

## Environment - South Africa

Private criminal prosecution of environmental crimes

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### Introduction

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### Introduction

The National Environmental Management Act (107/1998), read together with the Criminal Procedure Act (51/1977), expressly provide for individuals to institute private criminal prosecutions for the protection of the environment.

The possibility of private prosecutions is a risk for companies which can reach an accommodation with the relevant authorities regarding effective steps to mitigate and address any past transgressions of the relevant environmental laws, only to be faced with a private prosecution.

While the National Environmental Management Act creates an enabling environment for such proceedings, there are certain limitations, which must be genuine and in the interest of protecting the environment.

In practice, such proceedings are instituted infrequently; environmental action groups to date have mostly focused on laying criminal charges against alleged polluters and allowing the police, the Environmental Enforcement Directorate at the Department of Environmental Affairs and state prosecutors to undertake the necessary investigations and prosecution.

Despite the existence of these provisions for almost 15 years, there have been no reported cases to date concerning private prosecutions. Nevertheless, there are an increasing number of environmental action groups in South Africa which are looking to criminal law to assist them and, as such, it is useful to explore the topic of private prosecutions.

### Specific provisions in environmental law

Section 24 of the South African Constitution (108/1996) protects environmental rights as fundamental human rights in two ways. First, it guarantees individuals the right to an environment that is not harmful to their health and wellbeing. Second, a duty is imposed on the state to take adequate measures to ensure environmental protection so as to "achieve intergenerational equity through ecological sustainable development". Therefore, individuals have a right to expect the state to take the necessary measures in order to ensure environmental conservation and protection. The National Environmental Management Act was promulgated in order to ensure the realisation of the environmental right in Section 24 of the Constitution.

The National Environmental Management Act provides for a number of environmental crimes – most importantly, breach of the duty of care to remediate pollution and environmental degradation in Section 28 and offences relating to the commencement of listed activities which have a detrimental effect on the environment without the compulsory environmental authorisation.

While the competent environmental authorities are tasked with enforcing the National Environmental Management Act (in particular, Section 28), private individuals may also institute proceedings against parties that pollute the environment.

Section 32 of the act gives standing to "any person or group of persons" to "seek appropriate relief in respect of any breach or threatened breach of any provision of [the act]...or any other statutory provision concerned with the protection of the environment or

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the use of natural resources" in circumstances where such person is acting:

- in that person's or group of person's own interest;
- in the interest of, or on behalf of, a person who is, for practical reasons, unable to institute such proceedings;
- in the interest of or on behalf of a group or class of persons whose interests are affected;
- in the public interest; or
- in the interest of protecting the environment.

Therefore, a person who falls within the ambit of Section 32 may institute proceedings against any party, whether natural or legal,<sup>(1)</sup> for the protection of the environment.<sup>(2)</sup>

The provisions governing private prosecutions are found in Section 33(1), which states that:

*"Any person may, in the public interest; or in the interest of the protection of the environment, institute and conduct a prosecution in respect of any breach or threatened breach of any duty, other than a public duty resting on an organ of state, in any national or provincial legislation or municipal by-law, or any regulation, licence, permission or authorisation issued in terms of such legislation, where that duty is concerned with the protection of the environment and the breach of that duty is an offence."* (emphasis added)

Essentially, five criteria must be met before a person can institute private prosecution proceedings under the act:

- The person instituting the proceedings must be acting either in the public interest or in the interest of protecting the environment;
- The proceedings must be instituted for the breach (or threatened breach) of a duty;
- The duty must have been placed on the person who committed a breach by the relevant laws or authorisations issued under the relevant laws;
- The duty must be concerned with the protection of the environment;<sup>(3)</sup> and
- The breach of the duty must amount to the commission of an offence.

If these criteria have been satisfied, then a person may institute private prosecution proceedings against a party which has breached its duty in respect of environmental protection.

### **Private prosecution procedure**

Section 33(2) of the National Environmental Management Act states that private prosecution proceedings must be conducted in accordance with the procedure for such proceedings under the Criminal Procedure Act and, in particular, Sections 8 to 17 of the Criminal Procedure Act.<sup>(4)</sup>

In addition to the process under the Criminal Procedure Act, Section 33(2) of the National Environmental Management Act prescribes that the following three procedural requirements must be met in private prosecutions:

- The person prosecuting privately must do so through an advocate or attorney;
- The person prosecuting privately must also have given notice to the public prosecutor of his or her intention to institute such proceedings; and
- The public prosecutor must not, within 28 days of receipt of the notice, have stated in writing that he or she also intends to prosecute the alleged offence.

Under the National Environmental Management Act, the person instituting private prosecution proceedings is not required to:

- produce a certificate from the attorney general stating that he or she has refused to prosecute the accused; or
- provide security for such action, as is the norm in private prosecution proceedings under the Criminal Procedure Act.

Section 33(4) of the National Environmental Management Act also warns against persons who institute private proceedings under Section 33 which are not in the public interest or for the protection of the environment or where such prosecution is unfounded, trivial or vexatious. In such cases the accused party may be awarded a cost order against the person instituting the private prosecution proceedings (if the charge is dismissed or the accused is acquitted).

The court in *Crookes v Sibisi*<sup>(5)</sup> dealt with private prosecutions in general and

supported an approach similar to that in Section 33(4) of the National Environmental Management Act. It held that while the purpose of the right of private prosecution is "to operate as a safety valve in society and to reduce the temptation that would otherwise be offered to an aggrieved person to take the law in their own hands", it is important that this right not be abused and there should be a clear basis for bringing the private prosecution. As noted, this case did not specifically deal with private prosecution under the National Environmental Management Act. However, in the case of private prosecution under the National Environmental Management Act, the basis would be in the interest of protecting the environment.

For further information on this topic please contact [Claire Tucker](#) or [Athi Jara](#) at [Bowman Gilfillan Inc](#) by telephone (+27 11 669 9000), fax (+27 11 669 9001) or email ([c.tucker@bowman.co.za](mailto:c.tucker@bowman.co.za) or [a.jara@bowman.co.za](mailto:a.jara@bowman.co.za)).

## Endnotes

(1) Legal parties would include companies, organisations and major corporations.

(2) Section 1 of the National Environmental Management Act broadly defines the 'environment' as:

*"the surroundings within which humans exist and that are made up of:*

- *the land, water and atmosphere of the earth;*
- *micro-organisms, plant and animal life;*
- *any part or combination of the above and the inter-relationships among and between them; and*
- *the physical, chemical, aesthetic and cultural properties and conditions of the foregoing that influence human health and well-being."*

(3) This duty will include the duty of care under Section 28 of the National Environmental Management Act.

(4) Of particular importance are the provisions of Section 8 of the Criminal Procedure Act which state that "any body upon which or person upon whom the right to prosecute in respect of any offence is expressly conferred by law, may institute and conduct a prosecution in respect of such offence in any court competent to try that offence". The person wishing to institute the proceedings must consult with the attorney general and obtain the withdrawal of the attorney general before instituting proceedings against the other party. Also of note are the provisions of Section 10 of the Criminal Procedure Act which state that the private prosecution proceedings will be in the name of the private prosecutor and any indictment, charge sheet or summons must cite the private prosecutor (and may be signed by a legal representative in proceedings under Section 8). Section 12 of the Criminal Procedure Act states that the private prosecution proceedings may proceed in the same manner as a prosecution at the instance of the state.

(5) [2010] JOL 25407 (KZP). This case dealt with a different piece of legislation – namely, the Extension of Security of Tenure Act (62/1997).

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