

Corruption and Private Prosecutions in South Africa

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The recent reports by the Judicial Commission of Inquiry into Allegations of State Capture Report (“**JCI Report**”) and the investigation by the Special Investigating Unit into Covid-19-related procurement by State institutions (“**SIU Report**”) have implicated numerous parties, across both the private and public sphere, in allegations of significant and concerning corrupt practices. The SIU Report alone flagged transactions in excess of R7.8 billion arising from corrupt procurement activities related to the Covid-19 pandemic.

The well-known resource and capacity constraints experienced by the National Prosecuting Authority (“**NPA**”) raise the immediate concern that many of the corrupt actors will never be brought to account for their actions. Although not without its own difficulties, assistance from the private sector could well be of great benefit. Such involvement can broadly take the form of (1) private funding being directed to the NPA and/or (2) the institution of private prosecutions.

The NPA has historically opposed the idea of accepting private funding, citing concerns as to the potential such funding may have in diminishing its independence. However, recently, the NPA head, Shamila Batohi, has urged NPA members to have an open mind in relation to private funding.

Should the idea of private funding be entertained, it will be critical to develop and institute the appropriate safeguards to ensure the NPA retains its independence and is immune from the influence of funders and potential funders. Should this not be achievable, the introduction of private funding carries with it the real risk of facilitating corrupt activities being the antithesis of its aim.



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Private prosecutions, referring to instances in which natural persons step into the shoes of the NPA and initiate a prosecution, are also not without their difficulties. Based on the principle that private prosecutions do not serve as an alternative system of prosecution, the Criminal Procedure Act 51 of 1997 (“CPA”) strictly prescribes the circumstances in which private prosecution can be initiated. Significantly, the CPA only permits private prosecutions if, after proper consideration of the matter, the NPA decides not to proceed with (public) prosecution, signified by the issue of a *nolle prosequi*.

For purposes of initiating a private prosecution, section 7 of the CPA allows private persons with the relevant *locus standi* to institute a prosecution upon obtaining a certificate of *nolle prosequi* from the relevant Director of Public Prosecution (“DPP”) confirming that the respective police docket has been carefully assessed and that the DPP has declined to prosecute. In addition, a private person must have *locus standi* to initiate private prosecution. The concept of *locus standi* in this regard, meaning that the private person is either a family member of a victim or has a ‘*substantial and peculiar interest in the issue of the trial*’. This presents a challenge in the context of the corrupt activities contemplated in the above-mentioned reports.

Section 8 of the CPA allows a private person to prosecute in respect of any offence “*expressly conferred by law*”. In this regard, there is no need to obtain a certificate *nolle prosequi* and security need not be provided. The number of instances in which a private prosecution of this nature may take place are limited and are defined expressly by statute. As an example, section 6(2)(e) of the Societies for the Prevention of Cruelty to Animals Act 169 of 1993 specifically allows for private prosecutions against persons for offences related to cruelty to animals. Generally, private prosecutions expressly conferred by legislation relate to matters which, if solely handled by the NPA, would significantly increase the NPA’s workload. Currently, there is limited legislation which allows victims of corruption to privately prosecute their case. The implementation of legislation of this nature would assist both victims and the NPA in decreasing its workload. Alternatively, legislation could be implemented to provide for other non-corruption related crimes to be

privately prosecuted, which could provide the NPA with more capacity to prosecute corruption and bribery cases.

The time and cost associated with private prosecution means that it can practically only be carried out with the support of private groups. As such, the use of a private prosecution is arguably only an option to the few who can afford it. Furthermore, the need to prove a case beyond reasonable doubt (as opposed to on a balance of probabilities in civil matters) may further hinder private individuals from fighting corruption cases through private prosecution.

A ‘*substantial and peculiar interest*’, as referred to in section 7(1)(a) of the CPA, requires the private person to demonstrate an interest that is capable of resulting in conviction and, that has a causal connection to the actionable injury suffered by the individual initiating the prosecution. This requirement may pose challenges to the successful use of private prosecutions in resolving corruption cases. In this regard, groups such as AfriForum have launched several private prosecutions through its Private Prosecution Unit, which is dedicated to the prosecution of corrupt members of government. It is to be noted that, in this regard, groups such as AfriForum would have to find victims of corruption in whose name a private prosecution can be launched.

Whilst neither of the above options are without their own difficulties, it is clear that in order to address the rampant corruption exposed by the referenced reports, significant action needs to be taken to bolster the NPA’s capacity or ease its workload, through for instance use of private prosecutions. In light of the wealth of evidence now publicly available together with the willingness of private organisations to dedicate time and resources to combating corruption, public prosecutions may well serve as a viable option to ensure those implicated in corruption cases are taken to task, without compromising the independence of the NPA.

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