration of justice, due to the appellant's responses to the TransUnion investigators;

(c) Three counts of contravening the ECTA for accessing private information without permission, unlawfully overcoming security measures and unauthorised use of data.

There is no merit in the appellant's contention that it was impermissible for the Acting DPP to include additional charges in the certificate.

[38] The submission made by appellant's counsel that the second respondent should have first applied for and received the docket before obtaining the certificate has no merit. There is no prescribed procedure regulating the order of dealing with the request and issue of the certificate. Therefore, nothing further need be said on this submission.

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

[39] The relief sought by the appellant in Part B, a declarator and an interdict, is a rehash of the grounds of appeal already dealt with in Part A. In support of the relief sought in Part B, the appellant repeats the attack on the alleged non-compliance by

the second respondent, with the jurisdictional requirements of s 7(1)*(a)* of the CPA. The appellant repeats the allegations that the second respondent is unsuited, because she does not have *locus standi*, lacks substantial and peculiar interest arising from an actual injury that she individually suffered, to institute private prosecution. For reasons stated in Part A, these contentions have no merit.

[40] In addition, the appellant submits, with reference to the Acting DPP's decision in declining to prosecute, that the private prosecution has no prospects of success. That is the Acting DPP's opinion, which, clearly, the legal representatives of the second respondent do not agree with. This Court will refrain from speculating on the prospects of success, concerning a matter that may be the subject of adjudication by a trial court. The appellant's argument that the private prosecution amounts to 'an indulgence of a vindictive, affluent individual' and is 'against public policy,' ignores the history of the acrimonious relationship he had with the second respondent. If anything, this private prosecution presents an opportunity to bring the disputes between them to finality. It would also be in the public interest that this ongoing spectacle be finally resolved. I conclude, therefore, that the appellant did not present to this Court any right that falls to be declared and therefore this is not a case where relief in the form of a declarator is warranted.

[41] The further relief sought by the appellant in the form of an interdict, is grounded on the notion that the second respondent's private prosecution is vexatious. It is trite that for a party to succeed in obtaining an order for a final interdict, it must prove (a) a clear right; (b) an imminent injury to that right and (c) absence of an alternative remedy. The appellant's case comes nowhere close to establishing these requirements. When the DPP declined to prosecute, following the appellant's representation, the appellant wrote to the second respondent's legal representative as follows:

'Nick,

The Director of Public Prosecutions declines to prosecute me. He announced his decision to my counsel, Advocate A Du Toit, in a letter dated 8 November, which I attach. I expect you to consider it if your sad client instructs you to make statements about me in public again.

Regards,

David N Polovin'

When informed that the DPP's decision had been referred to the second respondent for her further instructions, the appellant wrote again the same day thus:

'Good. Now that her abuse of the public resource has been ended, we'll find out whether she's willing to waste her own money on her nasty vendetta'.

[42] By conducting himself in this manner, the appellant issued a provocative challenge, which, it appears the second respondent accepted. Having done that, the appellant now calls on the courts' protection by way of a declarator and an interdict, intending to stop the private prosecution. The appellant as an attorney, should have known better than to conduct himself in this manner. He has failed, on the evidence, to demonstrate that his rights are in anyway facing imminent threat or are being assailed.

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

'(1) Where in a private prosecution, other than a prosecution contemplated in section 8, the charge against the accused is dismissed or the accused is acquitted or a decision in favour of the accused is given on appeal, the court dismissing the charge or acquitting the accused or deciding in favour of the accused on appeal, may order the private prosecutor to pay to such accused the whole or any part of the costs and expenses incurred in connection with the prosecution or, as the case may be, the appeal.

(2) Where the court is of the opinion that a private prosecution was unfounded and vexatious, it shall award to the accused at his request such costs and expenses incurred in connection with the prosecution, as it may deem fit.'

[44] The appellant thus has alternative remedies at his disposal, that he can employ, should it be necessary. Apart from the opportunity to vindicate his professed innocence at trial, the appellant is adequately protected by the risk entailed in instituting a private prosecution. In instituting the private prosecution, the second respondent assumed the risk of being mulcted with punitive costs and compensatory

orders, in the event her private prosecution is found by the trial court to be unfounded and vexatious. In weighing up the scale of balance between the two rights, i.e. the appellant's right not to be subjected to unfounded and vexatious private prosecution, against the right of the second respondent, to have her dispute resolved by application of the law and decided in a fair public hearing before a court, as provided for in s 34 of the Constitution, the scale tilts in her favour.

[45] I 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*[28] and *Moyo and Another v Minister of Police and Others*,[29] 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.'[30] (Own emphasis.)

[46] The following order shall issue:

1 The application for leave to appeal is granted.

2 The appeal is dismissed with costs.

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S P MOTHLE

JUDGE OF APPEAL

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[28] *Thint (Pty) Ltd v National Director of Public Prosecutions and Others; Zuma and Another v National Director of Public Prosecutions and Others* [2008] ZACC 13; 2009 (1) SA 1 (CC); 2008 (2) SACR 421 (CC); 2008 (12) BCLR 1197 (CC) para 65.

[29] *Moyo and Another v Minister of Police and Others*; *Sonti and Another v Minister of Police and Others* [2019] ZACC 40; 2020 BCLR 91 (CC); 2020 (1) SACR 373 (CC).

[30] *President v Zuma* para 82.

Appearances

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For the 2nd respondent:	S P Rosenberg SC with B Prinsloo
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