REPORTABLE (1)

TELECEL ZIMBABWE (PRIVATE) LIMITED
v
ATTORNEY- GENERAL OF ZIMBABWE N.O.

SUPREME COURT OF ZIMBABWE
ZIYAMBI JA, GARWE JA & PATEL JA
HARARE, JULY 22, 2013 & JANUARY 28, 2014

I. Mureriwa, for the appellant
C. Mutangadura with him *E. Nyazamba*, for the respondent

PATEL JA: This is a matter on appeal from a decision of the High Court handed down on 19 October 2011. It concerns the powers of the Attorney-General, the respondent, in the specific context of private prosecutions by corporate entities.

The factual circumstances of this matter are common cause. In early 2010 four senior employees of the appellant were charged with a massive fraud of about US$1,700,000 perpetrated against the appellant. Because of the respondent's position that there was overwhelming evidence against the accused persons, all of them were initially denied bail. At a later stage, the charges against them were withdrawn before

plea following a directive by the respondent that there was insufficient evidence to prosecute. Consequently, the appellant sought a certificate *nolle prosequi* which was withheld and declined by the respondent. The appellant then applied to the High Court on review for that decision to be set aside as being both unlawful and grossly irrational.

The High Court held that a private company, as distinct from a private individual, had no *locus standi* to institute a private prosecution. The learned judge *a quo* adopted and applied the position taken by the South African Appellate Division in interpreting the equivalent statutory provisions in South Africa. He accordingly decided that it was not necessary to determine the further question as to the respondent's discretion to withhold his certificate.

The first issue on appeal is whether or not a private company is entitled to bring a private prosecution. The second issue, which is interrelated with the first, is whether the respondent has the discretion to issue or withhold his certificate *nolle prosequi* where he declines to prosecute at the public instance.

GOVERNING STATUTORY PROVISIONS

Part III of the Criminal Procedure and Evidence Act [*Cap 9:07*] (the CP&E Act) regulates the institution of private prosecutions. Section 13 confers the right to prosecute in the following terms:

> "In all cases where the Attorney-General declines to prosecute for an alleged offence, any private party, who can show some substantial and peculiar interest in the issue of the trial arising out of some injury which he individually has suffered by the commission of the offence, may prosecute, in any court competent to try the offence, the person alleged to have committed it."

Persons other than those referred to in s 13 who are entitled to prosecute are identified in s 14:

> "The following shall possess the right of prosecution –
> (*a*) a husband, in respect of offences committed against his wife;
> (*b*) the legal guardians or curators of minors or mentally disordered or defective persons, in respect of offences committed against their wards;
> (*c*) the wife or children or, where there is no wife or child, any of the next-of-kin of any deceased person, in respect of any offence by which the death of such person is alleged to have been caused;
> (*d*) public bodies and persons on whom the right is specially conferred by statute, in respect of particular offences."

Section 16 deals with the grant of certificates *nolle prosequi* by the Attorney-General and their production for the purpose of criminal proceedings. It provides as follows:

> "(1) Except as is provided by subsection (2), it shall not be competent for any private party to obtain the process of any court for summoning any party to answer any charge, unless such private party produces to the officer authorised by law to issue such process a certificate signed by the Attorney-General that he has seen the statements or affidavits on which the charge is based and declines to prosecute at the public instance, and in every case in which the Attorney-General declines to prosecute he shall, at the request of the party intending to prosecute, grant the certificate required.
> (2) When the right of prosecution referred to in this Part is possessed under any statute by any public body or person in respect of particular offences, subsection (1) shall not apply."

ORIGINS OF RIGHT OF PRIVATE PROSECUTION

Before addressing the status of corporate entities in the prosecutorial context, it seems necessary to delineate the historical background to private prosecutions generally. As was recognised and restated in s 89 of the former Lancaster House Constitution:

> "Subject to the provisions of any law for the time being in force in Zimbabwe relating to the application of African customary law, the law to be administered

> by the Supreme Court, the High Court and by any courts in Zimbabwe subordinate to the High Court shall be the law in force in the Colony of the Cape of Good Hope on 10th June, 1891, as modified by subsequent legislation having in Zimbabwe the force of law."

According to Dugard: *South African Criminal Law and Procedure – Vol. IV Introduction to Criminal Procedure* (1977) at p. 19, the Roman-Dutch law of criminal procedure and evidence remained in force at the Cape until the early 19th century. Following various alterations to the structure of the courts in the Cape, this adjectival law was radically anglicised by Ordinance No. 40 (1828) and Ordinance No.72 (1830) to form the foundations of our modern law (*ibid.* at p. 25). As regards the institution of prosecutions, the British Government accepted that the conditions prevailing in the Cape did not permit the unmodified adoption of the English system of private prosecution. Accordingly, the right of prosecution was vested in the Attorney-General but, where he declined to prosecute, a private individual might prosecute in respect of an injury to himself or to someone under his care (*ibid.* at p. 25). In principle, therefore, the law governing private prosecutions, both in Zimbabwe and in South Africa, does not originate in the Roman-Dutch law but is derived from the English common law.

In England, during the 17th and 18th centuries, the system of criminal procedure that prevailed was predominantly one of private prosecutions. No public official was designated as a public prosecutor, either locally or nationally, although the local justice of the peace sometimes assumed that role. In essence, private citizens were responsible for preserving the peace and maintaining law and order. Crimes were regarded as being committed not against the State but against a particular individual or

family. Thus, the prosecution of almost all criminal offences was usually initiated and conducted by the victim or his or her relative. The distinctive feature of the common law was that it was not a privilege but the duty of the private citizen to preserve the peace and bring offenders to justice. Consequently, no authority was vested in the King to dictate if and when a private individual could institute criminal proceedings. With the passage of time, King's attorneys were appointed to intervene in matters of particular interest to the King or to initiate and conduct prosecutions in his name. This led to the origin and evolution of the so-called law officers of the Crown, vested with the specific function of advising and litigating on behalf of the King.

The late 19th century saw the passage of the Prosecution of Offences Act 1879 which first introduced the office of Director of Public prosecutions. However, this Act did not fundamentally undermine private prosecutions, because public prosecutors enjoyed very limited authority. Again, the successor Act of 1908 did not substantially increase the powers of public prosecutors. It was only with the enactment of the Prosecution of Offences Act 1985 that England established an effective system of public prosecution through the Crown Prosecution Service. Even then, this Act continued to preserve a limited right of private prosecution.

RIGHT OF PRIVATE COMPANY TO PROSECUTE

The above historical synopsis demonstrates that the right of private prosecution originates in the reparation of individual injuries and the vindication of individual as opposed to corporate rights. The interests that the right to prosecute is conceived to safeguard are manifold. They are certainly not confined to purely pecuniary

loss or the kind of injury that might ordinarily be sustained by corporate entities in the normal course of their business. This rationale is aptly and eloquently captured by Van den Heever AJP in *Attorney-General* v *Van der Merwe and Bornman* 1946 OPD 197 at 201:

> "Prosecution is not primarily designed to recover compensation. I do not think, therefore, that the expression "substantial and peculiar interest" was intended …. to convey only a pecuniary interest in respect of which the prosecutor may obtain compensation or restitution. The object of the phrase was clearly to prevent private persons from arrogating to themselves the functions of a public prosecutor and prosecuting in respect of offences which do not affect them in any different degree than any other member of the public; to curb, in other words, the activities of those who would otherwise constitute themselves public busybodies.
>
> The 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 such inalienable rights by effecting ethical retribution. Finally it effects atonement, which is a social desideratum."

In the case of *Salisbury Bottling Co. (Pvt) Ltd & Ors* v *Central African Bottling Co. (Pvt) Ltd* 1958 (1) SA 750 (FC) all the parties involved were corporate entities. Our Federal Supreme Court canvassed the right of private prosecution under s 19 of [*Cap 28*] (the predecessor to s 13 of [*Cap 9:07*] as an alternative remedy to the grant of damages or an interdict. In that context, the court did not draw any specific distinction as between private individuals and companies. However, it did not consider or make any definitive ruling on the point presently under review.

The authority relied upon and followed by the court below in rejecting the appellant's *locus standi* to prosecute is the South African case of *Barclays Zimbabwe Nominees (Pvt) Ltd* v *Black* 1990 (4) SA 720 (AD). The court in that case held that the phrase "private person" in section 7(1) (a) of the Criminal Procedure Act No. 51 of 1977 (the equivalent of section 13 in the CP&E Act), as read in the context of section 7 and the Act as a whole, should be interpreted as meaning only a natural person. Milne JA, delivering the unanimous decision of the Appellate Division, elaborated several reasons for arriving at that conclusion: the definitions of the word "private" in the *Oxford Dictionary* (2nd ed.) are indicative of natural rather than artificial characteristics (at 722E-F and 723B-C); the reference to "some injury which he individually suffered" is peculiarly apposite in the case of natural persons (at 723C-G); s 8(1) of the 1977 Act (the equivalent of our section 14(d)) draws a clear distinction between natural persons and corporate bodies (at 725A-B); section 10(2) of the 1977 Act, which requires the signature of the indictment, charge sheet or summons, specifically differentiates between a private prosecutor and a corporate body (at 725C-E); and, lastly, the need to obviate any resort to self-help, as articulated in the *Van der Merwe* case, *supra*, underscores the point that "a corporate body as such has no human passions and there can be no question of the company, as such, resorting to violence" (at 726F-G).

Although, as was clearly recognised by the learned judge *a quo*, the South African and Zimbabwean statutes are broadly *in pari materia*, I think it necessary to highlight certain critical differences between them. First and foremost, s 7(1) of the South African Act confers the right to prosecute on "any private person …… either in person or

by a legal representative"; s 13 of the CP&E Act provides that "any private party …… may prosecute". Secondly, the right to prosecute under statute is exercisable in terms of s 8(1) of the South African Act by "any body upon which or person upon whom" such right is expressly conferred; by virtue of s 14(d) of the CP&E Act it is exercisable by "public bodies and persons on whom" it is specially conferred. Thirdly, there is no equivalent in the CP&E Act of s 10(2) of the South African Act which requires the signature of the indictment, charge sheet or summons by the "prosecutor or his legal representative". Fourthly, s 11(1) of the South African Act refers to the failure of "the private prosecutor" to appear on the day set down for trial; s 18(1) of the CP&E Act refers to such failure by "the prosecutor, being a private party".

Ultimately, the most fundamental distinction between the two statutes is the usage of "private person" in the South African Act as contrasted with the references to "private party" in the CP&E Act. The word "person", in its principal sense, is defined in *The Shorter Oxford English Dictionary* (3rd ed. 1978) as "an individual human being; a man, woman, or child". However, in its legal sense, it is defined to mean "a human being (*natural person*) or body corporate or corporation (*artificial person*), having rights or duties recognised by law". Again, in the legal context, the word "party" is defined as "each of two or more persons (or bodies of people) that constitute the two sides in an action at law, a contract, etc.". In my view, these definitions, coupled with the differences that I have highlighted as between the South African and Zimbabwean statutes, tend to diminish the persuasive authority of the Appellate Division's otherwise cogent reasoning in the *Barclays Zimbabwe Nominees* case.

In England, as I have stated earlier, the Prosecution of Offences Act 1985 [*Cap 23*] now provides the regulatory framework for a comprehensive system of public prosecution. Section 1 of this Act establishes the Crown Prosecution Service consisting of the Director of Public Prosecutions, Crown Prosecutors and other subordinate staff. In terms of s 3, the Director of Public Prosecutions, acting under the superintendence of the Attorney-General, is charged with the duty of, *inter alia*, taking over the conduct of all criminal proceedings instituted on behalf of any police force, as well as instituting criminal proceedings in important or difficult cases or where it is otherwise appropriate to do so. In any event, s 6 explicitly preserves the right of private prosecution as follows:

> "(1) Subject to subsection (2) below, nothing in this Part shall preclude any person from instituting any criminal proceedings or conducting criminal proceedings to which the Director's duty to take over the conduct of proceedings does not apply.
> (2) Where criminal proceedings are instituted in circumstances in which the Director is not under a duty to take over their conduct, he may nevertheless do so at any stage."

Prior to 1985, the importance of the private right to prosecute is illustrated by the reliance placed upon it by Lord Woolf CJ in *R (Hunt)* v *Criminal Cases Review Commission* [2001] QB 1108 at para. 20:

> "Great importance has always been attached to the ability of an ordinary member of the public to prosecute in respect of breaches of the criminal law."

The continuing survival of that right, to the extent provided for by s 6 of the 1985 Act, was vouchsafed by the House of Lords in *Jones* v *Whalley* [2007] 1 AC 63. Any judicial curtailment of the right was not readily countenanced. As was observed by Mitting J in *R (Ewing)* v *Davis* [2007] EWHC 1730 (Admin) at para. 23:

> "…….. if the right of private prosecution is to be taken away or subjected to limitation, it is for Parliament to enact and not for the courts by decision to achieve."

The position of corporate entities in England is no different. That the right of private prosecution can be exercised by a corporate body was confirmed by the Divisional Court in *R (Gladstone PLC)* v *Manchester City Magistrates Court* [2005] 1 WLR 1987.

More recently, the correctness of that position was reaffirmed by the Court of Appeal and the Supreme Court in a case involving the Financial Service Authority (the FSA). The central issue in that case was whether the FSA had the power to prosecute offences other than those referred to in ss 401 and 402 of the Financial Services and Markets Act 2000. The FSA contended that as a body corporate with legal personality it had the common law power to bring prosecutions in respect of other offences. The FSA is a company limited by guarantee, incorporated in June 1985. The Memorandum and Articles of Association of the FSA express its objects and powers in broad terms. The Act of 2000 did not create the FSA or turn it into a statutory corporation, but assumed its existence as a body corporate.

The Court of Appeal (Criminal Division), in *R* v *Rollins and McInerney* [2009] EWCA (Crim) 1941, rejected the contention that ss 401 and 402 of the Act together created a complete regime of offences that the FSA could prosecute. It was held by Richards LJ, at para. 30:

> "For our part, we can see no reason why the general right of private prosecution should not be enjoyed by the FSA. The right is not excluded by

> FSMA 2000 or any other statutory provision to which our attention has been drawn, and the powers conferred on the FSA by its Memorandum of Association are easily wide enough to cover the institution of criminal proceedings within the scope of its objects."

The court of appeal accordingly concluded that the FSA did have the power to prosecute offences beyond those referred to in sections 401 and 402 of the Act. This decision was upheld on appeal to the Supreme Court in *R* v *Rollins* [2010] UKSC 39. It was held that a corporation enjoyed the same power to prosecute as did any individual under the common law right of private prosecution. Sir John Dyson SCJ, delivering the judgment of the court, enunciated this position as follows, at paras. 8-9:

> "Every person has the right to bring a private prosecution: see, for example *Gouriet v Union of Post Office Workers* [1978] AC 435, 497H per Lord Diplock. The right to bring private prosecutions has been expressly preserved by section 6 of the Prosecution of Offences Act 1985 …….. .
>
> Nothing in section 6(1) excludes bodies corporate from the definition of 'any person'. A corporation may therefore bring a prosecution provided that it is permitted to do so by the instrument that gives it the power to act. As Lord Mance noted in *Jones v Whalley* [2007] 1 AC 67 at para 38, private prosecutions 'may be initiated by private bodies such as high street stores, by charities such as NSPCC and RSPCA, or by private individuals...'.".

For these reasons, the broad prosecutorial right of the FSA was confirmed, at paras. 11-14:

> "The general position, therefore, is that the FSA has always been able to bring any prosecution subject to statutory restrictions and conditions and provided that it is permitted to do so by its memorandum and articles of association. Most statutes which create offences do not specify who may prosecute or on what conditions. Typically, they simply state that a person who is guilty of the offence in question shall be liable to a specified maximum penalty, it being assumed that anybody may bring the prosecution. …….. .
>
> The general position before the enactment of FSMA was that the FSA had the power of a private individual to prosecute provided that this fell within the

> scope of its objects and prosecution was not precluded or restricted by the terms of the relevant statute."

Turning to the relevant provisions of the CP&E Act, I would accept that some of the phraseology employed in section 13 of the Act, in particular, the reference to "some injury which he individually has suffered", strongly supports the proposition that the right to prosecute conferred by that provision is confined to natural as opposed to artificial persons. On the other hand, the references to "public bodies and persons" and "public body or person", in ss 14 and 16 respectively, suggest otherwise. The term "private party" itself, as used in Part III of the Act, is defined in s 12, in a fashion that is plainly tautologous and unhelpful, to mean:

> "a person authorized by section *thirteen* or *fourteen* to prosecute any offence".

In the context of the Act as a whole, s 2 contemplates a broad definition of "person" in the following terms:

> " 'person' and 'owner' and other like terms, when used with reference to property or acts, include corporations of all kinds, and any other association of persons capable of owning or holding property or doing acts and they also, when relating to property, include any department of the State".

A broader connotation of the words under review is further supported by s 3(3) of the Interpretation Act [*Cap 1:01*] which provides that in every enactment:

> " 'person' or 'party' includes –
> (*a*) any company incorporated or registered as such under an enactment; or
> (*b*) any body of persons, corporate or unincorporated; or
> (*c*) any local or other similar authority".

Also relevant for present purposes is s 9 of the Interpretation Act which prescribes rules as to gender and number as follows:

> "(1) Unless the context otherwise requires, words importing female persons include male persons and juristic persons and words importing male persons include female persons and juristic persons.
> (2) Words in the singular include the plural and words in the plural include the singular."

One of the paramount principles of statutory construction is that the law should not be subject to casual change. As was succinctly put by Lord Devlin in *National Assistance Board* v *Wilkinson* [1952] 2 QB 648:

> "It is a well-established principle of construction that a statute is not to be taken as effecting a fundamental alteration in the general law unless it uses words that point unmistakably to that conclusion".

Bennion: *Statutory Interpretation*, at p. 317, elaborates the principle against casual change as follows:

> "It is a principle of legal policy that law should be altered deliberately rather than casually, and that Parliament should not change either common law or statute law by a sidewind, but only by measured and considered provision. In the case of common law, or Acts embodying common law, the principle is somewhat stronger than in other cases. It is also stronger the more fundamental the change is.
>
> The court, when considering, in relation to the facts of the instant case, which of the opposing constructions of the enactment would give effect to the legislative intention, should presume that the legislator intended to observe this principle. The court should therefore strive to avoid adopting a construction which involves accepting that Parliament contravened the principle."

Having regard to the English authorities cited above, it is clear that the common law right of private prosecution was not confined to natural persons but

extended as well to juristic and artificial entities. That common law right migrated to the Cape Colony through Ordinance No. 40 (1828) and Ordinance No.72 (1830) and remained intact until 10 June 1891, at which stage it became an integral part of our law (*cf.* section 89 of the former Constitution). The critical question is whether the right of private prosecution, as embodied in statute, has been modified by the CP&E Act (or its predecessors) so as to exclude private corporations from its ambit.

The governing rule of statutory interpretation dictates that the provisions of Part III of the CP&E Act should be construed, insofar as is consistent with their language and context, so as to preserve the common law components of the right to prosecute rather than to diminish or extinguish them. I do not perceive in these provisions any clear or positive legislative intention to alter pre-existing rights or to constrict the common law position relative to corporations.

This interpretation is fortified by the reality that a company is in essence an association of persons and therefore should, albeit subject to its obvious physical limitations, enjoy the same rights and privileges as the individual members comprising it, including the right of prosecution. The fact that it is devoid of human passions and has no personal interests to protect should not, in principle, detract from that right. Its interests may be of a purely material or pecuniary character, but they constitute a proper basis for the right to prosecute. This was clearly recognised in the *Van der Merwe* case, *supra* (in the passage quoted earlier), and in *Levy* v *Benatar* 1987 (1) ZLR 120 (S) at 126F.

To answer the question posed above, it seems to me that a liberal and inclusive construction of s 13 of the CP&E Act accords not only with the definition of "person" and "party" in section 2 of that Act but also with the broad definition of those terms in s 3(3) of the Interpretation Act. It also accords with the rule of interpretation prescribed by s 9(1) of the Interpretation Act, *viz.* that words importing male persons include female persons and juristic persons. Moreover, this construction is neither inconsistent with the context of s 13 nor does it lead to any absurdity. I accordingly take the view that the right of private prosecution conferred by that provision vests in natural as well as artificial persons, including private corporations.

ATTORNEY-GENERAL'S DISCRETION

The requirements for the issuance of a certificate *nolle prosequi* are crisply spelt out in s 13 of the CP&E Act. As was expounded by Gubbay JA in *Levy's* case (*supra*) at 125A-G:

> "The private party concerned must show:
> (i) some substantial and peculiar interest,
> (ii) in the issue of the trial,
> (iii) arising out of some injury,
> (iv) which he individually has suffered,
> (v) in consequence of the commission of the offence.
> …….
> …….
> These five requirements are in addition to the obligation to obtain from the Attorney-General a certificate of *nolle prosequi*, for the practice has always been for the State jealously to guard its right to prosecute offenders. See Landsdown and Campbell *South African Criminal Law and Procedure* Vol. 5 at 120."

Moreover, as the learned authors cited in the above passage point out, at p. 121:

> "The mere possession of the attorney-general's certificate does not in itself confer an absolute right of private prosecution. In the absence of such a right the court will interdict the person proposing to prosecute privately."

In other words, notwithstanding the possession of a certificate, the court may, in the exercise of its inherent power to prevent abuse of process, interdict a private prosecution pursuant to such certificate. This inherent power to restrain a private prosecution was emphasised by Roper J in *Solomon* v *Magistrate, Pretoria & Another* 1950 (3) SA 603 (W) at 607F-H:

> "The Court has an inherent power to prevent abuse of its process by frivolous or vexatious proceedings …….. , and though this power is usually asserted in connection with civil proceedings it exists, in my view, equally where the process abused is that provided for in the conduct of a private prosecution. In such a case as I have postulated, therefore, this Court would in my opinion by virtue of its inherent power be entitled to set aside a criminal summons issued by its own officials or to interdict further proceedings upon it."

This broad principle was confirmed, but with some caution, by Hoexter JA in *Phillips* v *Botha* 1999 (2) SA 555 (SCA) at 565G-I:

> "Where the Court finds an attempt made to use for ulterior purposes machinery devised for the better administration of justice it is the Court's duty to prevent such abuse. This power, however, is to be exercised with great caution and only in a clear case. …… The question is whether the private prosecution of the respondent was either instituted or thereafter conducted by the appellant for some collateral and improper purpose, such as the extortion of money, rather than with the object of having criminal justice done to an offender."

In the more recent South African case of *Singh* v *Minister of Justice and Constitutional Development & Another* (5072/05) [2006] ZAKZHC 20, it was argued that the National Director of Public Prosecutions (the NDPP) was obliged to issue to the applicant a certificate *nolle prosequi* once there had been a decision that he had declined to prosecute, and that it was not necessary for a private prosecutor to prove some substantial and peculiar interest in the issue of the trial. It was held, per Hollis AJ, that

upon a proper construction of s 7 of Act No. 51 of 1977 the NDPP was not obliged to do so unless the requirements of s 7(1) (a) had been met. It was necessary for the applicant to provide a factual basis proving that he had some substantial and peculiar interest in the issue of the trial, arising out of some injury which he has individually suffered in consequence of the commission of the alleged offence.

Bennion (*op. cit.*) at p. 625, dealing specifically with rights in relation to law and legal proceedings, opines that:

> "One aspect of the principle against doubtful penalisation is that by the exercise of state power the rights of a person in relation to law and legal proceedings should not be removed or impaired, except under clear authority of law."

In his ensuing commentary on the principle, the learned author makes the following observation, at p. 626:

> "The right to bring, defend and conduct legal proceedings without unwarranted interference is a basic right of citizenship. …….. . While the court has control, subject to legal rules, of its own procedure, this does not authorize any ruling which abridges the basic right."

The language of s 16(1) of the CP&E Act is categorically clear, *viz.* a private prosecutor must produce "a certificate signed by the Attorney-General that he has seen the statements or affidavits on which the charge is based and declines to prosecute at the public instance". Moreover, "<u>in every case</u> in which the Attorney-General declines to prosecute <u>he shall</u>, at the request of the party intending to prosecute, <u>grant the certificate required</u>".

In any event, in construing this provision, we must also have regard to the Attorney-General's constitutionally guaranteed independence and wide discretion in matters of criminal prosecution. Taking this into account, it seems to me that the exercise of his discretion vis-à-vis any intended private prosecution involves a two-stage process. The first stage is for him to decide whether or not to prosecute at the public instance. If he declines to do so, the next stage comes into play, *i.e.* to decide whether or not to grant the requisite certificate. In so doing, he must take into account all the relevant factors prescribed in s 13 of the Act, to wit, whether the private party in question "can show some substantial and peculiar interest in the issue of the trial arising out of some injury which he individually has suffered by the commission of the offence". If he cannot show any such interest, the Attorney-General is entitled to refuse to issue the necessary certificate. However, where the private party is able to demonstrate the required "substantial and peculiar interest" and attendant criteria, the Attorney-General is then bound to grant the certificate *nolle prosequi*. At that stage, his obligation to do so becomes peremptory and s 16(1) can no longer be construed as being merely permissive or directory.

This conclusion clearly does not impinge on the Attorney-General's principal discretion to prosecute or not to prosecute at the public instance. That decision is an incident of his constitutional primacy in the sphere of criminal prosecution and is generally not reviewable. Indeed, as is expressly recognized in s 20 of the CP&E Act, even after a private prosecution has commenced, he is entitled to apply for the proceedings to be stopped in order to institute or continue the prosecution at the public

instance. However, once he has declined to prosecute and is met with a request for private prosecution by a party that satisfies the "substantial and peculiar interest" requirement of s 13, he has no further discretion in the matter and is statutorily bound by s 16(1) to issue the requisite certificate.

DISPOSITION

It follows from all of the foregoing that the appellant, *qua* private corporation, is entitled to institute a private prosecution in terms of s 13 of the Act. However, this entitlement is subject to the issuance of a certificate *nolle prosequi* under s 16(1) upon the respondent being satisfied that the appellant meets the requirements of s 13.

According to the appellant's founding affidavit in the proceedings *a quo*, it has incurred a massive loss in the amount of US$1,700,000 arising from the alleged fraudulent activities of its former employees. The respondent takes issue with the evidence required to establish fraud but does not dispute the nature and extent of the prejudice suffered by the appellant. On the papers, therefore, the appellant has clearly demonstrated a substantial and peculiar interest in the issue of the intended prosecution and trial arising out of an injury which it has suffered by the commission of the alleged offence.

The appellant also avers that, at the stage of bail proceedings, the evidence against the four accused persons was found to be so overwhelming as to entail the refusal of bail by the Magistrates Court. Three weeks later, charges against all four accuseds

were withdrawn before plea on the ground of insufficient evidence. After a further three weeks, following the appellant's request to mount a private prosecution, the respondent withheld and declined to issue his certificate *nolle prosequi*. The reasons stated for that decision, in the respondent's letter of 23 April 2010, were that "the evidence [in the police docket] does not establish a criminal offence against the four suspects" and that it would be "*contra bonos mores* for me to grant my certificate in this matter." However, nothing was stated in the letter as to his evaluation of the nature and extent of the appellant's interest in the matter or the relationship between the alleged offence and the injury sustained by the appellant.

The appellant's grounds for seeking to review the respondent's decisions before the court *a quo* are essentially twofold, to wit, gross irrationality in his assessment of the evidence in the docket and misdirection at law in his application of s 16(1) of the Act. The *locus classicus* on judicial review in England is the decision of the House of Lords in *Council for Civil Service Unions* v *Minister for the Civil Service* [1984] 3 All ER 935 (HL). Lord Diplock, at 950-951, described the grounds of review as follows:

> "The first ground I would call 'illegality', the second 'irrationality' and the third 'procedural impropriety'. That is not to say that further development on a case by case basis may not in course of time add further grounds. I have in mind particularly the possible adoption in the future of the principle of 'proportionality' which is recognised in the administrative law of several of our fellow members of the European Economic Community; but to dispose of the instant case the three already well-established heads that I have mentioned will suffice.
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> By 'illegality' as a ground for judicial review I mean that the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it. Whether he has or not is par excellence a justiciable question to be decided, in the event of dispute, by those persons, the judges, by whom the judicial power of the state is exercisable.
>
> By 'irrationality' I mean what can by now be succinctly referred to as 'Wednesbury unreasonableness' (see *Associated Provincial Picture Houses Ltd* v

> *Wednesbury Corp* [1947] 2 All ER 680, [1948] 1 KB 223). It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it. Whether a decision falls within this category is a question that judges by their training and experience should be well equipped to answer, or else there would be something badly wrong with our judicial system. To justify the court's exercise of this role, resort I think is today no longer needed to Viscount Radcliffe's ingenious explanation in *Edwards (Inspector of Taxes)* v *Bairstow* [1955] 3 All ER 48, [1956] AC 14 of irrationality as a ground for a court's reversal of a decision by ascribing it to an inferred though unidentifiable mistake of law by the decision-maker. 'Irrationality' by now can stand on its own feet as an accepted ground on which a decision may be attacked by judicial review.
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> I have described the third head as 'procedural impropriety' rather than failure to observe basic rules of natural justice or failure to act with procedural fairness towards the person who will be affected by the decision. This is because susceptibility to judicial review under this head covers also failure by an administrative tribunal to observe procedural rules that are expressly laid down in the legislative instrument by which its jurisdiction is conferred, even where such failure does not involve any denial of natural justice. But the instant case is not concerned with the proceedings of an administrative tribunal at all."

Lord Roskill, at 953-954, adverted favourably to the "new nomenclature" devised by Lord Diplock but adopted a slightly different approach which, in essence, retains the same classification:

> "But your Lordships are vitally concerned with that branch of judicial review which is concerned with the control of executive action. This branch of public or administrative law has evolved, as with much of our law, on a case by case basis and no doubt hereafter that process will continue. Thus far this evolution has established that executive action will be the subject of judicial review on three separate grounds. The first is where the authority concerned has been guilty of an error of law in its action, as for example purporting to exercise a power which in law it does not possess. The second is where it exercises a power in so unreasonable a manner that the exercise becomes open to review on what are called, in lawyers' shorthand, Wednesbury principles (see *Associated Provincial Picture Houses Ltd* v *Wednesbury Corp* [1947] 2 All ER 680, [1948] 1 KB 223). The third is where it has acted contrary to what are often called 'principles of natural justice'."

In *Patriotic Front-Zimbabwe African People's Union* v *Minister of Justice, Legal and Parliamentary Affairs* 1985 (1) ZLR 305 (SC), the question that fell for resolution was whether the courts could test the validity of anything done by the President. Dumbutshena CJ, at 325-326, commended the decision in the *CCSU* case as follows:

> "More recently the House of Lords laid down the grounds upon which administrative actions are subject to judicial review. These grounds appeal to me not only because they were pronounced by an eminent Law Lord, but also because they make clear the wide extent of the theatre of operation in which courts can test the validity of prerogative actions."

The learned Chief Justice then proceeded, at 327-328, to adopt and apply the grounds of review expounded by the House of Lords:

> "I respectfully agree with Lord Diplock's three grounds on the reviewability of decisions taken under royal prerogative (in our case Executive prerogative), which clearly state the grounds upon which actions taken under executive prerogative can be attacked by the courts.
>
> I have no doubt in my mind that the Electoral Act (Modification) Notice 1985 and Proclamation 2 of 1985 …….. are reviewable by the court on the grounds so ably stated by Lord Diplock."

Section 26 of the High Court Act [*Chapter 7:06*] declares the inherent power, jurisdiction and authority vested in the High Court to review all proceedings and decisions of all inferior courts, tribunals and administrative authorities within Zimbabwe. In terms of s 28 of the Act, upon the review of any civil proceedings or decision, the High Court may, subject to any other law, set aside or correct the proceedings or decision.

The principles of judicial review enunciated by Lords Diplock and Roskill, and subsequently adopted by Dumbutshena CJ, are now codified in s 3(1)(a) of the Administrative Justice Act [*Cap10:28*]. This provision enjoins every administrative authority which has the responsibility or power to take any administrative action which may affect the rights, interests or legitimate expectations of any person to "act lawfully, reasonably and in a fair manner". Subsections (2) and (3) of s 4 restate and elaborate the inherent powers of the High Court to grant relief in respect of any reviewable irregularity. These include the power to confirm or set aside the decision under review or refer the matter back to the administrative authority concerned for consideration or reconsideration. Additionally, the High Court may give such directions as it may consider necessary or desirable to achieve and ensure compliance by the administrative authority with s 3 as well as the relevant law or empowering provision.

Dealing with the irrationality ground invoked by the appellant, I do not think that the respondent's assessment of the evidence against the accused persons in question can properly be subjected to review. As I have already stated, that is a function that forms part of his constitutional prerogative and cannot ordinarily be questioned by the courts. Even if it were held to be reviewable, it cannot be said on the facts *in casu* that his decision is so irrational in its defiance of logic or accepted moral standards that no reasonable person in his position who had applied his mind to the matter could have arrived at it.

On the other hand, turning to the legality of the respondent's decision not to issue his certificate, it is clear that he has failed to exercise his statutory powers on a proper legal footing. Having declined to prosecute at the public instance, he should have considered whether or not the appellant satisfied the "substantial and peculiar interest" requirement of s 13 of the Act. He did not do so but proceeded to decline his certificate *nolle prosequi* on the basis that there was insufficient evidence to prosecute. He consequently failed to correctly understand and give effect to the requirements of s 16(1) which regulated his decision-making power. Put differently, by withholding his certificate, he was guilty of an error of law by purporting to exercise a power which in law he did not possess. He thereby contravened his duty to act lawfully in accordance with the peremptory injunction of s 16(1). This constitutes a manifest misdirection at law rendering his decision reviewable on the ground of illegality.

It follows that the court *a quo* should have found in favour of the appellant on the first ground of review pleaded by it, *viz.* that the respondent misdirected himself at law in exercising his discretion under s 16(1) of [*Cap 9:07*]. As I have already indicated, the High Court is endowed with wide powers of review, including the power to set aside and correct the decision under review or refer the matter back for reconsideration or give directions to ensure compliance with the law. In the present matter, in light of the appellant having demonstrated its "substantial and peculiar interest in the issue of the trial" in terms of s 13, no useful purpose would be served by remitting the matter to the respondent for reconsideration. The best recourse in the circumstances of this case would be to grant the relief prayed for by the appellant in the High Court.

In the result, the appeal is allowed with costs. The judgment of the court *a quo* is set aside and substituted with the following:

"1. The decision by the respondent to refuse to grant a certificate *nolle prosequi* to the applicant be and is hereby set aside.

2. The respondent is directed and ordered, within 5 days of the date of this order, to issue a certificate to the applicant that he declines to prosecute the fraud charge at the public instance.

3. The respondent shall pay the costs of this application."

ZIYAMBI JA: I agree.

GARWE JA: I agree.

Scanlen & Holderness, appellant's legal practitioners
Civil Division of the Attorney-General's Office, respondent's legal practitioners