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THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case No: 20781/2014

In the matter between:

NATIONAL SOCIETY FOR THE PREVENTION OF CRUELTY TO ANIMALS	**APPELLANT**

and

MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT	**FIRST RESPONDENT**
NATIONAL DIRECTOR OF PUBLIC PROSECUTION	**SECOND RESPONDENT**

Neutral citation: *National Society for the Prevention of Cruelty to Animals v Minister of Justice and Constitutional Development* (20781/2014) [2015] ZASCA 206 (4 December 2015)

Coram: Maya DP, Petse, Saldulker and Mbha JJA and Van der Merwe AJA

Heard: 19 November 2015

Delivered 4 December 2015

Summary: Constitutional law **-** constitutional challenge to Act s 7(1)(*a*) of the Criminal Procedure Act 51 of 1977 - whether the section is unconstitutional insofar as it allows only private persons to institute private prosecutions and not juristic persons - whether the differentiation is rationally connected to a legitimate governmental purpose.

ORDER

On appeal from: Gauteng Division of the High Court, Pretoria (Fourie J sitting as court of first instance).

The appeal is dismissed.

JUDGMENT

Saldulker JA (Maya DP, Petse and Mbha JJA and Van Der Merwe AJA concurring):

[1] This appeal concerns a constitutional challenge to s 7(1)*(a)* of the Criminal Procedure Act 51 of 1977, (the CPA), to the extent that it allows only a private person to institute a private prosecution and not a juristic person. The Gauteng Division of the High Court, Pretoria, (Fourie J), dismissed an application by the appellant, the National Society for the Prevention of Cruelty to Animals, against the first respondent, the Minister of Justice and Constitutional Development (the Minister), and the second respondent, the National Director of Public Prosecutions

(the NDPP) to declare the provisions of s 7(1)*(a)* of the CPA invalid and unconstitutional to the extent that they prohibit juristic persons from instituting and conducting private prosecutions merely because they are not private persons.

[2] The appellant is a juristic person, created in terms of s 2 of the Societies for the Prevention of Cruelty to Animals Act 169 of 1993, (the SPCA Act). The objects of the appellant are set out in s 3 of the SPCA Act and include:
(i) determining, controlling and co-ordinating the policies and standards of societies, in order to promote uniformity;
(ii) preventing the ill-treatment of animals by promoting their good treatment by man;
(iii) taking cognisance of the application of laws affecting animals and societies and making representations in connection therewith to the appropriate authority;
(iv) doing all things reasonably necessary for or incidental to the achievement of the aforegoing objectives.

[3] The appellant is managed and controlled by a board consisting of directors elected in accordance with a constitution and a director nominated by the minister.[1] In terms of s 6 (1) of the SPCA Act, the appellant shall for the purposes of s 8[2] of the Animal Protection Act 71 of 1962 (the Animal Protection Act) be a society for the prevention of cruelty to animals. The Animal Protection Act criminalises certain acts of cruelty to animals. The duties, powers and functions of the appellant are set out in s 6 of the SPCA Act, which include the appointment of suitably qualified persons as inspectors, conferring upon inspectors certain functions and powers which the appellant may deem necessary, including the power to enter premises, search and seize animals, material, substances or other articles on such premises.

[4] The Minister is charged with the administration of the Criminal Procedure Act 51 of 1977. The NDPP is cited in its representative capacity as head of the National Prosecuting Authority (the NPA) responsible for the prosecution of crimes on behalf of the State. The NPA is established in terms of the National Prosecuting Authority

[1] In terms of s 1 of the SPCA Act which contains the definitions, reference to 'Minister' means the Minister of Agriculture.
[2] Section 8 of the Animal Protection Act sets out the powers of officers of society for prevention of cruelty to animals.

Act 32 of 1998 (the NPA Act) which established a single national prosecuting authority in compliance with s 179 of the Constitution.[3]

[5] The respondents did not oppose the appellant's application in the court below. They, however, filed 'explanatory affidavits' and made submissions before us, akin to that of an amicus curiae. I will return to this aspect later.

The appellant's contentions

[6] The appellant seeks an order declaring s 7(1)*(a)* of the CPA unconstitutional. Its case is summarised as follows: s 7(1)*(a)* differentiates between natural persons on one hand and juristic persons on the other hand. There is no good reason for differentiating between the two classes of persons. As a result, the differentiation fails to serve a legitimate governmental purpose and is therefore irrational and non-compliant with the rule of law as an articulated standard in s 1(c) of the Constitution. Further, the differentiation 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 s 9(1) of the Constitution. The consequential relief claimed in the notice of motion by the appellant was to excise the words 'private' and 'individual' from the provisions of s 7 (1)*(a)* of the CPA. However, during argument counsel for the appellant appeared to be content with only the word 'private' being excised from the section.

Background

[7] The appellant has, as stated, a policing function to prevent cruelty to animals. During November 2010, the appellant was made aware of a religious ritual involving a slaughtering of a camel as a sacrifice by a group of Islamic worshippers in Lenasia. In compliance with its statutory obligations, an inspector of the appellant visited the venue where the appellant contends the inspector witnessed the 'cruel and inhumane' treatment of the animal. To prevent the animal from suffering further, and

[3] The NPA Act repealed the whole of the Attorneys-General Act 92 of 1992. Historically, South Africa had attorneys-general (head of prosecution) at various divisions of the high courts. There was no single national prosecuting authority, and the attorneys-general acted independently of each other.

'in an act of compassion', the inspector shot the camel to relieve it of its misery. As the inspector was of the opinion that the treatment of the camel by certain of the worshippers constituted an offence in terms of the Animal Protection Act, the matter was referred to the prosecuting authorities. According to the appellant, despite the overwhelming evidence it furnished to the prosecutors, the prosecuting authority declined to prosecute. The appellant's request for a certificate *nolle prosequi* (refusal to prosecute) so that it could take up the criminal case and privately prosecute the offenders, was refused by the prosecutor. The reason being that the appellant was a juristic person and not a 'private person' as required by s 7(1)*(a)* of the CPA. It is as a result of this refusal, among others, by the public prosecutor, which may also arise in the future, that the appellant seeks to have the impugned provision declared unconstitutional.

[8] The statutory provisions regulating private prosecution have been in place for almost 100 years. The provisions of s 7(1) of the CPA are framed in almost identical terms to the old Criminal Procedure and Evidence Act 31 of 1917. They retain the limitation that only a private person is allowed to institute a private prosecution and read as follows:

'(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;

(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 provision 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.'

[9] Section 7(2) of the CPA, provides for the issuing of a certificate by the prosecuting authority to the effect that he or she has perused the statements and declines to prosecute on behalf of the State. The prosecuting authority is obliged to furnish a certificate called *nolle prosequi* to someone who wishes to prosecute privately. Section 9 provides for security to be deposited by a private prosecutor, whereas s 10, read with s 12, determines the process and manner of a private prosecution.

[10] Section 8 of the CPA regulates private prosecution by a 'body' under statutory right and reads:

'(1) Any body upon which or person upon whom the right 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 that offence.

(2) A body which or a person who intends exercising a right of prosecution under subsection (1), shall exercise such right only after consultation with the attorney-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 offences with reference to which such body or person may by law exercise such right of prosecution.

(3) An attorney-general may, under subsection (2), withdraw his right of prosecution on such conditions as he may deem fit, including a condition that the appointment by such body or person of a prosecutor to conduct the prosecution in question shall be subject to the approval of the attorney-general, and that the attorney-general may at any time exercise with reference to any such prosecution any power which he might have exercised if he had not withdrawn his right of prosecution.'

[11] In the context of the prevention of cruelty to animals, the Prevention of Cruelty to Animals Act 8 of 1914 (the Prevention of Cruelty to Animals Act) applied. This Act was repealed by the Animal Protection Act in 1962. Before its repeal, s 12 of the Prevention of Cruelty to Animals authorised the society for the prevention of cruelty to animals to privately prosecute offenders. Section 12 provided as follows:

'(1) Any society for the prevention of cruelty to animals may, by any person authorised thereto in writing under the hand of the chairman or secretary thereof, prosecute for any

offence against this Act and the provisions of any law relating to private prosecutions shall apply to all such prosecutions.

(2) A magistrate may, by writing under his hand, authorise any officer of such a society to exercise within his district all or any of the powers conferred by this Act upon a police officer and in the exercise of such powers the officer of the society shall when required produce for inspection such documents of authority. The magistrate may for good cause revoke any such authority.'

It appears therefore that historically, the predecessor of the appellant had the right specially conferred by statute, to privately prosecute offenders. This power is not conferred by the Animal Protection Act or the SPCA Act.

[12] The appellant is a public body carrying out its functions in the interest of the public. In terms of s 6(2)*(e)* of the SPCA Act, the appellant has the power to defend or 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 it or by it. Thus, it is clear from the provisions of the SPCA Act, that it does not confer on the council or the society the right to privately prosecute any offender.

Constitutional challenge

[13] As stated above, the appellant contends that s 7(1)*(a)* of the CPA is unconstitutional on the basis that it violates subsecs 1*(c)* and 9(1) of the Constitution. Significantly, the appellant does not challenge the provisions of s 8 of the CPA. The appellant asserts that the right to bring a private prosecution ought to be capable of enforcement by any person, both a natural and a juristic person.

[14] The rule of law is a founding value entrenched in s 1*(c)* of 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.

[15] 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. In *Prinsloo v Van der Linde and another*[4] 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[5]. . . .

[16] The provisions of s 9(1) of the Constitution read: '[e]veryone is equal before the law and has the right to equal protection and benefit of the law.' The test to determine whether s 9(1) has been violated was set out as follows in *Prinsloo*:

'[25] . . . [t]he purpose of this aspect of equality is, therefore, to ensure that the State is bound to function in a rational manner. This has been said to promote the need for governmental action to relate to a defensible vision of the public good, as well as to enhance the coherence and integrity of legislation. In Mureinik's celebrated formulation, the new constitutional order constitutes 'a bridge away from a culture of authority . . . to a culture of justification.

[26] Accordingly, before it can be said that mere differentiation infringes s 8 it must be established that there is no rational relationship between the differentiation in question and the governmental purpose which is proffered to validate it. In the absence of such rational relationship the differentiation would infringe s 8. But while the existence of such a rational relationship is a necessary condition for the differentiation not to infringe s 8, it is not a sufficient condition; for the differentiation might still constitute unfair discrimination if that further element, referred to above, is present.'

[17] In *Glenister v President of the Republic of South Africa & others,*[6] the Constitutional Court said:

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[4] *Prinsloo v Van der Linde & another* [1997] ZACC 5; 1997 (3) SA 1012 (CC) para 25.
[5] See para 25.
[6] *Glenister v President of the Republic of South Africa & others* [2011] ZACC 6; 2011 (3) SA 347 (CC) para 55.

'Under our Constitution, national legislative authority vests in Parliament. However, in the exercise of its legislative authority, "Parliament is bound only by the Constitution, and must act in accordance with, and within the limits of, the Constitution". But, like all exercise of public power, there are constitutional constraints that are placed on Parliament. One of these constraints is that "there must be a rational relationship between the scheme which it adopts and the achievement of a legitimate governmental purpose". Nor can Parliament act capriciously or arbitrarily. The onus of establishing the absence of a legitimate governmental purpose, or of a rational relationship between the law and the purpose, falls on the objector. To survive rationality review, legislation need not be reasonable or appropriate.' (Footnotes omitted.)

[18] In *Weare & another v Ndebele NO & others*[7] after accepting the high court's finding that s 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 legislation which differentiated between classes of persons was considered not to violate s 9(1) of the Constitution if it was rationally linked to the achievement of a legitimate government purpose.

[19] Counsel for the appellant properly conceded that the regulation of private prosecutions is a legitimate governmental purpose. Therefore, the question is whether the provisions of s 7(1)*(a)* of the CPA are rationally connected to this purpose. The rationality threshold is low. The connection must not be arbitrary but must be based on a reason that does not have to be the most efficient or the only reason. Put differently, the question is whether there is an acceptable reason for the limitation of private prosecutions contained in s 7(1)*(a)*. This question must be answered within the context of the whole of s 7 and s 8 of the CPA, s 179 of the Constitution and the provisions of the NPA Act.

[20] Section 179 of the Constitution reads:

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[7] *Weare & another v Ndebele & others* [2008] ZACC 20; 2009 (1) SA 600 (CC).

‘(1) There is a single national prosecuting authority in the Republic, structured in terms of an Act of Parliament, and consisting of-

(a) a National Director of Public Prosecutions, who is the head of the prosecuting authority, and is appointed by the President, as head of the national executive; and

(b) Directors of Public Prosecutions and prosecutors as determined by an Act of Parliament.

(2) The prosecuting authority has the power to institute criminal proceedings on behalf of the state, and to carry out any necessary functions incidental to instituting criminal proceedings.

(3) National legislation must ensure that the Directors of Public Prosecutions -

(a) are appropriately qualified; and

(b) are responsible for prosecutions in specific jurisdictions, subject to subsection (5).

(4) National legislation must ensure that the prosecuting authority exercises its functions without fear, favour or prejudice.

(5) The National Director of Public Prosecutions -

(a) must determine, with the concurrence of the Cabinet member responsible for the administration of justice, and after consulting the Directors of Public Prosecutions, prosecution policy, which must be observed in the prosecution process;

(b) must issue policy directives which must be observed in the prosecution process;

(c) may intervene in the prosecution process when policy directives are not complied with; and

(d) may review a decision to prosecute or not to prosecute, after consulting the relevant Director of Public Prosecutions and after taking representations within a period specified by the National Director of Public Prosecutions, from the following:

(i) The accused person.

(ii) The complainant.

(iii) Any other person or party whom the National Director considers to be relevant.

(6) The Cabinet member responsible for the administration of justice must exercise final responsibility over the prosecuting authority.

(7) All other matters concerning the prosecuting authority must be determined by national legislation.’

[21] In terms of s 32(1)*(a)* of the NPA Act, a member of the prosecuting authority shall serve impartially and exercise, carry out or perform his or her powers, duties and functions in good faith and without fear, favour or prejudice and subject only to the Constitution and the law. Sections 21(1) and 22(2)*(a)* of the NPA Act provide that the NDPP must determine prosecuting policy and issue policy directives, which must be observed in the prosecuting process. In terms of s 22(2)*(b)* of the NPA Act, the NDPP may intervene in any prosecuting process when policy directives are not complied with. Section 22(2)*(c)* of the NPA Act provides that the NDPP may review a decision to prosecute or not to prosecute after consulting the relevant Director of Public Prosecutions and after taking representations, within the periods specified by the NDPP of the accused person, the complainant and any other person or body who the NDPP considers to be relevant.

[22] In *Democratic Alliance & others v Acting National Director of Public Prosecutions & others,*[8] this court held at paras 23 to 32 that in a constitutional state such as South Africa there were by definition legal limits to the exercise of public power: the government, like everyone else, was bound by and equal before the law. The power to enforce the rule of law resided in the judiciary through its powers of review under the rule of law, which extended beyond the confines of a review of 'administrative action' under the Promotion of Administrative Justice Act 3 of 2000 (PAJA). When it decided to discontinue a prosecution, the NDPP exercised a public power which was subject to a rule of law review, even if it did not constitute administrative action.

And at para 27 the court said:

'While there appears to be some justification for the contention that the decision to discontinue a prosecution is of the same genus as a decision to institute or continue a prosecution, which is excluded from the definition of "administrative action" in terms of s 1(ff) of PAJA, it is not necessary to finally decide that question. Before us it was conceded on behalf of the first and third respondents that a decision to discontinue a prosecution was subject to a rule of law review. That concession in my view was rightly made. . . .'

[8] *Democratic Alliance & others v Acting National Director of Public Prosecutions & others* [2012] ZASCA 15; 2012 (3) SA 486 (SCA).

[23] In *National Director of Public Prosecutions & others v Freedom Under Law,*[9] this court held that the same policy considerations underlying the exclusion of a decision to institute or to continue to prosecute from the ambit of PAJA applied to a decision not to prosecute or to discontinue a prosecution.

At para 27 the court said:

'(a) It has been recognised by this court that the policy considerations underlying our exclusion of a decision to prosecute from a PAJA review are substantially the same as those which influenced the English courts to limit the grounds upon which they would review decisions of this kind.

(b) The English courts were persuaded by the very same policy considerations to impose identical limitations on the review of decisions not to prosecute or not to proceed with prosecution.

(c) In the present context I can find no reason of policy, principle or logic to distinguish between decisions of these two kinds.

(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(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 to a review on the wider basis of PAJA, but is limited to grounds of legality and rationality.'

[24] Thus, all decisions by the prosecuting authority to prosecute or not to prosecute must be taken impartially, without fear, favour or prejudice. They must also adhere to prosecuting policy and policy directives. It goes without saying that the aim of prosecuting policy and policy directives must be to serve the interests of justice for the benefit of the public in general. And decisions to prosecute or not to prosecute may be reviewed, either by the NDPP under the NPA Act or by the courts under the rule of law.

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[9] *National Director of Public Prosecutions & others v Freedom Under Law* [2014] ZASCA 58; 2014 (2) SACR 107 (SCA) paras 25 – 27.

[25] It follows that a decision of the prosecuting authority not to prosecute, which of course is a prerequisite for a private prosecution in terms of s 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 subsecs 7(1) and 8 of the CPA.

[26] The effect of s 7(1) of the CPA is to permit private prosecutions only where private and personal interests are at stake. This is explained in *Attorney General v Van der Merwe and Bornman*[10] where the court said:

'The object of the phrase [substantial and peculiar interest] 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 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 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 involved by the deterrent effect of punishment and it sets at naught the inroad into to such inalienable rights by effecting ethical retribution. Finally it effects atonement, which is a social desideratum.'

[27] In *Barclays Zimbabwe Nominees (Pvt) Limited v Black*[11] the question arose as to whether or not a company was entitled to bring a private prosecution. Milne JA said, at 724 G, that the term 'private person' should be interpreted as meaning only a natural person, and expressly excluded a company or a juristic person. And at 726F-J he said:

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[10] *Attorney General v Van Der Merwe and Bornman* 1946 OPD 197 at 201.
[11] *Barclays Zimbabwe Nominees (Pvt) Limited v Black* [1990] ZASCA 92; 1990 (4) SA 720 (A).

'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, s 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 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.'

[28] In the final analysis, private prosecutions in terms of s 7 of the CPA are only permitted on grounds of direct infringement of human dignity. This is the reason for s 7(1)*(a)* of the CPA and for the exclusion of juristic persons other than those mentioned in s 8 from instituting private prosecutions. Human dignity is a foundational value of our Constitution. To allow for private prosecutions other than in terms of s 8 of the CPA only on grounds of direct infringement of human dignity, is for the reasons mentioned, rationally related to the legitimate government purpose of limitation of private prosecutions. I therefore find that s 7(1)*(a)* of the CPA is not unconstitutional.

[29] Another aspect requires attention. It is unfortunate that the respondents failed to deal with the merits and provide this court with the rationale for the limitation of private prosecutions. The first respondent is charged with the administration of the Criminal Procedure Act. The second respondent was cited as head of the single national prosecuting authority responsible for the institution of criminal proceedings on behalf of the State. The government and the respondents have a constitutional duty to the courts, to the legislature and the citizens of this country to be open and accountable in a manner that promotes the rule of law. Our courts have on many

occasions referred to the special duty that rests on the government in constitutional litigation.[12] As was said by Cameron J in *Van Niekerk v Pretoria City Council,*[13] government cannot 'play possum' by simply rolling over and playing dead when a constitutional challenge is brought against a statute.

[30] As to the costs aspect, both parties did not seek costs. In accordance with the principle set out in *Biowatch Trust v Registrar, Genetic Resources & others*[14] no order as to cost is made.

[31] The following order is made:

The appeal is dismissed.

[12] See *Permanent Secretary, Department of Welfare, Eastern Cape v Ngxuza & others* [2001] ZASCA 85; 2001 (4) SA 1184 (SCA) paras 14 and 15; *Van der Merwe & another v Taylor NO & others* [2007] ZACC 16; 2008 (1) SA 1 (CC) paras 71 and 72).

[13] *Van Niekerk v Pretoria City Council* 1997 (3) SA 839 (T) at 850A-C.

[14] *Biowatch Trust v Registrar, Genetic Resources & others* [2009] ZACC 14; 2009 (6) SA 232 (CC) paras 21 – 25.

H Saldulker

Judge of Appeal

APPEARANCES:

For the Appellant	K Hopkins (with S Freese and L Nkoana)
	Instructed by:
	Marston & Taljaard c/o Friedland Hart Solomon & Nicolson, Pretoria
	Honey Attorneys, Bloemfontein
For the Respondents:	L Montsho – Moloisane SC (with VD Mtsweni)
	Instructed by:
	The State Attorney, Pretoria
	The State Attorney, Bloemfontein