



**CONSTITUTIONAL COURT OF SOUTH AFRICA**

Case CCT 1/16

In the matter between:

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

Applicant

and

**MINISTER OF JUSTICE AND  
CONSTITUTIONAL DEVELOPMENT**

First Respondent

**NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS**

Second Respondent

and

**CORRUPTION WATCH**

Amicus Curiae

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

**Coram:** Nkabinde ADCJ, Cameron J, Froneman J, Jafta J, Khampepe J, Madlanga J, Mhlantla J, Musi AJ and Zondo J

**Judgment:** Khampepe J (unanimous)

**Heard on:** 23 August 2016

**Decided on:** 8 December 2016

**Summary:** animal welfare — private prosecution — juristic persons — NSPCA

**ORDER**

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On appeal from the Supreme Court of Appeal (hearing an appeal from the High Court of South Africa, Gauteng Division, Pretoria):

The following order is made:

1. Leave to appeal is granted and the appeal is upheld.
2. Condonation is granted.
3. The orders of the High Court and Supreme Court of Appeal are set aside and replaced with the following:
  - “(a) It is declared that the National Society for the Prevention of Cruelty to Animals 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 read with section 8 of the Criminal Procedure Act 51 of 1977.
  - (b) The respondents must pay the applicant’s costs, including the costs of two counsel.”
4. The respondents must pay the applicant’s costs in this Court, including the costs of two counsel.

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**JUDGMENT**

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KHAMPEPE J (Nkabinde ADCJ, Cameron J, Froneman J, Jafta J, Madlanga J, Mhlantla J, Musi AJ and Zondo J concurring):

[1] 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. Animals have shifted from being “mere brutes or beasts” to “fellow beasts, fellow mortals or fellow creatures” and finally to “companions, friends and brothers.”<sup>1</sup> To protect these voiceless companions, individuals have time and again stepped in when animals are mistreated. Around the world, societies similar to the National Society for the Prevention of Cruelty to Animals (NSPCA) zealously defend their welfare.<sup>2</sup> These organisations champion the norm that we do not accept acts of cruelty against those who cannot defend themselves, a norm finding its origins in 1635.<sup>3</sup> The question before us is whether the NSPCA is entitled to privately prosecute crimes of animal cruelty connected with its mandate.

[2] The NSPCA brings a constitutional challenge to section 7(1)(a) of the Criminal Procedure Act (CPA).<sup>4</sup> This challenge failed in both the High Court and Supreme Court of Appeal.<sup>5</sup> In this Court, the NSPCA has widened the basis upon which it seeks relief. During oral submissions, the argument was advanced that the NSPCA is already

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<sup>1</sup> Keith Thomas *Man and the Natural World* (Penguin Books, London 1984) at 172.

<sup>2</sup> For example, the Royal Society for the Prevention of Cruelty to Animals (RSPCA) describes itself as “the largest non-governmental law enforcement agency in England and Wales” and is the de facto prosecutorial authority for many animal cruelty cases there. It was formed in 1824 and inspired the formation of similar volunteer charitable societies in other countries. Prosecutions of animal cruelty occurred in Zimbabwe from as early as 1832; the first SPCA was registered there in 1967. In the late nineteenth century, the RSPCA expanded across to Australia and New Zealand. The first SPCA in South Africa was established before the city of Johannesburg, over 140 years ago.

<sup>3</sup> The earliest recorded law against animal cruelty dates back to 1635 in Ireland. *The Act against Plowing by the Tayle, and Pulling the Wooll off Living Sheep* (1635) (Ireland) prohibited using horses’ tails to control them and pulling wool from sheep that were still alive.

<sup>4</sup> 51 of 1977.

<sup>5</sup> *National Society for the Prevention of Cruelty to Animals v Minister of Justice and Constitutional Development* [2014] ZAGPPHC 763 (High Court judgment); *National Society for the Prevention of Cruelty to Animals v Minister of Justice and Constitutional Development* [2015] ZASCA 206; 2016 (1) SACR 308 (SCA) (Supreme Court of Appeal judgment).

empowered to institute private prosecutions in terms of section 8 of the CPA, read with section 6(2)(e) of the Societies for the Prevention of Cruelty to Animals Act (SPCA Act).<sup>6</sup> It now seeks a declaration to that effect.

### *Parties*

[3] The applicant is the NSPCA, a body empowered to prevent animal cruelty and promote animal welfare.<sup>7</sup> It is established in terms of section 2(1) of the SPCA Act. The first respondent is the Minister of Justice and Constitutional Development (Minister),<sup>8</sup> cited in his official capacity as the minister responsible for administering the CPA.<sup>9</sup> The second respondent is the National Director of Public Prosecutions (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.

### *Background*

[4] During November 2010, the NSPCA became aware of a religious sacrificial slaughter of two camels in front of a crowd of people. A number of NSPCA inspectors visited the site and witnessed alleged cruel and inhumane treatment. 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’s throat was slit three times. In an act of compassion, an inspector shot both camels to relieve them of their misery.

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<sup>6</sup> 169 of 1993.

<sup>7</sup> Papers filed in the High Court incorrectly cited the name of the applicant as “NSPCA” rather than “National Council of Societies for the Prevention of Cruelty to Animals”, which is the body’s correct name. “NSPCA” has been used in subsequent filings and submissions in this and lower courts and is the name of record.

<sup>8</sup> The Minister is now known as the “Minister of Justice and Correctional Services”.

<sup>9</sup> In terms of section 1 of the CPA.

[5] The NSPCA was of the opinion that animal cruelty offences had been committed under the Animals Protection Act (APA).<sup>10</sup> Accordingly, it referred the matter to the NPA for prosecution. The NSPCA contends that it furnished overwhelming evidence to the prosecutors, but the NPA nevertheless declined to prosecute.

[6] Subsequently, the NSPCA sought to institute a private prosecution. To do so, it 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.

[7] 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. 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.

[8] 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. The letter also reiterated that, in the NPA’s opinion, the NSPCA does not meet the requirements for a section 7(1)(a) private prosecution.

[9] Feeling its work was “hamstrung” by this position, the NSPCA 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. In its founding papers, the NSPCA explained that the inability to privately prosecute renders it unable to fulfil its statutory mandate. Unsuccessful in the High Court, the NSPCA subsequently

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<sup>10</sup> 71 of 1962.

appealed to the Supreme Court of Appeal. That challenge was likewise unsuccessful, leading to the present application for leave to appeal.

*Litigation history*

*High Court*

[10] In the High Court, the NSPCA challenged the constitutionality of section 7(1)(a) of the CPA. The NSPCA contended that there is no rational basis for treating juristic persons differently to natural persons.<sup>11</sup> The 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.”<sup>12</sup>

[11] The Minister and National Director did not oppose the application; they instead filed explanatory affidavits. Both contended that the NSPCA lacked sufficient legal standing. This, because the NSPCA is not directly affected by the impugned provision as it operates in the public interest rather than a private interest. 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]”.

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<sup>11</sup> High Court judgment above n 5 at para 4.

<sup>12</sup> *Id.*

[12] In reply, the NSPCA 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.

[13] The High Court found that in terms of sections 7 and 8 of the CPA, only natural persons and public bodies have the power to privately prosecute.<sup>13</sup> It concluded that the exclusion of juristic persons amounts to discrimination.<sup>14</sup> However, it concluded that this discrimination is not unfair because it serves a legitimate government purpose, underpinned by a “rational relationship between this purpose and the differentiation.”<sup>15</sup> The Court therefore, upheld the validity of the provision.

[14] The High Court briefly considered 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.<sup>16</sup> 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. 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”.<sup>17</sup>

#### *Supreme Court of Appeal*

[15] The Supreme Court of Appeal 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

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<sup>13</sup> Id at para 15.

<sup>14</sup> Id at paras 25 and 28.

<sup>15</sup> Id at para 28.

<sup>16</sup> Id at para 29.

<sup>17</sup> Id.

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.”<sup>18</sup>

[16] The Supreme Court of Appeal applied the test in *Prinsloo*<sup>19</sup> to assess the constitutionality of section 7(1)(a).<sup>20</sup> The Court came to the same conclusion as the High Court.<sup>21</sup> However, it did so on different reasoning. After finding that differentiation exists,<sup>22</sup> the Court considered whether the impugned provision is rationally connected to regulating private prosecutions, and whether there is an acceptable reason for limiting access to private prosecutions.<sup>23</sup> The Court concluded that the policy of limiting private prosecutions to certain kinds of cases “cannot be faulted” and upheld the constitutional validity of section 7(1)(a).<sup>24</sup>

[17] Like the High Court, the Supreme Court of Appeal also considered the applicability of section 8.<sup>25</sup> 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.<sup>26</sup>

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<sup>18</sup> Supreme Court of Appeal judgment above n 5 at para 6.

<sup>19</sup> *Prinsloo v Van der Linde* [1997] ZACC 5; 1997 (3) SA 1012 (CC); 1997 (6) BCLR 759 (CC) at para 25.

<sup>20</sup> Supreme Court of Appeal judgment above n 5 at paras 14-6.

<sup>21</sup> *Id* at paras 26-7.

<sup>22</sup> *Id* at paras 14-5, citing *Prinsloo* above n 19 at para 25.

<sup>23</sup> *Id* at para 19.

<sup>24</sup> *Id* at paras 20-5.

<sup>25</sup> *Id* at paras 10-2.

<sup>26</sup> *Id* at para 12.



*In this Court*

*Applicant's submissions*

[18] The NSPCA seeks leave to appeal the decision of the Supreme Court of Appeal. It does so on the basis that the impugned provision creates an “arbitrary distinction” between juristic persons and natural persons, which violates the rule of law and the right to equality.

[19] Clutching onto an argument raised by the respondents, which I deal with below, the NSPCA advances an alternative argument based on section 8 of the CPA read with section 6(2)(e) of the SPCA Act. This it did during oral submissions.

*Respondents' submissions*

[20] In their papers, the Minister and National Director reject the NSPCA's contention that section 7(1)(a) of the CPA is unconstitutional. They accept that the section differentiates between natural persons and juristic persons, but submit that the differentiation is rational as it is connected to a legitimate government purpose. To this end, the respondents endorse the Supreme Court of Appeal's reasoning and findings on this issue.

[21] The respondents also argue in their papers that redress for the NSPCA lies not in section 7, but in section 8 of the CPA. They contend that section 8 confers a right to conduct private prosecutions “to statutory bodies under a statutory right”, and state 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”. This is the argument that the NSPCA adopted as an alternative argument. Consequently, the NSPCA sought leave to amend its notice of motion from the bar, concordant with this argument. Counsel requested the Court to declare that the NSPCA has the statutory authority to privately prosecute. Neither the respondents nor the *amicus curiae* opposed this application.

*Amicus curiae's submissions*

[22] Corruption Watch argues that section 7(1)(a) of the CPA can be interpreted in line with the Bill of Rights to allow juristic persons to institute private prosecutions. It contends that the three constituent elements of section 7(1)(a) – being “private person”, “some substantial and peculiar interest” and “individually suffered” – are reasonably capable of a more flexible and generous interpretation than that afforded in the lower courts. It submits that there is nothing in the language of the section which precludes its application to juristic persons. Corruption Watch also argues that the State has a constitutional obligation to take reasonable measures to combat corruption, which must be infused into any reading of section 7(1)(a). Enabling juristic persons to prosecute privately is consistent with that duty, and the lower courts’ interpretation of section 7(1)(a) as applying only to natural persons undermines this duty.

[23] In the alternative, Corruption Watch endorses the NSPCA’s constitutional challenge. It submits that, if section 7(1)(a) cannot be interpreted more broadly, then it must be declared unconstitutional and invalid.

*Jurisdiction and leave to appeal*

[24] The NSPCA alleges that section 7(1)(a) of the CPA violates section 9(1) of the Constitution and the rule of law. Where a legislative provision is challenged on the basis that it violates a right in the Bill of Rights,<sup>27</sup> or the rule of law,<sup>28</sup> this Court has jurisdiction. Determining whether section 7(1)(a) can be interpreted in line with the

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<sup>27</sup> *Fraser v ABSA Bank Ltd* [2006] ZACC 24; 2007 (3) SA 484 (CC); 2007 (3) BCLR 219 (CC) at para 43; *Daniels v Campbell NO* [2004] ZACC 14; 2004 (5) SA 331 (CC); 2004 (7) BCLR 735 (CC) at paras 43-4; *S v Boesak* [2000] ZACC 25; 2001 (1) SA 912 (CC); 2001 (1) BCLR 36 (CC) at para 14.

<sup>28</sup> *Pharmaceutical Manufacturers Association of SA: In re ex parte President of the Republic of South Africa* [2000] ZACC 1; 2000 (2) SA 674 (CC); 2001 (1) BCLR 36 (CC) at paras 46 and 51.

Bill of Rights is accordingly a relevant consideration.<sup>29</sup> Leave to appeal should therefore be granted on the basis of section 167(3)(b)(i) of the Constitution.<sup>30</sup>

### *Condonation*

[25] The Minister and National Director filed their notice of opposition two days late, and their written submissions nineteen days late. The NSPCA filed their written submissions two days late. The explanations given for the NSPCA's delay, and for the respondents' first lapse in filing their notice of opposition late are satisfactory. The explanation given for the second lapse of the respondents in the late filing of their written submissions is concerning. The delay of the NSPCA in providing their foreign case law (being four foreign cases) to the respondents, and the necessity that senior counsel for the respondents be given time to review the papers after the date of filing had lapsed is not an adequate reason for a delay of this length. There has, however, been little prejudice to the NSPCA. Therefore, in each of the three instances, condonation is granted.

### *Relief sought*

[26] The NSPCA seeks redress for a specific impediment: it contends that as a result of being unable to privately prosecute, it cannot fulfil its statutory mandate. The NSPCA submits that this mandate requires that it be able to prosecute the animal cruelty offences set out in the APA. The 2014 Supreme Court of Appeal decision in *Lemthongthai* situated the care and protection of animals within the ambit of the Constitution.<sup>31</sup> This Court has repeatedly emphasised that, within reason, "judicial officers must prefer interpretations of legislation that fall within constitutional bounds

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<sup>29</sup> In *Mankayi v AngloGold Ashanti Ltd* [2011] ZACC 3; 2011 (3) SA 237 (CC); 2011 (5) BCLR 453 (CC) at para 120, Froneman J, in a concurring judgment, found that "[w]hat is thus required from an applicant who seeks leave to appeal to this [C]ourt is the plausible assertion of some constitutional value or right which is implicated in the case". See also the majority judgment at paras 13-9 (constitutional issue) and 20-3 (interests of justice) which found jurisdiction on a narrower ground, but did not disavow the approach in the concurring judgment. See also *S v Shaik* [2007] ZACC 19; 2008 (2) SA 208 (CC); 2007 (12) BCLR 1360 (CC) at para 83.

<sup>30</sup> Section 167(3)(b)(i) enables the Constitutional Court to decide "constitutional matters".

<sup>31</sup> *S v Lemthongthai* [2014] ZASCA 131; 2015 (1) SACR 353 (SCA) (*Lemthongthai*) at para 20.

over those that do not”.<sup>32</sup> 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.

[27] If section 6(2)(e) can be construed in a constitutionally-compliant manner that provides the NSPCA with the remedy it seeks, this is the preferable route. This approach best gives effect to the constitutional imperative and also ensures that appropriate relief is provided. Consequently, the Court is faced with three inquiries:

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

#### *The section 8 argument*

[28] As the NSPCA sought to rely on the section 8 argument only during oral argument in this Court, a preliminary point concerns whether it should be adjudicated at all. In *CUSA*, 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”.<sup>33</sup> Here, it

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<sup>32</sup> *Bertie van Zyl (Pty) Ltd v Minister for Safety and Security* [2009] ZACC 11; 2010 (2) SA 181 (CC); 2009 (10) BCLR 978 (CC) at para 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) at para 23.

<sup>33</sup> *CUSA v Tao Ying Metal Industries* [2008] ZACC 15; 2009 (2) SA 204 (CC); 2009 (1) BCLR 1 (CC) at para 68. See further Cameron J’s majority judgment in *KwaZulu-Natal Joint Liaison Committee v MEC for Education*,

was the respondents who first raised the section 8 argument in their papers, accordant with earlier letters sent from the NPA to the NSPCA. The applicant adopted this argument during the hearing in this Court.<sup>34</sup> Neither respondent, nor the *amicus curiae*, raised opposition to the advancement of the section 8 argument. Nor did they oppose the applicant amending its notice of motion to reflect this.

[29] The Court posed numerous questions to counsel during oral argument to further clarify the submission. The High Court and Supreme Court of Appeal both considered this point. In my view, the argument has been sufficiently canvassed before us. Considering the section 8 argument in this context does not appear to me to constitute unfairness to either party. The overarching principle remains that a court may only adjudicate on issues properly put before it.<sup>35</sup> As Zondo J’s dissenting judgment in *KwaZulu-Natal Joint Liaison Committee* forcefully emphasises, “[t]his Court has repeatedly said that in motion proceedings a party must make its case in its papers”.<sup>36</sup> In a separate dissenting judgment in the same case, Nkabinde J reminds that the purpose of pleadings is to set out the issues for the other parties and the court.<sup>37</sup> Nevertheless,

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*KwaZulu-Natal* [2013] ZACC 10; 2013 (4) SA 262 (CC); 2013 (6) BCLR 615 (CC). The judgment at para 68 states:

“[T]his 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.”

See also *Director of Public Prosecutions, Transvaal v Minister of Constitutional Development* [2009] ZACC 8; 2009 (2) SACR 130 (CC); 2009 (7) BCLR 637 (CC) (*Transvaal*) at para 35; *Matatiele Municipality v President of the RSA* [2006] ZACC 12; 2006 (5) SA 47 (CC); 2006 (5) BCLR 622 (CC) at para 67; *Alexkor Ltd v The Richtersveld Community* [2003] ZACC 18; 2004 (5) SA 460 (CC); 2003 (12) BCLR 1301 (CC) at para 44.

<sup>34</sup> From the written submissions filed in the High Court, it is clear that the NSPCA did not consider that there was an express conferral of the power of private prosecution upon it.

<sup>35</sup> *Transvaal* above n 33 at para 39, citing *Paddock Motors (Pty) Ltd v Igesund* 1976 (3) SA 16 (A); [1976] 3 All SA 332 (A) at 23B-D.

<sup>36</sup> *KwaZulu-Natal Joint Liaison Committee* above n 33 at para 160. See further *Phillips v National Director of Public Prosecutions* [2005] ZACC 15; 2006 (1) SA 505 (CC); 2006 (2) BCLR 274 (CC) at para 39; *Carmichele v Minister of Safety and Security* [2001] ZACC 22; 2001 (4) SA 938 (CC); 2001 (10) BCLR 995 (CC) at para 31; *Prince v President, Cape Law Society* [2000] ZACC 1; 2001 (2) SA 388 (CC); 2001 (2) BCLR 133 (CC) at para 22.

<sup>37</sup> *KwaZulu-Natal Joint Liaison Committee* id at para 147. See also *Barkhuizen v Napier* [2007] ZACC 5; 2007 (5) SA 323 (CC); 2007 (7) BCLR 691 (CC) at para 39.

parties may be allowed to rely on a point of law external to the pleadings when it has been explored at a hearing.<sup>38</sup>

[30] As I have indicated, the respondents have always endorsed the section 8 argument. Both parties have had the opportunity to express and explore the legal question. Therefore, there is no reason why this Court should not adjudicate the section 8 argument. I now turn to its merits and will first situate the issue within the overarching framework of the prosecutorial scheme.

*The statutory scheme of prosecutions*

[31] The power of prosecution takes three forms in our current legal regime: State, statutory, and on certificate *nolle prosequi*. The legal framework for prosecution is established through the Constitution, National Prosecuting Authority Act<sup>39</sup> (NPA Act) and the CPA. State prosecution, the first category of prosecution, is governed by the Constitution and the NPA Act – section 179 of the Constitution provides for a “single national prosecuting authority in the Republic, structured in terms of an Act of Parliament”<sup>40</sup> and empowers the prosecuting authority to “institute criminal proceedings *on behalf of the state*”.<sup>41</sup> The NPA Act gives effect to that power.<sup>42</sup> The NPA Act re-emphasises that proceedings are instituted and conducted “on behalf of the State”,<sup>43</sup> and that the power is exercised “on behalf of the Republic”.<sup>44</sup>

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<sup>38</sup> *KwaZulu-Natal Joint Liaison Committee* id at para 147.

<sup>39</sup> 32 of 1998.

<sup>40</sup> Section 179(1) of the Constitution.

<sup>41</sup> Section 179(2) of the Constitution. My emphasis.

<sup>42</sup> Section 2 of the NPA Act provides for a “single national prosecuting authority established in terms of section 179 of the Constitution”. Section 20 sets out the power of the authority to “institute and conduct criminal proceedings” as “contemplated in section 179(2) and all other relevant sections of the Constitution”.

<sup>43</sup> Section 20(a) of the NPA Act.

<sup>44</sup> Section 20 of the NPA Act.

[32] The other two categories of prosecutions are not instituted on behalf of the state; both are legislatively titled “private prosecutions”.<sup>45</sup> In complement to the NPA Act, the CPA governs prosecution on certificate (section 7) and by statutory right (section 8). These sections constitute two “carve-outs” from the general principle that criminal prosecutions are for the public interest and in the name of the state. Section 8 of the CPA requires that the right to private prosecution be “expressly conferred”.

*“Expressly conferred” under the CPA*

[33] The text of a particular provision is the starting point in the interpretive process, but textual meaning is always informed by context, even where the language is clear.<sup>46</sup> The use of “expressly” in legislation does not always entail a requirement that the thing be made verbally explicit. 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”.<sup>47</sup> “Express” is “stronger than implication” but does not require the use of specific words.<sup>48</sup> 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.

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<sup>45</sup> Both sections 7 and 8 of the CPA provide for “private prosecution”.

<sup>46</sup> *Tshwane City v Link Africa* [2015] ZACC 29; 2015 (6) SA 440 (CC); 2015 (11) BCLR 1265 (CC) at para 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) (*Bato Star*) at paras 90-1.

<sup>47</sup> *Premier, Limpopo Province v Speaker of the Limpopo Provincial Government* [2011] ZACC 25; 2011 (6) SA 396 (CC); 2011 (11) BCLR 1181 (CC) at para 34, citing *Commissioner of Inland Revenue v Dunn* 1928 EDL 184 at 195.

<sup>48</sup> *Id.*

[34] Whether the conferral is sufficiently clear is established through a purposive<sup>49</sup> and contextual<sup>50</sup> reading of the empowering provision – in this case, section 6(2)(e) of the SPCA Act. This holistic interpretive approach is generous and “gives expression to the underlying values of the Constitution” within the bounds of language and context.<sup>51</sup> To determine whether section 6(2)(e) of the SPCA Act expressly confers a right of private prosecution, we look to the specific statutory language; its textual, historical, and social context; and the constitutional values which underpin it.

*“Institute legal proceedings” connected with its functions*

[35] “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.”*<sup>52</sup>

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<sup>49</sup> Moseneke DCJ, writing for the Court, in *Department of Land Affairs v Goedgelegen Tropical Fruits (Pty) Ltd* [2007] ZACC 12; 2007 (6) SA 199 (CC); 2007 (10) BCLR 1027 (CC) at para 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) at para 46; *S v Zuma* [1995] ZACC 1; 1995 (2) SA 642 (CC); 1995 (4) BCLR 401 (CC) at paras 15 and 17; *Bato Star* above n 46 at paras 90-1.

<sup>50</sup> See *Mansingh v General Council of the Bar* [2013] ZACC 40; 2014 (2) SA 26 (CC); 2014 (1) BCLR 85 (CC) at para 9; *SATAWU v Garvas* [2012] ZACC 13; 2013 (1) SA 83 (CC); 2012 (8) BCLR 840 (CC) at para 37.

<sup>51</sup> *Mansingh* id at para 16.

<sup>52</sup> My emphasis. This power, which is conferred on the Council and Board of the NSPCA, is extended to include the societies of the NSPCA by section 9(1)(i) of the same Act. The same provision provides that the NSPCA may also “defend legal proceedings instituted against the Councils”.



Both the High Court and Supreme Court of Appeal found that the power to “institute legal proceedings” does not constitute a conferral of the power of private prosecution.<sup>53</sup> 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.<sup>54</sup>

[36] On a plain textual reading, the term “institute legal proceedings” can include the power to privately prosecute. The language used in the provision is broad and permissive; it does not distinguish between civil and criminal proceedings. 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.

[37] Numerous other statutory bodies are similarly empowered using the term “institute legal proceedings”; they serve as a useful point of distinction to understand the meaning given in context of the SPCA Act.<sup>55</sup> 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 different types of causes of action and different types of claims. Certain statutes connect the term “institute legal proceedings” to

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<sup>53</sup> Supreme Court of Appeal judgment above n 5 at para 12; High Court judgment above n 5 at para 29.

<sup>54</sup> This is understandable, as the section 8 challenge was not the focus of the applicant’s submissions in the lower courts. The High Court at para 29 simply concluded:

“It is unfortunate that section 6(2)(e) of the Societies for the Prevention of Cruelty to Animals Act, No 169 of 1963 does not specifically confer the right of a public prosecution upon the applicant”.

The Supreme Court of Appeal at para 12 similarly found:

“In terms of section 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”.

<sup>55</sup> See *Premier, Limpopo Province* above n 47 at para 35, noting that while the meaning assigned to terms in other contexts “provides a useful guide, the meaning that a word has in the Constitution or legislation is generally coloured by the context in which it occurs”.

*specific* proceedings, such as the recovery of moneys,<sup>56</sup> or the addressing of particular environmental issues.<sup>57</sup> Therefore, the types of legal proceedings the NSPCA can institute is intimately connected with its functions; whether or not it can prosecute is informed by the SPCA Act as a whole, as well as its surrounding statutory scheme.

*The SPCA Act and the APA*

[38] Interpreting the SPCA Act properly requires that it be read in conjunction with the APA. The NSPCA operates in the animal welfare framework that the APA establishes. The Act has a perspicuous purpose: to promote animal welfare and prevent cruelty to animals. The Act has three central functions:

- (a) to set out an extensive list of offences that constitute animal cruelty;<sup>58</sup>
- (b) to establish a broad remedial scheme of civil and criminal punishment;<sup>59</sup>  
and
- (c) to empower societies for the protection of animals (of which the centralised NSPCA is the current instantiation).<sup>60</sup>

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<sup>56</sup> For example, section 4(t) of the Council for the Built Environment Act 43 of 2000 permits the Council to “institute legal proceedings to recover all outstanding membership fees payable under this Act”. Section 34(2) of the South African Language Practitioners’ Council Act 8 of 2014 enables the Council to institute legal proceedings in respect of a person failing to pay the prescribed annual fee. Section 30(1) of the South African National Roads Agency Limited and National Roads Act 7 of 1998 enables the Agency to “institute legal proceedings to recover toll moneys owing to it”.

<sup>57</sup> For example, section 82(a) of the National Environmental Management Act: Integrated Coastal Management Act 24 of 2008 enables the Minister, an MEC or a relevant municipality to institute legal proceedings to prevent damage to the coastal public property or the coastal environment.

<sup>58</sup> Sections 2 and 2A together provide for 24 distinct offences constituting cruelty to animals, in varying levels of specificity.

<sup>59</sup> Section 3 (“Powers of court”) sets out orders that the court may give, specifically relating to animal treatment. Section 4 (“Power of court to award damages”) sets out a civil punishment scheme enabling the court to award damages.

<sup>60</sup> Section 8 of the APA. The SPCA Act specifically notes that the Council and societies are “for the purposes of section 8 of the Animals Protection Act . . . a society for the prevention of cruelty to animals”. The purpose of the APA is “[t]o consolidate and amend the laws relating to the prevention of cruelty to animals”.

The APA also sets out a wide range of orders that a court may make to minimise future animal suffering if an offence has been established under that Act.<sup>61</sup>

[39] The SPCA Act gives effect to the society envisaged by the APA. It sets out functions and purposes of the NSPCA, which principally have the objective of protecting animal welfare as contemplated in the APA. The NSPCA is also subject to ministerial oversight.<sup>62</sup> Together, these indicate the special and central role the NSPCA plays in protecting animal welfare in our society.

[40] Specific provisions of the legislation reinforce the wide ambit of the Act. For example, the NSPCA is empowered 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”<sup>63</sup> and doing “all things reasonably necessary for or incidental to the achievement of [its] objects”.<sup>64</sup> These are sweeping functions. More so when read in light of the comprehensive list of offences in the APA. Further, 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”. By design, the NSPCA is uniquely placed to robustly and responsively combat animal cruelty.

[41] At the time of enactment of the SPCA Act, Parliament recognised that—

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<sup>61</sup> For example, a court, under section 3 of the APA, may order that—

- (a) an animal be destroyed if it would be cruel to keep it alive;
- (b) the person convicted not be allowed to own the animal harmed in the offence; or
- (c) the person convicted be declared unfit to own or look after any animal in general, or a specific type of animal, for a certain period of time.

<sup>62</sup> See section 13. Further, section 2(3)(b) of the Act requires that the Minister nominate a director for the board of the NSPCA, further reinforcing ministerial involvement.

<sup>63</sup> Section 3(c) of the SPCA Act.

<sup>64</sup> Section 3(f) of the SPCA Act.

“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.”<sup>65</sup>

This depicts a shift towards empowering the NSPCA to fulfil functions the state cannot: functions increasingly considered as important for our community. It inherently recognises the limitations of the state in achieving the national goal of animal protection.

[42] For this reason, much of the SPCA Act is dedicated to centralising the activities of the previously disparate societies empowered by the APA.<sup>66</sup> This structural shift changed the nature of these societies, unifying them under a national body. Through the SPCA Act, the NSPCA became more accountable to the state and the community in general. Ultimately, the SPCA Act elevates the potency of the APA, and bolsters the NSPCA’s efficacy in its role of combating animal cruelty.

#### *Associated Acts*

[43] 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*”.<sup>67</sup> 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

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<sup>65</sup> Debates of the National Assembly (Hansard) 25 November 1993 at 14065 (Minister of Agriculture).

<sup>66</sup> This followed recognition by the Legislature that these societies were responsible for approximately 80 per cent of animal welfare activities in South Africa and consequently represent a “large and important group”: Debates of the National Assembly (Hansard) 25 November 1993 at 14066 (Minister of Agriculture).

<sup>67</sup> Section 9(2)(i). My emphasis.

legislation (animal protection regime).<sup>68</sup> The APA lays the groundwork for the animal protection regime.

[44] The other statutes fulfil different roles in protecting animals and regulating their treatment. The Performing Animals Protection Act regulates how performing animals and guard dogs are treated, trained and exhibited. The Veterinary and Para-Veterinary Professions Act standardises practice in the veterinary and para-veterinary professions. Part of the Medicine and Related Substances Act controls the types of medicines that may be prescribed for use on animals. The Animal Diseases Act seeks to promote animal health through controlling animal diseases and parasites. The Abattoir Hygiene Act maintains proper standards of hygiene in animal slaughter for consumption.

[45] Together, these statutes set the standard for how animals are to be cared for, treated and used. Underscoring these is the notion that the prevention of unnecessary cruelty to animals – including those which we may use for service or food – is a goal of our society.

[46] 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. Because the majority of the provisions in the APA concern offences, the legal proceedings stemming from it are most likely to be criminal. The other statutes in the animal protection regime also include a range of offences related to the mistreatment of animals. As 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.

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<sup>68</sup> 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.

[47] Functionally, 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. To understand the SPCA Act as conferring the power of private prosecution is to give effect to the objects and purposes of the regime. This construction harmonises the powers and purpose of the NSPCA within the legislation itself and the wider context. Importantly, it gives effect to the NSPCA's primary purpose: to protect animal welfare.

[48] To read section 6(2)(e) as excluding the right of private prosecution would render the regime a toothless tiger. Legislation should not be construed to create futile provisions.<sup>69</sup> 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.

[49] The historical development of the legislative scheme also supports this interpretation. 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.<sup>70</sup> At that time, it fulfilled three functions rarely conferred in tandem – policing, investigating and prosecuting. The 1914 SPCA Act was repealed by the APA, which was silent on the right of private prosecution.<sup>71</sup> This was a conscious decision and not an inadvertent omission.<sup>72</sup> During the parliamentary debates in 1962, the Minister of Justice specifically objected to a provision conferring the power to privately prosecute, grounded on the concern that there was no safeguard of attorney-general supervision.<sup>73</sup>

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<sup>69</sup> See *Dage Properties (Pty) Ltd v General Chemical Corporation Ltd* 1973 (1) SA 163 (A); [1973] 1 All SA 299 (A) at 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) at 418G-H; *Ex Parte the Minister of Justice: In re Rex v Jacobson & Levy* 1931 AD 466 at 477.

<sup>70</sup> See section 12 of the Prevention of Cruelty to Animals Act 8 of 1914 (1914 SPCA Act).

<sup>71</sup> When the Bill was reintroduced in Parliament after initial debates, the section was omitted: Debates of the National Assembly (Hansard) 11 May 1962 at 5515-6 (Minister of Justice).

<sup>72</sup> *Id* at 5516.

<sup>73</sup> The Minister of Justice stated:

[50] The rationale for the deliberate exclusion of the right in 1962 does not carry through to the current Act. The iteration of the CPA<sup>74</sup> effective at that time provided, as its counterpart does today, for a dualistic private prosecution scheme on certificate and by statutory conferral.<sup>75</sup> It, however, lacked the important safeguard of oversight by the prosecutorial authority present in the current CPA.<sup>76</sup> 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.<sup>77</sup>

[51] There is no evidence that Parliament deliberately denied the right of private prosecution to the NSPCA, as it had done previously. Further, the current SPCA Act, as enacted in 1993, is not a direct heir to the APA. It does not repeal the APA, as the APA did for the 1914 SPCA Act. Rather, the two operate in conjunction; the SPCA Act builds on the powers conferred by the APA. These factors all bear pertinently on

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“The principle that private individuals should be allowed to bring prosecutions in the courts without restriction is not one which I can accept . . . The usual safety valve as far as private prosecutions are concerned namely, that it is only when the Attorney-General and the prosecutor have refused to prosecute and have given a certificate to that effect, that the private individual can go to court, does not apply here. The principle [of private prosecution] contained in this section is not one which I can accept.”

Debates of the National Assembly (Hansard) 9 February 1962 at 929.

<sup>74</sup> 56 of 1955.

<sup>75</sup> Section 11 of the 1955 CPA was titled “[p]rivate prosecution where attorney-general declines to prosecute” and section 12 was titled “[p]ublic bodies and certain other persons have right of private prosecution”. These provisions mirror the 1977 CPA’s conferral of the power of private prosecution through certificate *nolle prosequi* in section 7, and through statutory conferral in section 8, as discussed at [32].

<sup>76</sup> Section 8(2) of the CPA requires that the attorney-general has first right to prosecute any offence. It provides:

“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.”

Section 8(3) further reinforces the oversight. It states:

“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.”

<sup>77</sup> Id.

the proper meaning to be afforded to the term “institute legal proceedings” in the SPCA Act.<sup>78</sup>

[52] This term, when connected with the functions of the NSPCA, takes on a specific meaning informed by the unique legislative context of the animal protection regime. It is a meaning that confers the right of private prosecution with sufficient clarity for the purposes of section 8 of the CPA.

[53] It is apposite here to distinguish the use of the term “institute legal proceedings” in other pieces of legislation. 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. 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. The exceptional status afforded to the NSPCA is 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.

### *Animal cruelty*

[54] The desirability of preventing animal cruelty has been evident since the first South African SPCA was established in the 1870s, and was reinforced through the promulgation of the 1914 SPCA Act.<sup>79</sup> In 1928, the Legislature (somewhat ironically)

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<sup>78</sup> Debates of the National Assembly (Hansard) 25 November 1993 at 14080 provides:

“Mr J A JOOSTE: Mr Chairman, on a point of order: Is an honourable member allowed to refer to other honourable members in the Chamber as reptiles?”

Mr J H MOMBERG: Who said I was a reptile? [Interjections.]

The DEPUTY CHAIRMAN OF COMMITTEES (Assembly): Order! The honourable member probably did not mean it like that. The honourable member may proceed.

Mr J H MOMBERG: Mr Chairman, I do not understand what the honourable member means.”

<sup>79</sup> Debates of the National Assembly (Hansard) 25 November 1993 at 14063 (Minister of Agriculture).



introduced an amendment to the 1914 SPCA Act that prescribed whipping as punishment for any wilful and aggravated act of cruelty to animals. In *Masow*, the Court explained that this was an ethical decision on behalf of the Legislature to entrench the need to protect animals against cruel treatment.<sup>80</sup>

[55] Our courts now afford increasingly robust protection to animal welfare. The 1929 decision of *R v Smit* illustrates the emergence of this approach.<sup>81</sup> The offender, convicted of an animal cruelty offence, had beaten a dog for half an hour with a pole and spade, before pelting it with stones, and finally shooting it in its kennel. The Court 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".<sup>82</sup> Underscoring the conclusions in *Smit* and *Masow*, the Court in *Moato* found 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".<sup>83</sup> This approach was endorsed with increased fervour by Miller J in *Edmunds*, who held that cruelty was prohibited so as to "prevent degeneration of the finer human values in the sphere of treatment of animals".<sup>84</sup>

[56] More recently, Cameron JA's minority judgment in *Openshaw* 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".<sup>85</sup> The High Court in *South African Predator Breeders*

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<sup>80</sup> *Ex Parte: The Minister of Justice: In re Rex v Masow* 1940 AD 75 at 81 (*Masow*).

<sup>81</sup> *R v Smit* 1929 TPD 397 (*Smit*).

<sup>82</sup> *Id* at 401.

<sup>83</sup> *R v Moato* 1947 (1) SA 490 (O) (*Moato*).

<sup>84</sup> *S v Edmunds* 1968 (2) PH H398 (N) (*Edmunds*).

<sup>85</sup> *National Council of Societies for the Prevention of Cruelty to Animals v Openshaw* [2008] ZASCA 78; 2008 (5) SA 339 (SCA) (*Openshaw*) at para 38.

*Association* championed this view.<sup>86</sup> A unanimous Full Bench found that canned-hunting of lions is “abhorrent and repulsive” due to the animals’ suffering.<sup>87</sup> On appeal, the Supreme Court of Appeal did not dispute this finding.<sup>88</sup>

[57] The Supreme Court of Appeal in *Lemthongthai* explained in the context of rhino poaching, that “[c]onstitutional values dictate a more caring attitude towards fellow humans, animals and the environment in general”.<sup>89</sup> The Court concluded further that this obligation was especially pertinent because of our history.<sup>90</sup> Therefore, the rationale behind protecting animal welfare has shifted from merely safeguarding the moral status of humans to placing intrinsic value on animals as individuals.

[58] *Lemthongthai* is also notable because it relates animal welfare to questions of biodiversity. Animal welfare is connected with the constitutional right to have the “environment protected . . . through legislative and other means”.<sup>91</sup> 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.

[59] Parallel to the development of a principle prizing animal welfare, the NSPCA (previously comprised of discrete SPCAs) increasingly came to be seen as the special guardians of this laudable norm. In *Nel*, the Court explained that the SPCAs have “over the years, become well established and fully recognised as the authoritative voice in the

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<sup>86</sup> *South African Predator Breeders Association v Minister of Environmental Affairs and Tourism* [2009] ZAFSHC 68. In this case, regulations promulgated by the Government aimed at preventing the hunting and killing of a lion raised in captivity were challenged and held to be rational.

<sup>87</sup> *Id* at para 72.

<sup>88</sup> *South African Predator Breeders Association v Minister of Environmental Affairs and Tourism* [2010] ZASCA 151; [2011] 2 All SA 529 (SCA).

<sup>89</sup> *Lemthongthai* above n 31 at para 20.

<sup>90</sup> *Id*.

<sup>91</sup> See section 24(b) of the Constitution.

protection against injury or cruelty to animals from whatever source and under whatever circumstances, also acting against owners of the animals in question”.<sup>92</sup> 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.<sup>93</sup>

[60] The passage of the SPCA Act and the advent of the constitutional era have entrenched this position. During parliamentary debates, it was acknowledged that the NSPCA “is surely the most renowned organisation in this field [of animal welfare]”.<sup>94</sup> Cameron JA emphasised in *Openshaw* that the NSPCA is “a public body with wide and singular responsibilities in the field”.<sup>95</sup> The singularity of the NSPCA’s position is armoured by the fact that it is tasked with “preventing ill-treatment of voiceless beings”.<sup>96</sup>

[61] The historical development of the protection of animal welfare, and the role of the NSPCA in upholding this mandate, illustrates why the NSPCA plays a critical and unique role in our polity. Its long history of guarding the interests of animals reflects constitutional values. It has taken on the role of protecting animals in all of our interest. For this reason, and in the context of the statutory regime that now exists, a contextual and purposive reading of the SPCA Act must be taken to include the right to prosecute. It is unusual, but not entirely novel, for a body to have powers to police, investigate and prosecute.<sup>97</sup> 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 an unusual body. This exceptional status demands a broader understanding of its powers.

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<sup>92</sup> *Society for the Prevention of Cruelty to Animals, Standerton v Nel* 1988 (4) SA 42 (W) at 47C (*Nel*).

<sup>93</sup> *Id* at 47D.

<sup>94</sup> Debates of the National Assembly (Hansard) 25 November 1993 at 14070 (Mr G J Malherbe).

<sup>95</sup> *Openshaw* above n 85 at para 47. The majority found that the granting of the interim interdict in question was inappropriate on procedural grounds, and therefore did not consider the issue of animal cruelty or the nature of the powers of the NSPCA more generally.

<sup>96</sup> *Id* at paras 40 and 47.

<sup>97</sup> For example, Environmental Management Inspectors are empowered by sections 31G and 33 of the National Environmental Management Act 107 of 1998 to police, investigate and prosecute certain offences. As mentioned earlier, the 1914 SPCA Act also conferred this power.

*Remedy*

[62] Section 172(1)(b) of the Constitution states that this Court may make any order that is just and equitable. In *Hoërskool Ermelo*, Moseneke DCJ explained 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”.<sup>98</sup> 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”.<sup>99</sup> **In this case, it is just and equitable to both parties that the NSPCA be granted the declaration that it seeks. This will enable it to continue with its important work free of legal impediment. It also best resolves the underlying dispute between the parties. A declaration that the NSPCA is entitled to privately prosecute further fits comfortably within the constitutional and statutory prosecutorial scheme.**<sup>100</sup>

*The constitutional challenge*

[63] It remains to be determined whether the challenge to the constitutionality of section 7(1)(a) of the CPA need be considered. In *Transvaal*, Skweyiya J held that a court’s core responsibility is to adjudicate on “live disputes” and approved the proposition of the Canadian Supreme Court in *Borowski* that it is “possibly an intrusion into the role of the Legislature for a court to pronounce judgments on constitutional issues in the absence of a dispute affecting the rights of the parties to the litigation”.<sup>101</sup> As the NSPCA already has the power to privately prosecute, the effect of section 7(1)(a)

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<sup>98</sup> *Head of Department: Mpumalanga Department of Education v Hoërskool Ermelo* [2009] ZACC 32; 2010 (2) SA 415 (CC); 2010 (3) BCLR 177 (CC) (*Hoërskool Ermelo*) at para 97. See also *Electoral Commission v Mhlope* [2016] ZACC 15; 2016 (5) SA 1 (CC); 2016 (8) BCLR 987 (CC) at para 83; *Minister for Safety and Security v Van der Merwe* [2011] ZACC 19; 2011 (5) SA 61 (CC); 2011 (9) BCLR 961 (CC) at para 59.

<sup>99</sup> *Hoërskool Ermelo* id.

<sup>100</sup> Practically, the NPA still has the first bite of the proverbial cherry where animal cruelty prosecutions are considered. The NPA retains the first right to prosecute under section 8(2) of the CPA, which provides that any body or person with a statutorily-conferred right of private prosecution can do so only after it consults with the NPA, and the NPA withdraws its intention to prosecute a particular offence or set of offences.

<sup>101</sup> *Transvaal* above n 33 at para 222, citing *Zantsi v Council of State, Ciskei* [1995] ZACC 9; 1995 (4) SA 615 (CC); 1995 (10) BCLR 1424 (CC) at fn 8, citing *Borowski v Canada (Attorney General)* [1989] 1 SCR 342 at 358-62.

on it is no longer a live dispute that implicates the NSPCA's rights. In *Fose*, the Court found that "it is prudent not to anticipate a question of constitutional law in advance of the necessity of deciding it".<sup>102</sup> Determining whether this same right is also proffered by section 7(1)(a) would provide the NSPCA with no further relief. For this reason, I do not think it judicious to consider the constitutional argument any further.

[64] Corruption Watch entered this dispute as an *amicus curiae*, arguing that section 7(1)(a) can be interpreted to allow juristic persons to privately prosecute. Because it was never joined as a party, the purpose of its submissions as a friend of the Court was to assist in resolving the dispute between the NSPCA, and the Minister and National Director. For this reason, its submissions are not a sufficient reason to warrant diving into considering the meaning of section 7(1)(a). Nevertheless, nothing in this judgment should be construed as barring a future challenge to that provision, if the appropriate factual scenario arises.

#### *Order*

[65] **The following order is made:**

- 1. Leave to appeal is granted and the appeal is upheld.**
- 2. Condonation is granted.**
- 3. The orders of the High Court and Supreme Court of Appeal are set aside and replaced with the following:**
  - “(a) It is declared that the National Society for the Prevention of Cruelty to Animals 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 read with section 8 of the Criminal Procedure Act 51 of 1977.**

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<sup>102</sup> *Fose v Minister of Safety and Security* [1997] ZACC 6; 1997 (3) SA 786 (CC); 1997 (7) BCLR 851 (CC) at para 21, citing *Liverpool, New York and Philadelphia Steamship Co v Commissioners of Emigration* [1885] USSC 11; 113 US 33 (1885).

- (b) The respondents must pay the applicant's costs, including the costs of two counsel."
- 4. The respondents must pay the applicant's costs in this Court, including the costs of two counsel.

For the Applicant:

K Hopkins, S Freese and L Nkoana  
instructed by Marston & Taljaard

For the Respondents:

L M Moloisane SC and D Mtsweni  
instructed by the State Attorney

For the Amicus Curiae:

S Budlender and G Motaung instructed  
by Webber Wentzel