

**NSPCA HAS STATUTORY POWER TO  
INSTITUTE PRIVATE PROSECUTIONS – A  
TRIUMPH FOR ANIMALS AND HUMAN  
MORALITY**

***National Society for the Prevention of Cruelty to  
Animals v Minister of Justice and Constitutional  
Development [2016] ZACC 46***

## **1 Introduction**

In this case note, the decision of the Constitutional Court in *National Society for the Prevention of Cruelty to Animals v Minister of Justice and Constitutional Development* ([2016] ZACC 46) will be discussed, where it was held that the National Society for the Prevention of Cruelty to Animals (NSPCA) has the statutory power of private prosecution conferred upon it by section 6(2)(e) of the Societies for the Prevention of Cruelty to Animals Act 169 of 1993 (SPCA Act) read with section 8 of the Criminal Procedure Act 51 of 1977 (CPA) (par 65). From the ancient Khoisan reverence of the eland to the contemporary conception of the dog as “man’s best friend”, humans and animals have a storied relationship, one that is a part of the fabric of our society, homes and lives (par 1). Animals have shifted from being “mere brutes or beasts” to “fellow beasts, fellow mortals or fellow creatures” and finally to “companions, friends and brothers” (Thomas *Man and the Natural World* (1984) 172; Animal Rights Articles, *Moo-ving People toward Compassionate Living, What Rights Do Animals Have?* February 2017 <http://www.all-creatures.org/articles/ar-whatrights.html>). Many animal activists and animal anti-cruelty supporters argue that animals just as human beings deserve to live their lives free from violence, suffering and exploitation (McAnearney “Rights for all [animal] beings?” 2008 *Without Prejudice* 8). It is essential that individuals or organisations intervene where necessary to protect these voiceless companions when they are mistreated. Many organisations and societies that exist around the world, similar to the NSPCA work hard to defend the welfare of animals (par 1). These organisations have for many years been the champion of the norm that we do not accept acts of cruelty against those who cannot defend themselves (par 1).

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## 2 Facts

The applicant is the NSPCA, a body empowered to prevent animal cruelty and promote animal welfare. It is established in terms of section 2(1) of the SPCA Act (par 3). The first respondent is the Minister of Justice and Constitutional Development (hereinafter “the Minister”) cited in his official capacity as the Minister responsible for administering the CPA. The second respondent is the National Director of Public Prosecutions (hereinafter “the National Director”), cited in his representative capacity as the head of the National Prosecuting Authority (NPA). The *amicus curiae* is Corruption Watch, an independent, non-profit civil society organisation with no political or business affiliation (par 3). During November 2010 the NSPCA, was made aware of a religious ritual involving a slaughtering of two camels as a sacrifice by a group of Islamic worshippers in Lenasia (*National Society for the Prevention of Cruelty to Animals v Minister of Justice and Constitutional Development* (20781/2014) [2015] ZASCA 206 (par 7 of the SCA judgment)). In compliance with the NSPCA’s statutory obligations, NSPCA inspectors visited the site and witnessed the alleged cruel and inhumane treatment of the animals (par 7 of the SCA judgment). The sacrifice involved eight attempts to “slice open” one of the camel’s throats until the slit was deep enough for the animal to bleed out; the other camel’s throat was slit three times. In order to prevent the animal from suffering further pain, and “in an act of compassion”, one of the inspectors shot the camel to relieve it of its misery (par 4). The NSPCA inspectors were of the opinion that the treatment of the camels by certain of the worshippers constituted an offence in terms of The Animals Protection Act 71 of 1962 (APA) and the NSPCA accordingly referred the matter to the NPA (par 5). The NSPCA contends that it furnished overwhelming evidence to the prosecutors, but the NPA nevertheless declined to prosecute (par 6). Subsequently, the NSPCA sought to institute a private prosecution. The NSPCA applied for a certificate *nolle prosequi* (refusal to prosecute) in terms of section 7(1)(a) of the CPA. This certificate is required for a “private person” to institute a private prosecution (par 6). In a letter dated 7 June 2012, the NPA refused to issue the certificate. The letter stated that the NSPCA could not prosecute under section 7(1)(a) of the CPA as it is a juristic person and not a natural person, as required by the section (par 7). It asserted that neither section 6(2)(e) nor section 9(2)(i) of the SPCA Act confers the right to privately prosecute, and even if the SPCA Act did confer the right to privately prosecute on the NSPCA, this would be in terms of section 8 and not section 7(1)(a) of the CPA (par 7). On 21 June 2012, the NSPCA requested an internal review of that decision. On 6 November 2012, the NPA responded by stating that it remained unconvinced that there were any reasonable prospects of a successful prosecution (par 8). The letter also reiterated that, in the NPA’s opinion, the NSPCA does not meet the requirements in section 7(1)(a) for private prosecution (par 8). The NSPCA then instituted proceedings in the High Court in May 2013, challenging its exclusion from the power to privately prosecute in terms of section 7(1)(a) of the CPA (par 9). In its founding papers, the NSPCA explained that the inability to privately prosecute renders it unable to fulfil its statutory mandate (par 9).

## 2 1 *History of the litigation*

### The High Court

In the High Court, the NSPCA challenged the constitutionality of section 7(1)(a) of the CPA (the impugned provision). The NSPCA contended that there is no rational basis for treating juristic persons differently to natural persons (par 4 of the High Court judgment). The learned Fourie, J in the High Court summarised the NSPCA's argument as follows:

"The constitutional challenge to this section is premised on the lack of any apparent basis for treating juristic persons differently to natural persons with the consequent result that juristic persons do not, for all intents and purposes, enjoy the equal protection of the law, nor do juristic persons get the equal benefit of the law. The differentiation consequently fails to serve a legitimate government purpose and is therefore irrational and unconstitutional" (par 4 of the High Court judgment).

The Minister and National Director did not oppose the applications, instead they filed explanatory affidavits. The Minister and National Director contended that the NPSCA lacked sufficient legal standing. This was according to the applicants because the impugned provision does not affect the NSPCA as it operates in the public interest rather than a private interest (par 11). In the Minister's explanatory affidavit to the High Court, he submitted that the objects of the NSPCA operate for the benefit of the public and that the NSPCA should, therefore, look to section 8 of the CPA for the power to privately prosecute. In a corresponding affidavit, the National Director similarly argued that "[t]he relevant section for [the NSPCA's] purposes is section 8 of [the CPA]" (par 11). The NSPCA in their reply stated that it did not consider itself to have the power to institute private prosecutions and therefore could not rely on section 8 to assist its cause in seeking to prosecute animal cruelty offences (par 12).

Fourie J held that in terms of sections 7 and 8 of the CPA, only natural persons and public bodies have the power to privately prosecute (par 15 of the High Court judgment; see also *Barclays Zimbabwe Nominees (Pvt) Ltd v Black* 1990 (4) SA 720 (A) where the court held (726H) that:

"The general policy of the Legislature is that all prosecutions are to be public prosecutions in the name and on behalf of the State. See ss (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 s 8(2)) and, secondly, those persons referred to in s 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".

According to Fourie J, this is necessary to strictly control the right of private prosecution in terms of both section 7 and section 8 of the CPA, to ensure proper statutory control, to achieve criminal justice and to comply with the constitutional imperative as far as a single NPA is concerned. In *Democratic Alliance v President of the Republic of South Africa* (2013 (1) SA 248 (CC)) Yacoob, ADCJ (267) stated that:

“The final reason revolves around the importance of this portfolio in the context of our democracy. It is true that the functions of the National Director are not judicial in character. Yet, the determination of prosecution policy, the decision whether or not to prosecute and the duty to ensure that prosecution policy is complied with are, as I have said earlier, fundamental to our democracy. The office must be non-political and non-partisan and is closely related to the function of the judiciary broadly to achieve justice and is located at the core of delivering criminal justice.”

Fourie J concluded that the exclusion of juristic persons amounts to discrimination (par 25–28 of the High Court judgment). However, Fourie J held that this discrimination is not unfair because it serves a legitimate government purpose, underpinned by a “rational relationship between this purpose and the differentiation” (par 28 of the High Court judgment). Fourie J, therefore, upheld the validity of the provision (par 13).

The High Court did briefly consider the applicability of section 8 of the CPA. It postulated that the legal policy behind the provision was to allow public bodies to prosecute in the public interest (par 29 of the High Court judgment). Therefore, the NSPCA could be classified as a section 8 body. However, it found that section 6(2)(e) of the SPCA Act does not confer the right of private prosecution on the NSPCA (par 14). The Court added that “[i]f such a right were to be conferred upon the applicant, it would enable the applicant to more effectively execute its functions” (par 29 of the High Court judgment).

## The SCA

Saldulker JA (Maya DP, Petse and Mbha JJA and Van Der Merwe AJA concurring) in the Supreme Court of Appeal (SCA) summarised the NSPCA’s argument on appeal as follows:

“There is no good reason for differentiating between [natural persons and juristic persons in context of section 7(1)(a)]. As a result, the differentiation fails to serve a legitimate government purpose and is therefore irrational and non-compliant with the rule of law as an articulated standard in section 1(c) of the Constitution. [It also] fails to render both natural and juristic persons equal before the law and specifically denies juristic persons equal benefit of the law rendering the impugned provision non-compliant with the articulated standard in section 9(1) of the Constitution”(par 18).

Saldulker JA stated that the rule of law is a founding value entrenched in section 1(c) of the Constitution of the Republic of South Africa, 1996 (hereinafter “the Constitution”). It encapsulates the principle of legality and the requirement that the exercise of public power may not be arbitrary but must be rationally connected to a legitimate governmental purpose (par 14 of the SCA judgment; see also *Pharmaceutical Manufacturers Association of SA: In re ex parte President of the RSA* 2000 (2) SA 674 (CC) (par 85–86) where the Constitutional Court described the nature of the rationality principle; *New National Party of South Africa v Government of the Republic of South Africa* 1999 (3) SA 191 (CC) par 24).

Saldulker JA stated that for purposes of this enquiry if the differentiation

inherent in section 7(1)(a) of the CPA fails to serve a legitimate governmental purpose then the differentiation is irrational and falls foul of the rule of law (par 14–15 of the SCA judgment). In *Prinsloo v Van der Linde* ([1997] ZACC 5; 1997 (3) SA 1012 (CC) (par 25)) it was held that when Parliament enacts legislation that differentiates between groups or individuals it is required to act in a rational manner. The court said:

“In regard to mere differentiation the constitutional State is expected to act in a rational manner. It should not regulate in an arbitrary manner or manifest ‘naked preferences’ that serve no legitimate governmental purpose, for that would be inconsistent with the rule of law and the fundamental premises of the constitutional State ...” (par 25 of the judgment; see also *Glenister v President of RSA* 2011(3) SA 347 par 55; *New National Party of South Africa v Government of the Republic of South Africa supra*).

Saldulker JA stated that provisions of section 9(1) of the Constitution applied to juristic persons as well as to natural persons (par 16–18 of the SCA judgment). In *Weare v Ndebele NO* (2009 (1) SA 600 (CC)) after accepting the High Court’s finding that section 9(1) can be applied to juristic persons, the court considered whether differentiating between natural persons on the one hand and juristic persons on the other was rationally connected to the legitimate aim by government of regulating gambling. The court held that the legislation that differentiated between classes of persons was considered not to violate section 9(1) of the Constitution if it was rationally linked to the achievement of a legitimate government purpose (par 46 of the judgment).

Saldulker JA held that the decision of the NPA, which is a prerequisite for a private prosecution in terms of section 7(1) of the CPA, must be made for a good reason. Against this background, the conclusion that private prosecutions should be limited to exceptional cases, cannot be faulted. The exceptions are those found in subsections 7(1) and 8 of the CPA (par 25 of the SCA judgment).

The SCA held that “[t]he effect of section 7(1) of the CPA is to permit private prosecutions only where private and personal interests are at stake”. (par 28 of the SCA judgment; see also *Attorney General v Van Der Merwe and Bowman* 1946 OPD 197 201; *Barclays Zimbabwe Nominees (Pvt) Limited v Black supra* 724). The SCA held further that in the final analysis, private prosecutions in terms of section 7 of the CPA are only permitted on grounds of direct infringement of human dignity (par 28 of the SCA judgment). This, according to the court is the reason for section 7(1)(a) of the CPA and for the exclusion of juristic persons other than those mentioned in section 8 from instituting private prosecutions (par 28 of the SCA judgment). The SCA held that human dignity is a foundational value of our Constitution and that to allow for private prosecutions other than in terms of section 8 of the CPA only on grounds of direct infringement of human dignity, is rationally related to the legitimate government purpose of limitation of private prosecutions. The SCA concluded that the policy of limiting private prosecutions to certain kinds of cases could not be faulted and upheld the constitutional validity of section 7(1)(a) (par 28 of the judgment). Like the High Court, the SCA also considered the applicability of section 8 (par 25). On this occasion, it was again the Minister who contended that the NSPCA

should draw its power to privately prosecute through section 8 rather than section 7(1)(a). After reading section 8 of the CPA and section 6(2)(e) of the SPCA Act together, the Court concluded that the NSPCA does not have the right of private prosecution (par 26).

### **3 Issues in the Constitutional Court**

The Constitutional Court had to decide on the following issues (par 27):

- a) Whether the SPCA Act expressly confers the right of private prosecution on the NSPCA in terms of section 8 of the CPA;
- b) If, this was not the case, whether section 7(1)(a) of the CPA permits the NSPCA to privately prosecute; and
- c) If not, whether section 7(1)(a) of the CPA violates the Constitution.

### **4 Judgment**

Khampepe J (Nkabinde ADCJ, Cameron J, Froneman J, Jafta J, Madlanga J, Mhlantla J, Musi AJ and Zondo J concurring) in the Constitutional Court held that the unique context, history and background of the NSPCA demands that the term “institute legal proceedings” in section 6(2)(e) of the SPCA Act takes on a specific and nuanced meaning which confers the power to institute private prosecutions on the NSPCA (par 65). The Constitutional Court accordingly upheld the appeal with costs and declared that the NSPCA has the statutory power of private prosecution conferred upon it by section 6(2)(e) of the SPCA Act read with section 8 of the CPA (par 65). The Court held that it would not be judicious to consider the section 7 arguments, as it would not offer the NSPCA further relief but that nothing in the judgment should be construed as barring a future challenge to section 7 if the appropriate factual scenario should arise (par 64–65).

### **5 Discussion**

#### *5.1 Arguments in the Constitutional Court*

##### **Applicant’s submissions**

The NSPCA argued that the SCA was incorrect in dismissing the applicant’s appeal by holding that the differentiation inherent in section 7(1)(a) of the CPA between natural and juristic persons is justifiable on the grounds that it is rationally related to the legitimate governmental purpose of limiting private prosecutions. They argued further that the Court ought to declare section 7(1)(a) of the CPA unconstitutional to the extent that it prevents juristic persons (who have a peculiar and substantial interest in the prosecution and who have suffered) from launching a private prosecution (par 18). The submission of the NSPCA was that if the Court finds that section 7(1)(a) of the Act does impermissibly differentiate between the two types of persons and is inclined to uphold the appeal, then it was submitted by the NSPCA that the Court ought to declare the section unconstitutional and, through

severance and reading-in, adjust the wording of section 7(l)(a) so as to remove the obstacles faced by juristic persons going forward (par 18–19).

The NSPCA also raised an alternative argument (which was an argument the respondents initially raised) that redress for the NSPCA lies not in section 7, but in section 8 of the CPA read with section 6(2)(e) of the SPCA Act (par 21). They argued that section 8 confers a right to conduct private prosecutions “to statutory bodies under a statutory right”, and that the NSPCA is a “statutory body performing a statutory public interest function”. Therefore, the power to “institute legal proceedings” arising from section 6(2)(e) of the SPCA Act “include[s] the power to institute criminal proceedings” (par 21).

### Respondent’s submissions

In the Constitutional Court the respondents argued that the judgment of the High Court and SCA was correct in that the legitimate governmental purpose of section 7(1)(a) is to allow a private prosecution only where private or personal interests are at stake, and to prevent other natural persons as well as juristic persons not having such interests from doing so (par 20). The respondents argued further that the right to institute a private prosecution is determined by a limitation clause, which not only differentiates between juristic and natural persons but also between natural persons. This, according to the respondents was imperative to have strict control on the right to institute private prosecutions both in terms of section 7 and section 8 of the CPA, which provides for public bodies to institute a private prosecution under a statutory right, expressly conferred by law, and so give effect to section 179 of the Constitution (par 20–21). Accordingly the respondents submitted that the differentiation between natural and juristic persons in section 7(1)(a) is intended to serve a legitimate governmental purpose, and therefore the criteria applied by the legislature to achieve this differentiation cannot be deemed to be arbitrary as it serves a particular purpose (par 20–21).

### *Amicus curiae*’s submissions

Corruption Watch argued that precluding juristic persons from ever engaging in a private prosecution, no matter the circumstances, is not consistent with the Constitution (par 22). According to Corruption Watch to do so is not only inconsistent with section 9(1) of the Constitution, it is also inconsistent with the constitutional duty on the State to take reasonable measures to prevent corruption (par 22). They argued further that there is nothing in the language of section 7(1)(a) of the CPA that requires that this interpretation be adopted. Corruption Watch endorsed the constitutional challenge of the NSPCA and submitted that to the extent that section 7(1)(a) of the CPA is only capable of the interpretation adopted by the SCA, it is unconstitutional and invalid (par 23).

## The relief sought

The NSPCA contended that as a result of not being able to privately prosecute, it could not fulfil its statutory mandate. The NSPCA submitted that this mandate requires that it be able to prosecute the animal cruelty offences set out in the APA (par 26). In *S v Lemthongthai* ([2014] ZASCA 131; 2015 (1) SACR 353 (SCA) (hereinafter "*Lemthongthai*") (par 20)) the court stated that:

"The duty resting on us to protect and conserve our biodiversity is owed to present and future generations. In so doing, we will also be redressing past neglect. Constitutional values dictate a more caring attitude towards fellow humans, animals and the environment in general".

The Constitutional Court has also emphasized that, within reason, "judicial officers must prefer interpretations of legislation that fall within constitutional bounds over those that do not" (see *Bertie van Zyl (Pty) Ltd v Minister for Safety and Security* [2009] ZACC 11; 2010 (2) SA 181 (CC); 2009 (10) BCLR 978 (CC) par 23; *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd: In re Hyundai Motor Distributors (Pty) Ltd v Smit NO* [2000] ZACC 12; 2001 (1) SA 545 (CC); 2000 (10) BCLR 1079 (CC) par 23). This principle requires that a statute be read holistically as constitutionally compliant where possible. To provide appropriate relief, this Court must properly delineate private prosecution in sections 7 and 8 of the CPA and correctly situate the NSPCA within that framework. Since the NSPCA is a statutorily created public body, it is appropriate for the Court to locate its prosecutorial powers, if any, under section 8 (par 26).

The Constitutional Court had had to decide whether it was appropriate to adjudicate on the matter based on section 8 of the CPA. The NSPCA had only relied on an argument based on section 8 of the CPA during oral submissions (par 28). In *CUSA v Tao Ying Metal Industries* ([2008] ZACC 15; 2009 (2) SA 204 (CC); 2009 (1) BCLR 1 (CC)), Ngcobo J explained that:

"[w]here a point of law is apparent on the papers, but the common approach of the parties proceeds on a wrong perception of what the law is, a court is not only entitled but is in fact also obliged, *mero motu* [of its own volition], to raise the point of law and require the parties to deal therewith" (par 68 of the judgment; see also Cameron J's majority judgment in *KwaZulu-Natal Joint Liaison Committee v MEC for Education, KwaZulu-Natal* [2013] ZACC 10; 2013 (4) SA 262 (CC); 2013 (6) BCLR 615 (CC)).

In *CUSA v Tao Ying Metal Industries* (*supra*) the court went on to add that, "This Court has previously adopted remedies for a situation where a claim is apparent from the papers and the evidence, even if it was not the cause of action expressly advanced or argued" (par 68 of the judgment). The overarching principle remains that a court may only adjudicate on issues that are properly put before it (see *Paddock Motors (Pty) Ltd v Igesund* 1976 (3) SA 16 (A); [1976] 3 All SA 332 (A) 23B–D; *Transvaal v Minister of Constitutional Development* [2009] ZACC 8; 2009 (2) SACR 130 (CC); 2009 (7) BCLR 637 (CC) (hereinafter "*Transvaal*") par 39). Zondo J's dissenting judgment in *KwaZulu-Natal Joint Liaison Committee v MEC for Education*,

*KwaZulu-Natal (supra)* emphasized that, “[t]his Court has repeatedly said that in motion proceedings a party must make its case in its papers” (par 160 of the judgment; see also *Phillips v National Director of Public Prosecutions* [2005] ZACC 15; 2006 (1) SA 505 (CC); 2006 (2) BCLR 274 (CC) par 39; *Carmichele v Minister of Safety and Security* [2001] ZACC 22; 2001 (4) SA 938 (CC); 2001 (10) BCLR 995 (CC) par 31; *Prince v President, Cape Law Society* [2000] ZACC 1; 2001 (2) SA 388 (CC); 2001 (2) BCLR 133 (CC) par 22). In *KwaZulu-Natal Joint Liaison Committee v MEC for Education, KwaZulu-Natal (supra)* Nkabinde J expressed a dissenting judgment and held that the purpose of pleadings is to set out the issues for the other parties and the court (par 147 of the judgment; see also *Barkhuizen v Napier* [2007] ZACC 5; 2007 (5) SA 323 (CC); 2007 (7) BCLR 691 (CC) par 39). Nevertheless, parties may be allowed to rely on a point of law external to the pleadings when it has been explored at a hearing (*KwaZulu-Natal Joint Liaison Committee v MEC for Education, KwaZulu-Natal supra* par 147).

Khampepe J stated that there is no reason why this Court should not adjudicate on the section 8 argument based on the fact that the respondents have always endorsed the section 8 argument. Furthermore, both parties had the opportunity to express and explore the legal question and neither respondent, nor the *amicus curiae*, raised opposition to the advancement of the section 8 argument (par 30). According to Khampepe J, considering the section 8 argument in this context did not appear to constitute unfairness to either party in the present matter (par 29).

### The statutory scheme of prosecution

The power of prosecution takes three forms in our current legal regime: State, statutory, and on certificate *nolle prosequi* (par 31). The legal framework for prosecution is established through the Constitution, NPA Act, and the CPA establish. The Constitution and the NPA Act govern the first category of prosecution by the State (par 31; see also s 179 of the Constitution, which provides for a “single national prosecuting authority in the Republic, structured in terms of an Act of Parliament” and empowers the prosecuting authority to “institute criminal proceedings on behalf of the State”. The NPA Act gives effect to that power. Section 2 of the NPA Act also provides for a “single national prosecuting authority established in terms of section 179 of the Constitution. Section 20 of the NPA Act sets out the power of the authority to “institute and conduct criminal proceedings” as “contemplated in section 179(2) of the Constitution and all other relevant sections of the Constitution”. The NPA Act re-emphasises that proceedings are instituted and conducted “on behalf of the State and that the power is exercised “on behalf of the Republic” (see s 20(a) of the NPA Act).

The other two categories of prosecutions are not instituted on behalf of the State and are legislatively titled “private prosecutions” (both s 7 and 8 of the CPA provide for “private prosecution”). In complement to the NPA Act, the CPA governs prosecution on the certificate (s 7 of the NPA Act) and by statutory right (s 8 of the NPA Act). Section 7 of the CPA constitutes an exception to the principle of a single prosecuting authority of the NPA as provided for by section 179 of the Constitution read with section 2 of the

NPA Act (par 32). Section 7 of the CPA provides that:

“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;
- (b) a husband, if the said offence was committed in respect of his wife;
- (c) the wife or child or if there is no wife or child, any of the next of kin of any deceased person, if the death of such person is alleged to have been caused by the said offence; or
- (d) the legal guardian or curator of a minor or lunatic, if the said offence was committed against his ward, may, subject to the provisions of Section 9 and 59(2) of the Child Justice Act 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.”

Section 7 (2) of the CPA Act provides for the circumstances under which a private prosecution may be instituted. It provides that:

“No private Prosecutor under this section shall obtain the process of any Court for summoning any person to answer to any charge unless private prosecutor produce to the office authorised by law to issue such process a certificate signed by the attorney general that he has seen statements or affidavit on which the charge is based and he declines to prosecute at the instance of the state.”

Section 8 provides for a further exception to the principle of single prosecuting authority. However, this exception is limited to certain statutory bodies. It provides that:

- “(1) Anybody upon which or person upon whom the right to prosecute in terms of any offence is expressly conferred by law, may institute and conduct a prosecution in terms of such offence in any Court competent to try that offence.
- (2) A body which a person intends exercising a right of prosecution under subsection 1 shall exercise such right only after consultation with the attorney in general concerned and after the attorney general has withdrawn his right of prosecution in respect of any specified offence or any specified class or category of offence with reference to which such body or person may by lay exercise such right of prosecution”.

Section 8 of the CPA requires that the right to private prosecution be “expressly conferred”.

### Expressly conferred under the CPA

The starting point in the interpretative process is the text of a particular provision but textual meaning is always informed by context, even where the language is clear (par 33; see also *Tshwane City v Link Africa* [2015] ZACC 29; 2015 (6) SA 440 (CC); 2015 (11) BCLR 1265 (CC) par 33; *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism* [2004] ZACC 15; 2004 (4) SA 490 (CC); 2004 (7) BCLR 687 (CC) par 90–1.) The use of “expressly” in legislation does not always entail a requirement that the thing be made verbally explicit (par 33). Rather, it may indicate that the

meaning of a provision must be clear and incontrovertible, being conveyed with “reasonable clearness” or “as a necessary consequence” (see *Premier, Limpopo Province v Speaker of the Limpopo Provincial Government* [2011] ZACC 25; 2011 (6) SA 396 (CC); 2011 (11) BCLR 1181 (CC) par 34, citing *Commissioner of Inland Revenue v Dunn* 1928 EDL 184 195.) “Express” is “stronger than implication” but does not require the use of specific words (see *Premier, Limpopo Province v Speaker of the Limpopo Provincial Government supra* par 34, citing *Commissioner of Inland Revenue v Dunn supra*). Therefore, the words “private prosecution” need not be explicitly used to confer the right, although it must be sufficiently clear that it has been conferred (par 33).

Khampepe J stated that whether the conferral is sufficiently clear is established through a purposive and contextual reading of the empowering provision and in this case, it would be section 6(2)(e) of the SPCA Act (par 34). In *Department of Land Affairs v Goedgelegen Tropical Fruits (Pty) Ltd* [2007] ZACC 12; 2007 (6) SA 199 (CC); 2007 (10) BCLR 1027 (CC) Moseneke DCJ (par 53) noted that:

“In searching for the purpose, it is legitimate to seek to identify the mischief sought to be remedied. In part, that is why it is helpful, where appropriate, to pay due attention to the social and historical background of the legislation. We must understand the provision within the context of the grid, if any, of related provisions and of the statute as a whole including its underlying values. Although the text is often the starting point of any statutory construction, the meaning it bears must pay due regard to context. This is so even when the ordinary meaning of the provision to be construed is clear and unambiguous” (see also *Ferreira v Levin NO; Vryenhoek v Powell NO* [1995] ZACC 13; 1996 (1) SA 984 (CC); 1996 (1) BCLR 1 (CC) par 46; *S v Zuma* [1995] ZACC 1; 1995 (2) SA 642 (CC); 1995 (4) BCLR 401 (CC) par 15 and 17; *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism supra* par 90–1; *Mansingh v General Council of the Bar* [2013] ZACC 40; 2014 (2) SA 26 (CC); 2014 (1) BCLR 85 (CC) par 9; *SATAWU v Garvas* [2012] ZACC 13; 2013 (1) SA 83 (CC); 2012 (8) BCLR 840 (CC) par 37).

This holistic interpretive approach is generous and “gives expression to the underlying values of the Constitution” within the bounds of language and context (par 34; *Mansingh v General Council of the Bar supra* par 16). It is prudent to study the specific statutory language; its textual, historical, and social context; and the constitutional values, which underpin it to determine whether section 6(2)(e) of the SPCA Act expressly confers a right of private prosecution (par 34).

### “Institute legal proceedings” connected with its functions

In order to perform its functions and achieve [its] objects, section 6(2)(e) of the SPCA Act permits the NSPCA to –

“institute legal proceedings connected with its functions, including such proceedings in an appropriate court of law or prohibit the commission by any person of a particular kind of cruelty to animals, and assist a society in connection with such proceedings against or by it.”

Both the High Court and SCA found that the power to “institute legal

proceedings” does not constitute a conferral of the power of private prosecution. Neither Court explained their reasoning for this conclusion, nor did they undertake a contextual or purposive analysis of the provision, since this was not the focus of the NSPCA’s argument (par 12 of the SCA judgment; par 29 of the High Court judgment). Khampepe J stated that on a plain textual reading, the term “institute legal proceedings” could include the power to privately prosecute (par 36). The language used in the provision is broad and permissive and it does not distinguish between civil and criminal proceedings (par 36). There is nothing in the text itself that excludes that power. Section 6(2)(e) specifically allows the NSPCA to “institute legal proceedings connected with its functions”. Therefore, the NSPCA’s power to institute legal proceedings cannot be divorced from its functions (par 36).

There are a number of other statutory bodies that are similarly empowered using the term “institute legal proceedings”. These serve as a useful point of distinction to understand the meaning given in the context of the SPCA Act (par 37; see *Premier, Limpopo Province v Speaker of the Limpopo Provincial Government* *Premier supra* par 35). The power to “institute legal proceedings” changes in every context it is used. The power is statutorily conferred on various bodies, but these all implicate and deal with different types of causes of action and different types of claims (par 37). Certain statutes connect the term “institute legal proceedings” to specific proceedings, such as the recovery of moneys, or the addressing of particular environmental issues (eg, s 82(a) of the National Environmental Management Act: Integrated Coastal Management Act 24 of 2008 enables the Minister, a MEC or a relevant municipality to institute legal proceedings to prevent damage to the coastal public property or the coastal environment.) Therefore, the types of legal proceedings the NSPCA can institute are intimately connected with its functions. The SPCA Act as a whole, as well as its surrounding statutory scheme (par 37) informs whether the NSPCA can prosecute.

## The SPCA Act and the APA

A proper interpretation of the SPCA Act requires it to be read in conjunction with the APA (par 38). The NSPCA operates in the animal welfare framework that the APA establishes. The APA has a perspicuous purpose: to promote animal welfare and prevent cruelty to animals (par 38). The Act has three central functions, namely:

- a) to set out an extensive list of offences that constitute animal cruelty; ( see s 2 and 2A);
- b) to establish a broad remedial scheme of civil and criminal punishment; (see s 3 and s 4 of the APA);
- c) to empower societies for the protection of animals (of which the centralised NSPCA is the current instantiation) (see s 8 of the APA).

If an offence is established under that Act, the APA also sets out a wide range of orders that a court may make to minimise future animal suffering (see s 3 of the APA).

The SPCA Act gives effect to the society envisaged by the APA. The SPCA Act sets out the functions and purposes of the NSPCA, which principally have the objective of protecting animal welfare as contemplated in the APA (par 39). The NSPCA is also subject to ministerial oversight (see s 13 and further, s 2(3)(b) of the SPCA Act). Together, these indicate the special and central role the NSPCA plays in protecting animal welfare in our society (par 39). The SPCA Act and the APA empower the NSPCA to investigate and police acts of animal cruelty. The objects of the NSPCA are broad and expansive and include “prevent[ing] the ill-treatment of animals and doing “all things reasonably necessary for or incidental to the achievement of [its] objects” (see s 3(c) and s 3(f) of the SPCA Act). Section 6(2)(r) of the SPCA Act compels the NSPCA to do “everything which in its opinion is conducive to the performance of its functions or the achievement of [its] objects”. The SPCA Act creates a unique platform for the NSPCA to be responsive and to perform its mandate in a robust manner in order to prevent and combat animal cruelty (par 40). When Parliament enacted the SPCA Act, it recognised that:

“the responsibilities of animal welfare organisations are becoming greater as urbanisation in South Africa accelerates and animals in many disadvantaged communities are in dire need of basic animal care. The state is and will probably remain unable to provide these services... The [Act] gives [the NSPCA] a platform to face this challenge.” (Debates of the National Assembly (Hansard) 25 November 1993 14065 (Minister of Agriculture).

This illustrates an effort by the State to empower the NSPCA to fulfil functions the State cannot perform in achieving the national goal of animal protection, which is increasingly considered as important for our community (par 41). It is precisely for this reason that a large amount of the SPCA Act is dedicated to centralising the activities of the previously disparate societies empowered by the APA. This structural shift changed the nature of these societies, unifying them under a national body. It is through the SPCA Act, the NSPCA became more accountable to the state and the community in general. The SPCA Act elevates the potency of the APA and bolsters the NSPCA’s efficacy in its role of combating animal cruelty (par 42).

### Associated Acts

The SPCA Act also provides that societies must “co-operate with or permit the board to institute legal proceedings where the society is capable of instituting such proceedings under this Act, the APA or the associated Acts (see s 9(2)(i) of the SPCA Act). The “associated Acts” refer to five statutes that form part of the current statutory regime for protecting animal welfare and preventing animal cruelty. In its entirety, this spans seven pieces of legislation (referred to as “the animal protection regime”) (The SPCA Act refers to five “associated Act[s]”, being: Performing Animals Protection Act 24 of 1935; Medicines and Related Substances Act 101 of 1965; Veterinary and Para-Veterinary Professions Act 19 of 1982; Animal Diseases Act 35 of 1984 and Abattoir Hygiene Act 121 of 1992). These statutes fulfil different roles in protecting animals and regulating their treatment, although the APA (par 43) lays down the groundwork for the animal protection. The NSPCA’s

functions are intrinsically connected to the protection of animals and frequently with associated enumerated offences set out in the animal protection regime (par 46). The majority of the provisions in the APA relate to offences and the legal proceedings stemming from it are most likely to be criminal (par 46). Khampepe J stated that because the NSPCA is explicitly charged with upholding these statutes and preventing animal cruelty, the term “institute legal proceedings connected with its functions” in the SPCA Act must be interpreted to encompass prosecutions of animal cruelty (par 46). For all practical purposes, the NSPCA is best placed to conduct a private prosecution and give effect to preventing and enforcing the offences set out in the animal protection regime (par 47). According to Khampepe J, the proper interpretation of the SPCA Act as conferring the power of private prosecution is to give effect to the objects and purposes of the regime (par 47). This construction harmonises the powers and purpose of the NSPCA within the legislation itself and the wider context. This, importantly, gives effect to the NSPCA’s primary purpose that is to protect animal welfare (par 47). Khampepe J stated that to read section 6(2)(e) of the SPCA Act as excluding the right of private prosecution would render the regime a “toothless tiger”. According to Khampepe J legislation should not be construed to create futile provisions, (see *Dage Properties (Pty) Ltd v General Chemical Corporation Ltd* 1973 (1) SA 163 (A); [1973] 1 All SA 299 (A) 174B–D; *Youngleson Investments (Pty) Ltd v South Coast Regional Rent Board; Graham Properties Ltd v South Coast Regional Rent Board* 1971 (1) SA 405 (A); [1971] 1 All SA 509 (A) 418G–H; *Ex Parte the Minister of Justice: In re Rex v Jacobson and Levy* 1931 AD 466 477). The term “institute legal proceedings” takes on a specific and nuanced meaning in this context, capable of conferring the power of initiating court proceedings, including the power to institute private prosecutions (par 48).

Khampepe J stated that the historical development of the legislative scheme also supports this interpretation (par 49). The NSPCA has a unique historical and statutory role with respect to preventing animal cruelty. The 1914 instantiation of the NSPCA expressly had the right of private prosecution conferred on it (see s 12 of the Prevention of Cruelty to Animals Act 8 of 1914 (1914 SPCA Act). The 1914 SPCA Act at that time fulfilled three functions, policing, investigating and prosecuting (par 49). The APA repeated the 1914 SPCA Act, which was silent on the right of private prosecution. (When the Bill was reintroduced in Parliament after initial debates, the section was omitted: Debates of the National Assembly (Hansard) 11 May 1962 5515–6 (Minister of Justice).) This was a conscious decision by the Minister who objected to a provision conferring the power to privately prosecute, grounded on the concern that there was no safeguard of attorney general supervision (see Debates of the National Assembly (Hansard) 9 February 1962 929; par 49).

The rationale for the deliberate exclusion of the right to privately prosecute in 1962 is not necessary in the current Act (par 50). The CPA 56 of 1955, which was effective at that time, provided, as its counterpart does today, for a dualistic private prosecution scheme on the certificate and by statutory conferral (see s 11 of the 1955 CPA; par 50). It, however, lacked the important safeguard of oversight by the prosecutorial authority present in the

current CPA (see s 8(2) of the CPA). This lack of oversight was no longer a concern at the time the SPCA Act was passed, as it was built in through section 8(2) and 8(3) of the current CPA (see s 8(3) of the CPA). Furthermore, there is no evidence that Parliament deliberately denied the right of the private prosecution to the NSPCA, as it had done previously (par 51). The current SPCA Act, as enacted in 1993 and is not a direct heir to the APA. It does not repeal the APA, as the APA did in the 1914 SPCA Act. The SPCA Act and the APA operate in conjunction. The SPCA Act builds on the powers conferred by the APA (par 51). These factors all bear pertinently on the proper meaning to be afforded to the term “institute legal proceedings” in the SPCA Act. The term “institute legal proceedings when connected with the functions of the NSPCA, takes on a specific meaning informed by the unique legislative context of the animal protection regime (par 52). It is a meaning according to Khampepe J that confers the right of private prosecution with sufficient clarity for the purposes of section 8 of the CPA (par 52).

Khampepe J found it apposite to distinguish the use of the term “institute legal proceedings” in other pieces of legislation (par 53). The term takes on a precise meaning in this context because it is intrinsically tied to the offences contemplated under the APA and the animal protection regime generally (par 53). The term “institute legal proceedings” includes private prosecutions in light of the enumerated offences set out in the animal protection regime and the NSPCA’s function in enforcing them (par 53). The NSPCA is given exceptional status that has been guided by changes in legislation, which have made the NSPCA structurally capable of private prosecutions. This power is also underpinned by the content of what this prosecutorial power intends to sanction, namely, the prevention of animal cruelty (par 53).

## Foreign law

Section 39(l)(c) of the Constitution provides that: “When interpreting the Bill of Rights, a court, tribunal or forum may consider foreign law”. Thus, when considering whether or not juristic persons are entitled to the equal benefits to bring a private prosecution in this country, in terms of section 7(l)(a) of the CPA regard may be had to the laws regulating similarly situated juristic entities in other jurisdictions.

Not all countries or jurisdictions permit the institution of a private prosecution. In those countries that permit private prosecutions, whether it be by natural persons or otherwise is normally a result of the State’s desire to “safeguard against the wrongful refusal or failure by prosecuting authorities to institute proceedings” (see generally Mujuzi “The Right to Institute a Private Prosecution: A Comparative Analysis” 2015 *International Human Rights LR* 222–255). A common feature in these jurisdictions is that the person who does bring the private prosecution must have some sort of interest in the prosecution and that there must be some sort of system of checks or balances in place to ensure fairness (Mujuzi 2015 *International Human Rights LR* 222–225). In Canada, section 504 of its Criminal Code permits anyone to lay information. It is uncontroversial in Canada that this

right applies to both natural and juristic persons. New Zealand's Criminal Procedure Act 2011 also allows both natural and juristic persons to be private prosecutors. In the United Kingdom (UK) section 6 of the Prosecution of Offences Act, 1985 regulates the position regarding private prosecutions. A purely literal reading of the UK statute indicates that any person is entitled to bring a private prosecution, whether such person is a natural person or a juristic person. In *Gujra, R v Crown Prosecution Service* ([2012] UKSC 52) Lord Wilson of the United Kingdom Supreme Court confirmed that while there has been lively debate around the existence of private prosecutions, the right was reaffirmed by Parliament in the 1985 Act and must be applied consistently. It was noted in *Virgin Media Ltd, R v Zinga* ([2014] EWCA Crim 52 par 15–16) that “private prosecutions by charitable or public interest bodies such as the Royal Society for the Prevention of Cruelty to Animals (RSPCA) are common” (see generally *Prosecution, Protecting animals against cruelty and neglect*, February 2017 <https://www.rspca.org.uk/whatwedo/endcruelty/prosecution>). The court said that “commercial organisations regularly undertake private prosecutions” and that “this type of private prosecution is undertaken not only by trade organisations such as the Federation Against Copyright Theft (principally the visual media) and the British Music Industry (“BPI”) but also ordinary commercial companies” (par 16 of the judgment). Whether or not section 9(1) in the Bill of Rights is indeed infringed is a matter that calls for interpretation and, when interpreting such provision, the Constitutional Court may consider the foreign law which at least in the jurisdictions discussed above supports the notion that both natural and juristic persons may initiate private prosecutions. Persons should receive equal treatment when it comes to the exercising of rights and benefits associated with bringing private prosecutions and whereas juristic entities (such as the RSPCA in England and Wales) enjoy the right to bring private prosecutions in terms of section 6(1) of the Prosecution of Offences Act of 1985 so too should juristic entities (such as the NSPCA in South Africa) be entitled to bring private prosecutions in terms of section 7(1) of the CPA.

### Animal cruelty

The need to prevent animal cruelty has been evident in South Africa since the first South African SPCA was established in the 1870s, and was reinforced through the promulgation of the 1914 SPCA Act (par 54). In 1928, an amendment to the 1914 SPCA Act was introduced that prescribed whipping as punishment for any wilful and aggravated act of cruelty to animals (par 54). In *Ex Parte: The Minister of Justice: In re Rex v Masow* (1940 AD 75 (81)) the Court explained that this was an ethical decision on behalf of the legislature to entrench the need to protect animals against cruel treatment. The 1929 decision of *R v Smit* (1929 TPD 397) illustrated the emergence of a robust approach to animal welfare protection in South Africa. The Court in *R v Smit (supra)* found that, even if the dog had legal status as the man's property, which he was entitled to destroy, the man was compelled to do so “humanely” while causing “as little suffering as possible”(401 of the judgment). In *R v Moato* (1947 (1) SA 490 (O)) the court

held that “[t]he object [of the APA] was plainly to prohibit one legal subject behaving so cruelly to animals that he offends the finer feelings and sensibilities of his fellow humans”. The court in *S v Edmunds* (1968 (2) PH H398 (N)) endorsed this approach where Miller J held that cruelty was prohibited to “prevent degeneration of the finer human values in the sphere of treatment of animals”. In *National Council of Societies for the Prevention of Cruelty to Animals v Openshaw* ([2008] ZASCA 78; 2008 (5) SA 339 (SCA)) Cameron JA’s minority judgment recognised that animals are worthy of protection not only because of the reflection that this has on human values but because animals “are sentient beings that are capable of suffering and of experiencing pain” (par 38 of the judgment). In *South African Predator Breeders Association v Minister of Environmental Affairs and Tourism* ([2009] ZAFSHC 68) a unanimous full Bench found that canned-hunting of lions is “abhorrent and repulsive” due to the animals’ suffering (par 78 of the judgment). This finding was not overturned in the SCA (par 56; see also *South African Predator Breeders Association v Minister of Environmental Affairs and Tourism* [2010] ZASCA 151; [2011] 2 All SA 529 (SCA)). The rationale behind protecting animal welfare has shifted from merely safeguarding the moral status of humans to placing an intrinsic value on animals as individuals (par 57). In *S v Lemthongthai* (*supra*) the SCA in the context of rhino poaching stated, “[c]onstitutional values dictate a more caring attitude towards fellow humans, animals and the environment in general”. The Court concluded further that this obligation was especially pertinent because of our history (par 20 of the judgment). Animal welfare also relates to issues of biodiversity. Animal welfare is connected with the constitutional right to have the “environment protected ... through legislative and other means” (see s 24(b) of the Constitution). This integrative approach correctly links the suffering of individual animals to conservation and illustrates the extent to which showing respect and concern for individual animals reinforces broader environmental protection efforts. Animal welfare and animal conservation together reflect two intertwined values (par 58). The NSPCA (previously comprised of discrete SPCAs) is now seen as the special guardian of this laudable norm (par 59). In *Society for the Prevention of Cruelty to Animals, Standerton v Nel* (1988 (4) SA 42 (W)) the Court explained that the SPCAs have “over the years, become well established and fully recognised as the authoritative voice in the protection against injury or cruelty to animals from whatever source and under whatever circumstances, also acting against owners of the animals in question”. As a result, “[i]t would be an anomalous situation if the law required that the SPCA had to stand idly by” where animal cruelty was likely to occur (par 47 C of the judgment). Even during parliamentary debates, it has been acknowledged that the NSPCA “is surely the most renowned organisation in this field [of animal welfare]” (par 60; Debates of the National Assembly (Hansard) 25 November 1993 14070 (Mr G J Malherbe). In *National Council of Societies for the Prevention of Cruelty to Animals v Openshaw* (*supra* par 38) Cameron JA emphasized that the NSPCA is “a public body with wide and singular responsibilities in the field”. The singularity of the NSPCA’s position is armoured by the fact that it is tasked with “preventing ill-treatment of voiceless beings” (par 40–47).

## Remedy

Section 172(1)(b) of the Constitution states that the Constitutional Court may make any order that is just and equitable. In *Head of Department: Mpumalanga Department of Education v Hoërskool Ermelo* ([2009] ZACC 32; 2010 (2) SA 415 (CC); 2010 (3) BCLR 177 (CC)) Moseneke DCJ stated that this remedy, “may be made even in instances where the outcome of a constitutional dispute does not hinge on constitutional invalidity of legislation or conduct” (par [97] of the judgment; see also *Electoral Commission v Mhlope* [2016] ZACC 15; 2016 (5) SA 1 (CC); 2016 (8) BCLR 987 (CC) par 83; *Minister for Safety and Security v Van der Merwe* [2011] ZACC 19; 2011 (5) SA 61 (CC); 2011 (9) BCLR 961 (CC) par 59). The learned Judge went on to add that section 172(1)(a) should be used to “forge an order that would place substance above mere form by identifying the actual underlying dispute between the parties” (par 97 of the judgment). Khampepe J held that in this case, it is just and equitable to both parties that the NSPCA be granted the declaration that it seeks (par 62). This, according to Khampepe J will enable it to continue with its important work free of legal impediment and it best resolves the underlying dispute between the parties. Accordingly, the learned Khampepe J concluded that a declaration that the NSPCA is entitled to privately prosecute further fits comfortably within the constitutional and statutory prosecutorial scheme (par 62).

## The constitutional challenge

The court had to still consider the challenge to the constitutionality of section 7(1)(a) of the CPA. In *Director of Public Prosecutions, Transvaal v Minister of Constitutional Development (supra)* Skweyiya J held that a court’s core responsibility is to adjudicate on “live disputes” (par 222 of the judgment). As the NSPCA already has the power to privately prosecute, the effect of section 7(1)(a) of the CPA on it is no longer a live dispute that implicates the NSPCA’s rights (par 63; see also citing *Zantsi v Council of State, Ciskei* [1995] ZACC 9; 1995 (4) SA 615 (CC); 1995 (10) BCLR 1424 (CC), citing *Borowski v Canada (Attorney General)* [1989] 1 SCR 342 358–62). In *Fose v Minister of Safety and Security* ([1997] ZACC 6; 1997 (3) SA 786 (CC); 1997 (7) BCLR 851 (CC) (par 21)) the Court found that “it is prudent not to anticipate a question of constitutional law in advance of the necessity of deciding it”, (see also citing *Liverpool, New York and Philadelphia Steamship Co v Commissioners of Emigration* [1885] USSC 11; 113 US 33). Khampepe J stated that determining whether this same right is also proffered by section 7(1)(a) would provide the NSPCA with no further relief (par 63). The learned Khampepe J did not think it judicious to consider the constitutional argument any further but stated that nothing in this judgment should be construed as barring a future challenge to section 7 (a) should a suitable factual scenario arises (par 63–64).

## 4 Concluding remarks

The NSPCA plays a critical role in our society; this is illustrated by the

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historical development of the protection of animal welfare as well as the role of the NSPCA in upholding its mandate (par 61). The NSPCA's long history of guarding the interests of animals reflects our constitutional values. It has taken on the role of protecting animals in the interest of humankind. For this reason, and in the context of the statutory regime that now exists, a contextual and purposive reading of the SPCA Act provides the NSPCA with the right to prosecute (par 61). It is unusual, but not entirely novel, for a body to have powers to police, investigate and prosecute. Taking into account its historical evolution, as well as the context, nature and objectives of the legislative scheme, it is situated in, the NSPCA is a unique body. This exceptional status demands a broader understanding of its powers (par 61). Aside from the peculiar situation that the NSPCA finds itself in, there are also other good reasons for extending the right to institute private prosecutions to other juristic entities or other legal entities as well. The modern commercial world is exposed to crimes that are increasingly harder to detect, investigate, and prosecute. The crimes themselves are becoming more technical and the methods of committing them more sophisticated. The State may not always possess the requisite skills, expertise, or the capacity to prosecute all offenders. To provide juristic entities or other entities with a statutory right to prosecute may be seen as an indirect way of controlling corruption and incompetence in the State's prosecutorial services (Feldhaus and Koraan "Explainer: How South Africa's first Private Prosecutions Unit will Work" February 2017 *The Conversation.com*, <https://theconversation.com/explainer-how-south-africas-first-private-prosecutions-unit-will-work-72389>). There are highly specialised companies and organisations, who may sometimes fall victim to criminal acts, and who may wish to prosecute the perpetrators of these criminal acts should the NPA decline to prosecute. The companies and organisations may also employ the right people with the necessary capacity, skills, knowledge, (and incentive) to prosecute (see Mujuzi "Protecting Animals from Mistreatment through Private Prosecutions in South Africa: A Comment on *National Society for the Prevention of Cruelty to Animals v Minister of Justice and Constitutional Development* 2016 1 SACR 308 (SCA)" 2016 *Journal of African Law* 15). Law enforcement will be enhanced and society will be the beneficiary of an enlarged class of "persons" that can competently institute private prosecutions where the State fails.

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