

SOUTH AFRICA / JUDGMENT

Barclays Zimbabwe Nominees (Pvt) Ltd. v Black (2438/88) [1990] ZASCA 92; 1990 (4) SA 720 (AD); [1990] 2 All SA 576 (A) (14 September 1990)

[1990] ZASCA 92**COURT**

Supreme Court of Appeal

BEFORE

Botha, Milne, F H Grosskopf, Friedman, Nienaber

CASE / FILE NUMBER

2438/88

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Source record**Case No 186/89/wlb****SUPREME COURT OF SOUTH AFRICA APPELLATE DIVISION**

In the appeal between:

BARCLAYS ZIMBABWE NOMINEES (PRIVATE)
LIMITED Appellant and CHARLES JONATHAN BLACK Respondent
CORAM
: BOTHA, MILNE, F H GROSSKOPF JJA et FRIEDMAN, NIENABER
AJJA
Date of Hearing: 30 August 1990
Date of Judgment: 14 September 1990

JUDGMENT

MILNE JA/

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MILNE JA:

The question for decision in this case is whether a company is entitled to bring a private prosecution. It arose in the following circumstances. The Attorney-General for the Witwatersrand Local Division declined to prosecute the respondent on certain charges of fraud and perjury and issued a certificate to that effect in terms of section 7(2)(a) of the Criminal Procedure Act, No 51 of

1977. The appellant, a company incorporated in Zimbabwe, then purported to institute a prosecution against the respondent on such charges in the Regional Court in terms of section 7(1)(a) of that Act. The respondent gave due notice of his intention to plead, in terms of section 106(1)(h), that the appellant had no title to prosecute. This plea was based on the contention that the appellant, being a company, was not a "private person" within the meaning of

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section 7(1)(a). The Regional Magistrate dismissed the plea without giving any reasons. The trial then proceeded and the respondent was convicted of fraud. He appealed to the Witwatersrand Local Division against his conviction on the ground that the magistrate had wrongly dismissed the plea that the appellant had no title to prosecute, and on the further ground that the evidence in any event failed to establish his guilt. The court a quo upheld the plea. Smit J also held that, in any event, the guilt of the respondent had not been proved. Schabert J however declined to express a view on the merits of the conviction because the issue had not been canvassed in argument. Leave to appeal was granted by the court a quo on the question of whether the appellant had, in law, title to prosecute.

Section 7(1) is in the following terms:

"In any case in which an attorney-general declines-3-

to prosecute for an alleged offence -

- (a) any private person who proves some substantial and peculiar interest in the issue of the trial arising out of some injury which he individually suffered in consequence of the commission of the said offence; (b) a husband, if the offence was committed in respect of his wife; (c) the wife or child, or if there is no wife or child, any of the next of kin of any deceased person, if the death of such person is alleged to have been caused by the said offence; or (d) the legal guardian or curator of a minor or lunatic, if the said offence was committed against his ward,

may, subject to the provisions of section 9 , either in person or by a legal representative, institute and conduct a prosecution in respect of such an offence in any court competent to try that offence."

The Afrikaans version, which is the signed

version, reads as follows:

"In 'n geval waar 'n prokureur-generaal weier om

weens 'n beweerde misdryf te vervolg, kan -

- (a) 'n private persoon wat by die geskil in

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die verhoor 'n wesenlike en besondere belang bewys wat uit benadeling ontstaan wat hy persoonlik ten gevolge van die pleging van bedoelde misdryf gely het;

(b) h eggenoot, indien bedoelde misdryf ten opsigte van sy eggenote gepleeg is; (c) die eggenote of kind of, indien daar geen eggenote of kind is nie, 'n

naasbestaande van 'n oorledene, indien die oorledene se dood na bewering deur bedoelde misdryf veroorsaak is; of

(d) die wettige voog of kurator van 'n

minderjarige of kranksinnige, indien bedoelde misdryf teen sy pupil gepleeg is,

behoudens die bepalinge van artikel 9, hetsy persoonlik of deur 'n regsverteenwoordiger, 'n

vervolgling ten opsigte van so 'n misdryf instel en voortsit in 'n hof wat bevoeg is om daardie misdryf te bereg."

Mr Rubens for the appellant submitted that: (a) In terms of section 2(b) of the Interpretation Act No 33 of 1957, the word "person" in section 7(1)(a) of the Criminal Procedure Act must ' be construed as including "any company

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incorporated or registered as such under any law" unless the context "otherwise requires" or unless it was "otherwise provided".

(b) The context does not "otherwise" require nor is there anything in the Criminal Procedure Act to indicate that the provisions of the Interpretation Act do not apply to it nor that the definition of "person" does not apply.

(c) There is no good reason in principle why a company should not be able to conduct a private prosecution.

This is an attractive argument but an analysis of the provisions of the Criminal Procedure Act satisfies me that it cannot succeed.

I assume in favour of the appellant that, although-6-

it was incorporated in Rhodesia (now Zimbabwe) and there is nothing to indicate that it has been registered as an "external company" in the Republic in terms of the Companies Act, it is "a company incorporated ... as such under any law" in terms of section 2 of the Interpretation Act.

In elaborating his submissions summarized in para (b) above, Mr Rubens submitted that the legislature used the word "private" in section 7(1)(a) solely to distinguish it from a public or official prosecution. There is no definition of the word "private" in the Criminal Procedure Act or in the Interpretation Act. Counsel for the appellant submitted that there was no significance in the use of the phrase "private person" other than to contrast such a person with a person holding public office or an official person. Indeed the Oxford Dictionary (2nd ed) Vol XII at p 515 defines

"private", in the context "of a person", as "not

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holding public office or official position." Curiously enough, however, a number of the illustrations provided by the learned editors of the use of the words in this sense and, in particular those from 1930 onwards, refer to "private man" or "private individuals" as if "private persons" were synonymous with them. Definition 7a at p 518 moreover defines "private" as "of, pertaining or relating to, or affecting a person, of a small intimate body or group of persons apart from the general community; individual, personal." (My underlining). Quite apart from these considerations one must obviously read section 7(1)(a) as a whole. It is not any private person who may prosecute but only one 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." The words "substantial and peculiar interest" make it quite clear that no official person in his

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capacity as such could prosecute under section 7(1). In *Attorney-General v Van der Merwe & Bornman* 1946 OPD 197 at

201 Van den Heever J said

"I do not think, therefore, that the expression 'substantial and peculiar interest' [in section 14 of Act 31 of 1917 which is equivalent to section 7(1) of the present Criminal Procedure Act] was intended -as Mr Lutge suggested - to convey only a pecuniary interest in respect of which the prosecutor may obtain compensation or restitution. The object of the phrase was clearly to prevent private persons from arrogating to themselves the functions of a public prosecutor and prosecuting in respect of offences which do not affect them in any different degree than any other member of the public; to curb, in other words, the activities of those who would otherwise constitute themselves public busybodies."

The word "private" in the phrase "private persons" is not there to prevent officials such as a public prosecutor from using its provisions. That a public prosecutor would seek to do so seems, in any event, in the highest degree unlikely bearing in mind that in terms of section 4 of the Criminal Procedure Act all prosecutors derive their authority to

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prosecute from the Attorney-General and we are, ex hypothesi, considering a situation where the Attorney-General has issued a certificate to the effect 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. The word "private" in the phrase "any private person" is, therefore, not used to differentiate the persons there referred to from officials. As already mentioned the word "private" is perfectly capable of designating an "individual" and one of the meanings of that word is "a single human being" - OXFORD DICTIONARY (2nd ed) Vol VII p 880 meaning 3a.

There are furthermore even more potent pointers to the fact that the legislature intended to refer only to natural persons in section 7(1)(a). The section refers to an injury which "he individually suffered". The Afrikaans

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version, "wat hy persoonlik gely het", is the signed version. I agree with Smit J's remark in the judgment a quo

that this "...is language peculiarly apposite in the case of natural persons" and, I might add, wholly inappropriate to describe "benadeling" to a company. One of the meanings of the word "individually" is "personally" - OXFORD DICTIONARY supra at p 881 meaning 3. If one reads

"individually" as meaning "personally" then the meaning of

the English text accords exactly with the meaning of the Afrikaans text. In my view the Afrikaans text is referring unambiguously to a private individual, but if I am wrong

"... a reference to the other text is permissible whenever the text under consideration is ambiguous. The Legislature obviously intends both versions to have exactly the same meaning and that intention is carried out if the ambiguity in one text is resolved by reference to the unambiguous words in the other text."

per Hoexter JA in *Peter v Peter & Others* 1959(2) SA 347 (A)

at 350D. A further pointer to the intention of the

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legislature, although it is a minor one, is the use of the word "he" in the phrase "which he individually suffered". The use of the word "hy" is perfectly permissible in Afrikaans with reference to a company but it is certainly not permissible usage to speak in English of an injury which "he suffered" when referring to a company.

Mr Rubens sought to rely upon the remarks of Watermeyer CJ in *Vanderbiil Park Health Committee & Others v Wilson & Others* 1950(1) SA 447 (A) at 468, where he said that there was no compelling reason why the word "individually" should be interpreted as referring only to natural persons. The section under consideration in that case is clearly distinguishable. The court was there considering the provisions of section 36(1) of the Liquor Act, No 30 of 1928, which provided that

"... any person ordinarily resident within the-12-

district either individually or jointly with other persons so resident, and any local authority within the district may lodge ... a written objection to any application to be considered

The equivalent words of the Afrikaans version were

"... mag iemand wat gewoonlik in die distrik woon, hetsy alleen of gesamentlik met ander sodanige inwoners en enige plaaslike bestuur in die distrik ... h beswaarskrif indien teen h aanvraag ...".

There are two clear points of distinction. In the first place we are not here concerned with a situation where the

statute simply refers to a "person". The word "person" does not stand alone. It is necessarily qualified by the word which immediately precedes it. What we have to decide is what was meant by the words "private person" in the context of section 7. The second point of distinction is this. In

the Vanderbiil Park case the English version, which was the

signed version, referred to an objection "either

individually or jointly with other persons so resident" and

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there was nothing in the Afrikaans version which conveyed any notion to the contrary, the word "individually" being translated by the word "alleen". Furthermore, section 7(1) provides that any person referred to in (a), (b), (c) or

(d) may institute and conduct a prosecution "... either in person or by a legal representative" and it would, I think, be straining language to speak of a company instituting and conducting a prosecution "in person".

There are other difficulties in applying the definition of "person" in section 2 of the Interpretation Act to section 7(1)(a) of the Criminal Procedure Act. In fact Mr Rubens conceded that the use of the word "private" in the phrase "private person" precluded the inclusion of the classes of persons referred to in sub-para (a) of the definition of "person" in the Interpretation Act, namely "any divisional council, municipal council, management

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board, or like authority". That does not of course mean that the remainder of the definition cannot be applied. *Durban Turf Club v Commissioner for Inland Revenue* 1949(3) SA 484 (A) at 491. If, however, one applies to section 7(1)(a) only that part of the definition of the word "person" which includes a company, the section will then read "any private person including any company incorporated or registered as such under any law, who proves" etc. Quite apart from the linguistic awkwardness of using the pronoun "who" to refer to a company, the question would then arise as to whether the word "private" also governs company. *Prima facie* it would, in which case the section would apply only to private companies. This would create an anomaly since there would seem to be no reason in principle why a private company should be able to prosecute and a public company should not.

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I am accordingly satisfied that the context of the section itself requires that the words "private person" should be interpreted as meaning only a natural person.

Nor does the wider context of the Act read as a whole contain any indication that the legislature intended that those words should include an artificial person such as a company. The only other sections in which the words "private person" occur are sections 42 and 47 of the Criminal Procedure Act, and it was rightly conceded that the context makes it clear that the private persons referred to should be interpreted as referring only to natural persons. In fact such indications as there are in the Criminal Procedure Act other than section 7 itself are against the appellant's contention. For example, section 8(1) provide that:

"Any body upon which or person upon whom the right-16-

to prosecute in respect of any offence is expressly conferred by law, may institute and conduct a prosecution in respect of such offence in any court competent to try such an offence."

Sub-section (2) similarly distinguishes between "a body which" or "a person who".

It seems clear that the reference in section 8(1)

to "any person upon whom" and in section 8(2) to "a person who" is to natural persons and a clear distinction is drawn in those sub-sections between natural persons and "any body". If the appellant is correct in saying that the word "person" includes a company and, in sections other than section 7 also the other bodies referred to in section 2 of the Interpretation Act, why, one may ask, did sections 8(1) and 8(2) not simply refer to "any person"?

Some guidance may also be obtained from-17-

section 10(2) of the Criminal Procedure Act which provides that

"The indictment, charge sheet or summons, as the case may be, shall describe the private prosecutor with certainty and shall, except in the case of a body referred to in section 8, be signed by such prosecutor or his legal representative."

The use of the pronoun "his" again suggests a natural person. The only exception made to the requirement that the charge is to be signed is "in the case of a body referred to in section 8". One may speculate as to why it was thought necessary in the case of a prosecution by a body referred to in section 8 to exempt it from the necessity to have the charge signed by it or its legal representative. Whatever the reason may be, why, if the legislature intended a company to be able to prosecute privately, was a company also not similarly exempted?

Reliance was sought to be placed by the

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appellant's counsel upon the provisions of section 10(3). This provides that "two or more persons shall not prosecute in the same charge except where two or more persons had been injured by the same offence." It was argued on behalf of the appellant that this provision contained an indication that when the legislature referred to a person in section 7(1) it intended to refer to both natural and artificial persons. The argument, as I understood it, proceeds thus: section 10(3) clearly qualifies sections 7 and 8; "person" in section 8 includes both natural and artificial persons; "persons" in section 10(3) must therefore include both natural and artificial persons; it is unlikely that the legislature would have intended that the word "person" in section 7 should have a different meaning from the word "persons" in section 10(3).. There are several fallacies in this argument. In the first place there is no difficulty in construing section 7 so as to

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refer only to natural persons, section 8 as referring to a body or a natural person upon whom a right to prosecute is expressly conferred by law and section 10(3) as referring to both such bodies and natural persons. Secondly, I think it is clear from the context of section 8(1) that when it refers to a person it is referring only to a natural person.

Reliance was also sought to be placed upon the

provisions of section 426 of the Companies Act, No 61 of 1973. Sub-section (1) of this section provides that

"If it appears in the course of the winding-up of a company and any past or present director, member or officer of the company has been guilty of an offence for which he is criminally liable under this Act or, in relation to the company or the creditors of the company, under the common law the liquidator shall cause all the facts known to him which appear to constitute the offence to be laid before the Attorney-General concerned and, if the said Attorney-General certifies that he declines to prosecute, the liquidator may, subject to the provisions of sections 386(3) and (4), institute and conduct a private prosecution in respect of

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such offence." It was submitted that there was no reason why a liquidator "who ordinarily exercises powers which formally resided in the directors, should be empowered to institute a private prosecution which the directors themselves could not institute on behalf of the company prior to its winding-up." This submission is too widely stated. In respect of certain of their statutory powers liquidators do not stand in the place of the company. See *Visser en h Ander v Rousseau en Andere* N NO 1990(1) SA 139 (A) at 159G. While it may be correct to say that when a liquidator performs the functions of the former board of directors, his acts are the acts of the company (as stated in *AMS Marketing Co (Pty) Ltd v Holtzman & Ano* 1983(3) SA 263 (W) at 269H), it is clear that he also has certain duties to the creditors which the board of directors would not have had before liquidation. It may be that the legislature considered that, as a matter of

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policy, the liquidator should be given powers to act in their interest, including the right of private prosecution (even of members of the board), which the board would not have had.

Finally, in considering the interpretation of

section 7(1) it is clear that one has to consider the object as well as the context of the enactment. See the *DurbanTurf Club* case *supra* cit at 491. In this regard I refer again to the judgment of Van den Heever J in *Attorney-General v Van der Merwe & Bornman* *supra* cit immediately after the passage quoted above, where he went on to say

"The interest the legislature had in mind may be pecuniary, but may also be such that it cannot sound in money - such imponderable interests, for example, as the chastity and reputation of a daughter or ward, the inviolability of one's person or the persons of those dear to us. 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

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and a private prosecution affords a way of vindicating those imponderable interests other than the violent and crude one of shooting the offender."

A corporate body as such has no human passions and there can

be no question of the company, as such, resorting to violence. It was submitted, however, that the temptation to resort to self-help "is not diminished by the fact that the

loss sustained relates to a share-holding rather than to

some other form of asset." If, however, section 7(1)(a) were to be read as including a company then it would only be an injury suffered by the company as such which could give rise to a private prosecution and not an injury suffered by an individual shareholder or group of shareholders. These would not necessarily coincide.

The general policy of the legislature is that all prosecutions are to be public prosecutions in the name and

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on behalf of the State. See sections 2 and 3 of the Criminal Procedure Act. The exceptions are firstly where a law expressly confers a right of private prosecution upon a particular body or person (these bodies and persons being referred to in section 8(2)) and secondly, those persons referred to in section

7. There may well be sound reasons of policy for confining the right of private prosecution to natural persons as opposed to companies, close corporations and voluntary associations such as, for example, political parties or clubs.

In view of this conclusion it is not necessary to deal with the merits of the conviction.

The appeal is accordingly dismissed with costs.

A J MILNE BOTHA JA]

NIENABER AJA]

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