107/98

THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

CASE NO: 591/96 WLD

In the matter between:

ANDREW LIONEL PHILLIPS Appellant

and

PIERRE BOTHA Respondent

Coram: Hefer, Hoexter, Howie, Schutz JJ A et Ngoepe AJA

Heard: 2 November 1998

Delivered: 26 November 1998

J U D G M E N T

HOEXTER, JA:

This is a civil appeal. The appellant is the owner of a casino in Rivonia. The respondent is an attorney in Florida. Following upon the issue by the Attorney-General of the Witwatersrand of a certificate of *nolle prosequi*, the appellant in terms of sec 7(1) of Act 51 of 1977 ("the Act") instituted and conducted in the Regional Court for the Southern Transvaal Division a private prosecution for fraud against respondent.

The respondent pleaded not guilty to the charge. The appellant himself and two other persons testified in support of the charge. At the close of the prosecution's case counsel for the respondent applied for the discharge of his client. The application was granted and the respondent was found not guilty and discharged. Against the order of the regional court the appellant appealed unsuccessfully to the Witwatersrand Local Division. The judgment of the Court *a quo* (delivered by **HEHER** J with the concurrence of **M J STRYDOM** J) has been reported : *Phillips v Botha* 1995(3) SA

948(W). With leave of the Chief Justice the appellant now appeals to this Court.

The respondent has a current account ("his personal account") at the President Street, Johannesburg, branch of the Trust Bank. At the Midrand branch of the same bank the respondent's firm has an account ("the firm's account").

Late in the evening of 21 July 1993 the respondent visited the casino and there, until the small hours of the following morning, he gambled. In order to gamble he bought gambling counters in exchange for which the casino was prepared to accept from the respondent a series of cheques. At the gambling table luck deserted the respondent. He lost steadily, and, in the end, rather heavily. When his gambling debt to the casino reached the figure of R105 000 the appellant refused him further credit. By that stage the respondent had successively given to the casino in all no less than 22

cash cheques drawn by him. Twenty-one of these cheques (20 for R2 500 each, and one for R50 000) were drawn on his personal account. The remaining cheque (for R5 000) was drawn on his firm's account.

On the morning of 22 July 1993 the respondent instructed the Trust Bank to stop payment of the aforesaid 22 cheques. Upon presentment for payment each cheque was returned by the Trust Bank marked "payment stopped". On 22 July 1993 the respondent's personal account was in credit to the extent of R5 488-45 and no overdraft facilities were available to him.

The criminal summons against the respondent charged him with the commission of 22 counts (or alternatively a single count) of fraud. The annexure to the summons set forth particulars of the 22 cheques which during the night of 21 July and the early morning of 22 July 1993 the respondent had delivered to the appellant at the casino. The summons alleged that when he so gave each cheque to the appellant the respondent,

with intend to defraud, represented that it was his honest intention that upon presentation each cheque should be met and that he had no intention of countermanding payment thereof. By such false representation, so alleged the summons, the appellant was induced, to his loss and prejudice, to deliver to the respondent gambling counters ("chips") to the value of the amount of each cheque, whereas in fact the respondent did not believe that the cheques would be met on presentation and intended to countermand payment thereof.

It is necessary to examine in some detail the testimony given by the appellant in the regional court. At the time of the trial the appellant was thirty-six years of age. He described himself as a business-man who had owned the casino for some five or six years. He holds the degrees of Bachelor of Commerce and Master of Business Administration. When he accepted the 22 cheques from the respondent, so testified the appellant, he did not know that gambling debts are legally unenforceable. Of this fact he became aware only when, after the payment of the cheques had been stopped, he consulted

his attorney.

The appellant dealt with the 22 cheques as follows. He told the trial court that he had earlier negotiated with one Robinson to buy a motor vehicle from him for R70 000. In settlement of the price he delivered to Robinson nine of the cheques (being eight cheques for R2 500 each, and one cheque for R50 000 = R70 000). It was common cause that in respect of these nine cheques Robinson instituted an action for provisional sentence against the respondent. The action was resisted by the respondent and in the result provisional sentence was refused. By consent copies of the papers in the provisional sentence proceedings were handed in as exhibits at the private prosecution.

The appellant discovered that the respondent had countermanded payment when on 22 July 1993 one of his employees presented the remaining thirteen cheques for payment across the counter. Thereupon the appellant

telephoned the respondent and demanded an explanation. Much to the appellant's annoyance the respondent's reaction was "you are not going to get paid ; get your attorney to phone me".

Thereafter, and in the hope of avoiding the private prosecution the respondent made a number of unsuccessful settlement approaches to the appellant. From his evidence in cross-examination it appears that the appellant anticipated such overtures. In this connection he said :-

> "The cheques...that I presented were stopped. Negotiations...or interaction took place. I phoned Mr Botha, he said : 'get you attorney to phone me'. I then started asking around and I found out from other casino operators that Mr Pierre Botha is well-known on the circuit and this is a common *modus operandi* of his, and...one or two casino operators said look... in a few days time he will come and pay you and...he will strike a deal..."

The appellant testified that the respondent had made him a number of different offers. At one stage the respondent offered to pay him R150 000,

whereupon the appellant told him "you have to do better than that". At a later stage (so the appellant conceded after some hedging) it was "possible" that the respondent had offered to increase his offer to R290 000. The last figure mentioned was no less than R310 000. I quote again from the cross-examination :-

> "...to come back to the last time that he [the respondent] saw you, the amount actually came to R310 000 and you said : 'if you pay me R310 000,00 I will let you off the hook' ? — That is possible."

A document which admittedly featured in the settlement discussions [exh J] was handed in at the trial. It contains calculations in the appellant's own hand. The figures at the foot of exh J reflect a total of R310 000. When the respondent's counsel refreshed the appellant's memory by reference to the contents of exh J he was constrained to concede its correctness. The appellant went on to explain that after the settlement talks involving the sum of R310 000 the respondent had undertaken to "get back" to him ; but that

the respondent had failed to do so. The appellant was also cross-examined on a conversation between the parties during the course of the trial itself. The appellant admitted that in the course thereof he had informed the respondent that he [the appellant] had contacted "The Star" and "Beeld" newspapers ; and that he also telephoned Mr Prinsloo of the Law Society.

The appellant told the trial court that he had embarked upon the private prosecution not in an attempt to extract money from the respondent, but in order to teach him a lesson :-

> "I want to show him that the law applies to everybody...and I want to show him that a man who is expected to uphold the law...has to obey the law as well. That is my sentiment, that is my purpose here today. There is no money to be recovered today."

However, having regard to the settlement talks which took place between the parties a question which suggests itself is whether the appellant might not

have been prepared to withdraw the prosecution had the respondent been willing and able to settle for a sum of money sufficiently large. As the following extracts from his cross-examination will tend to show, on this point the appellant in his evidence vacillated and equivocated :-

> "The accused has made a number of approaches or advances to me. He sat...in my facility crying. He...has told me all the horror stories in the world about what this means to him. And I sat and I have listened to him. That is the extent of it..."
>
> ...
>
> "And if you are asking me would I have settled if the price was right, I may have settled if the price was right..."
>
> ...
>
> "I have played the same game with the accused that he has played with me.
>
> What game is that ? ---- What did you take, make an offer. He goes away and he makes an offer, breaks his word or does not return a phone call. He makes the approaches. I have never phoned him and said : 'won't you come and see me'. He makes the approaches to me, tells me he is sorry, he knows he...is going to jail, he knows he has committed fraud..."
>
> ...
>
> "...there have been three or four approaches at least and ...I

think I would be lying if I said the first approach was, it was not relevant so, you know if he had actually come with the money I would not have taken it. And that is the truth...I have...spent fortunes of money being here today and that is what this is about. This is not about the money.

Well I want to remind you that five minutes ago in your evidence you said to me the right amount come, you may have settled ? --- I may have, ja.

But what is the right amount ? --- Who knows ? I do not know..."

...

"I might take the money. I want to put something to you. I might take the money and not stop the prosecution..."

...

"Would you create the impression that you would stop the prosecution and then not stop it ? --- You know, I do not honestly know. Mr Pierre Botha has frauded me, aggrieved me..."

...

"...it was a game we were playing. Pierre [the respondent] comes to me with second-hand cars, et cetera...This is not about money, this trial. It probably costs me R130 000,00 to be here today."

In so far as is relevant to this appeal sec 7(1) of the Act reads as follows :-

"7(1) In any case in which an attorney-general declines to prosecute for an alleged offence-

(a) any private person who proves some substantial and peculiar interest in the issue of the trial arising out of some injury which he individually suffered in consequence of the commission of the said offence ;

...

may, subject to the provisions of section 9, either in person or by a legal representative, institute and conduct a prosecution in respect of such offence any court competent to try that offence."

At the trial it was common cause that the game on which the respondent had hazarded his money was a "gambling game" as defined in sec 1 of the Gambling Act 51 of 1965. At the conclusion of argument before him the regional magistrate delivered an extempore judgment. He rejected as palpably untrue the appellant's assertion that on the night in question he had been ignorant of the fact that gambling debts are unenforceable. In the concluding portion of his extempore judgment the regional magistrate remarked as follows :-

"Nou vra hy [the appellant], wat nie in die sivielereg, in die privaatreg geholpe kan raak nie, vra hy die strafreg om hom tegemoet te kom sê : ek het regtens 'n verlies gely, ek is regtens benadeel deur die optrede van die beskuldigde.

Ek glo nie dat dit ooit geargumenteer kan word dat hy regtens benadeel is en dat hy as gevolg daarvan, van die optrede van die beskuldigde nadeel gely het nie. Wanneer twee mense soos die beskuldigde en hierdie klaer met vuil hande staan, dan moet hulle nie verwag dat 'n geregshof daardie vuil hande moet skoon was nie. Dit is nie die funksie van 'n geregshof nie, en hierdie hof is van mening dat dit die grond is waarom die prokureur-generaal geweier het om 'n vervolging in te stel en dat dit op goeie gronde geskied het dat daar 'n weiering was aan die prokureur-generaal se kant om 'n vervolging in te stel.

Die hof is tevrede dat daar geen substansie was vir 'n vervolging in hierdie betrokke geval nie want die klaer se eis is, vir die redes deur die hof gemeld, nie gebring binne die bepalings van artikel 7 van die Strafproseswet nie en volgens die hof se oordeel, as hierdie argument dan nie aanvaar word nie is daar in elk geval, wat hierdie hof betref, nie enige nadeel wat die klaer tref in die regsin van die uitleg van die woord 'nadeel'."

Following upon the trial court's order discharging the respondent the appellant's attorney, by notice in terms of sec 310 of the Act, required the

regional magistrate to state a case for consideration of the Witwatersrand Local Division setting forth the question of law upon which he had discharged the respondent in terms of sec 174 of the Act ; his decision thereof ; and his findings of fact insofar as such were material to the question of law.

In written reasons in response to the above notice the regional magistrate said that the legal question which fell to be answered might be framed thus :-

> "Het die privaatvervolger in die verhoor 'n wesentlike en besondere belang bewys en homself sodoende binne die bepalings van art 7(1)(a) Wet 51 van 1977 gebring ?"

In seeking the answer to this question the regional magistrate pointed out that "daar geen siviele verhaalsreg is ten aansien van dobbelskuld nie" and he made reference to the decisions in *Mullins and Meyer v Pearlman* 1917 TPD 639 ("the *Mullins* case") ; *Ellis v Visser* 1954(2) SA 431(T) ("the *Ellis*

case") ; *Makhanya v Bailey N O* 1980(4) SA 713(T) ("the *Makhanya* case") ; and *Levy v Benatar* 1987(4) SA 693 (ZSC). Relying upon the following dictum of **MASON J** in the *Mullins* case (at 643) that -

> "where no right of civil redress exists the right of private prosecution would cease"

the regional magistrate held that he was bound by the decisions in the *Mullins* and *Ellis* cases -

> "en dat die privaat vervolger geen *locus standi* ingevolge artikel 7(1)(a) Wet 51 van 1977 het indien hy nie 'n siviele verhaalsreg het nie."

In the course of his comprehensive and closely-reasoned judgment **HEHER J** (at 954D-E) remarked :-

> "The conduct of both the appellant and the accused was *prima facie* illegal. *Ex turpi causa non oritur actio* : the appellant

> would, if seeking to enforce the contract, inevitably fail in such an action. The purpose of the maxim is to discourage illegality and advance public policy : *Jajbhay v Cassim* 1939 AD 537. One of the questions which arises in this matter is whether the placing of an interpretation upon S 7 of the Criminal Procedure Act which affords recognition of the prosecutor's title will conduce to an undermining or evasion of that principle."

Further on in his judgment (954I-955A) the learned Judge proceeded to say :-

> "The potential prejudice to the appellant is obvious : on the strength of the delivery of the cheques he exposed himself to the possibility of incurring losses to the accused during the course of the gaming. However, under the statute which requires that an 'injury' should have been suffered, considerations of policy in relation to the *locus standi* of a public prosecutor certainly import questions as to the legality of the injury."

HEHER J then proceeded to consider whether the regional magistrate had been correct in relying for his conclusion upon the dictum of **MASON J** quoted above. To this end the learned Judge subjected to critical analysis

the decided cases relevant to the inquiry. Dealing with the dictum of **MASON J** in the *Mullins* case **HEHER J** (at 956D-F) remarked :

> "It seems quite clear to me that the 'right of civil redress' to which the Court first referred meant simply the right which would arise when the requirements enunciated in *Patz v Greene* [1907 TS 427] and other cases cited were present. Upon a proper interpretation of the judgment (and although the learned Judge did not relate the enquiry to any particular part of the section [sec 12 of Transvaal Ordinance No 1 of 1903] authorising private prosecution) the Court was trying to determine when a substantial and peculiar interest could be said to exist in the context of an alleged breach of a statutory provision. It was in this context, and only in this context, that the initial remarks relating to the existence of civil redress were made. The learned Judge was certainly not concerned, as we are, with an injury arising from an alleged common law crime and could not have had in mind the question of enforceability or otherwise of rights flowing from the injury. In my respectful opinion the *Mullins* case is of no assistance in the decision of the case before us, and the magistrate was not bound to apply the dictum found at 643 of the judgment."

After a thorough review (at 955B-960A) of the four cases already mentioned

together with the decision in *Solomon v Magistrate, Pretoria, and Another* 1950(3) SA 603(T) and upon a consideration (at 960A-I) of the policy underlying sec 14 of Act 31 of 1917 (the forerunner of sec 7 of the Act) as expounded by **VAN DEN HEEVER AJP** in *Attorney-General v Van der Merwe and Bornman* 1946 OPD 197 at 201, **HEHER J** arrived at the following conclusions :-

> "...there has been a direct and serious infraction of the appellant's right not to be subjected to fraudulent conduct ; he justifiably regards it as an invasion which he cannot ignore ; there is no obvious remedy at law open to him which will compensate him for his commercial loss nor assuage his sense of having been put upon..." (at 960I-961A)

and further (at 961H-J) -

> "The point was well made that there is no reference to a right of civil redress to be found in the section. In each case the elements of s 7 must be matched with the facts in order to ascertain whether a particular complainant possesses *locus standi* or not. I respectfully agree with Le Roux J's assessment in *Makhanya's* case that when a legal right of a

> person is infringed then the question of a civil remedy is not relevant. In the present case, for example, *prima facie*, at least, the appellant's right not to be made the victim of a fraudulent misinterpretation has been infringed, yet there was and is no civil remedy available to him because the law regards his claim against the accused as unenforceable.
>
> Because of these considerations I do not experience difficulty with the elements of a 'substantial and peculiar interest in the issue of the trial'. Both aspects are clearly present in the facts disclosed by the evidence of the private prosecutor."

Having decided that the appellant was a private person who had proved some substantial and peculiar interest in the issue of the trial, **HEHER J** next embarked upon the further inquiry whether such interest had arisen "out of some injury which he individually suffered in consequence of the commission of the said offence".

The learned Judge decided (at 962F) that there was in fact no causal connection between the injury of which the appellant complained and the respondent's fraud ; and that on this ground the regional magistrate had been

right in discharging the respondent. The reasoning which impelled the Court *a quo* to this conclusion is reflected in the following passage (at 962D-E) of its judgment :-

> "The injury which the prosecutor relies on to satisfy the statute was the loss of R105 000 which would have been paid to him if the cheques had been met. But was this injury suffered 'in consequence of the commission' of the fraud ? I think not. In truth the injury upon which the appellant relies was caused not by the fraud - which simply persuaded him to issue chips for participation in the game, an act which resulted in no loss to him at all ; gambling chips have no inherent value, their value can only be determined by the result of the game - but by his inability in law to enforce his bargain..."

However, **HEHER J** went on to hold (at 962G) that even if in this respect he might have erred, there was a further and fatal obstacle to the recognition of the appellant's *locus standi* as a private prosecutor. The learned Judge stressed the fact (at 963B-C) that the gambling debts which gave rise to the cheques involved transactions which were prohibited by law ; and from

WESSELS, *The Law of Contract in South Africa*, he quoted, *inter alia*, the following passage from para 644 :-

> "An illegal contract is a vicious contract. It is one which the law forbids. The law is not indifferent to it. Not only does the law refuse to enforce it, but it refuses to help a party who has been the victim of such a contract. No claim can be grounded upon an illegal contract. The Court will have nothing to do with rights based directly or indirectly upon an illegal contract..."

HEHER J concluded that such injury as the appellant may have suffered in consequence of the respondent's fraud was not cognisable under sec 7 of the Act. He reasoned (at 963F-964B) as follows :-

> "The intransigent mien of the Courts towards illegal contracts which these passages from *Wessels* manifest has, of course, been softened by long contemplation of the principles enunciated in *Jajbhay v Cassim (supra)*... Such mitigation goes no further, however, than enabling a party to such a contract to obtain restitution when justice or public policy requires that...I

> have found nothing to suggest that the loss to a party caused by inablility to enforce an illegal contract has attracted any judicial sympathy. Compare the approach to a claim for damages on the strength of earnings illegally earned, in which public policy appears to be the determinant of judicial recognition : *Dhlamini en 'n Ander v Protea Assurance Co Ltd* 1974(4) SA 906(A) at 912H-915G : *Santam Insurance Ltd v Ferguson* 1985(4) SA 843(A) at 850B-E. I do not consider that I can introduce public policy as such as an interpretative tool in relation to s 7, but should I do so it would not affect my conclusion. Notwithstanding the factors to which I have earlier referred which encourage the view that a private prosecution should be available to the appellant, I cannot but conclude that the accused's fraud did not result in an injury to the appellant which the law recognises. The magistrate was, therefore, also correct in finding that the appellant did not suffer an injury as contemplated by s 7."

Accordingly the learned Judge dismissed the appeal with costs and ordered the appellant to pay the respondent's costs of the appeal. He further considered that the respondent's conduct warranted investigation by the Law Society and he directed that his judgment be brought to that body's attention.

In the course of his written reasons in support of the order for the discharge of the respondent the regional magistrate recorded, as part of his factual findings, the following :-

> "13. Dat beskuldigde 'n vaste aanbod van R205 000,00 gemaak het ter skikking voor die verhoor maar dat klaer 'n spel gespeel het om hom uit te lok om soveel as R310 000,00 te wil hê. (Bewysstuk "J").
>
> 14. Dat klaer beslis die hof probeer mislei het deur voor te gee dat hy nie geweet het dat dobbelskuld nie afdwingbaar is nie.
>
> 15. Dat klaer die strafhof wil misbruik om sy onwettige bedryf te bevorder."

Having regard to the above factual findings by the trial court as well as the tenor of much of the appellant's own testimony, this Court some weeks before the hearing of the appeal requested counsel for both parties to submit supplementary heads of argument to deal with the issue whether the private prosecution did not amount to an abuse of criminal process. We are

indebted to counsel for the additional written arguments furnished by them on this point.

A terse but useful definition of abuse of civil process is to be found in the judgment of **ISAACS J** in the Australian High Court case of *Varawa v Howard Smith Co Ltd* vol 13 CLR (1911) 35 at 91 :-

> "...the term 'abuse of process' connotes that the process is employed for some purpose other than the attainment of the claim in the action. If the proceedings are merely a stalking-horse to coerce the defendant in some way entirely outside the ambit of the legal claim upon which the Court is asked to adjudicate they are regarded as an abuse for this purpose..."

In *Solomon v Magistrate, Pretoria, and Another* 1950(3) SA 603(T) **ROPER J** (at 607 F-H) remarked :-

> "The Court has an inherent power to prevent abuse of its process by frivolous or vexatious proceedings (*Western*

> *Assurance Co v Caldwell's Trustee* (1918 AD 262) ; *Corderoy v Union Government* (1918, AD 512 at p 517) ; *Hudson v Hudson and Another* (1927 AD 259 at p 267), 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."

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. (See *Hudson v Hudson and Another (supra)* at 268).

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. Counsel for the respondent argued strenuously that the private prosecution in fact represented an abuse

of the trial court's process ; and he urged upon us that on this ground alone the appeal should fail. On the other hand counsel for the appellant, while candidly conceding that portions of the appellant's testimony made for sorry reading, submitted that neither the institution nor the actual conduct of the prosecution amounted to an abuse of the regional court's process. In particular counsel called attention to the fact that it was the respondent who had approached the appellant with offers of settlement ; and that it was not the appellant who had taken the initiative in this connection.

From the evidence of the admissions extracted from the appellant during his cross-examination it may be fairly inferred that, as part of a punitive campaign, the appellant played a protracted game of cat-and-mouse with the respondent. The appellant relished the woe and agony of mind experienced by the respondent in the awkward predicament in which he suddenly found himself. The appellant gloatingly rejected the various offers of settlement made by the respondent and on each occasion prodded him into making even

more substantial offers. That the appellant was determined to teach the respondent a sharp lesson is clear. Taking his evidence as a whole, however, and despite the unsavoury conduct to which he too resorted, I am unable to conclude that in prosecuting the respondent the appellant's dominant motive was one of extortion or oppression rather than having justice done to a wrongdoer.

I turn again to the judgment of the Court below. In considering the *locus standi* of the appellant under sec 7 of the Act **HEHER J** undertook two separate and discrete inquiries into whether the appellant had proved : (1) that he had some substantial and peculiar interest in the issue of the trial ; and, if so (2) that such interest arose out of some injury which he individually suffered in consequence of the commission of the said offence. In the concluding part of this judgment I shall consider briefly whether this bifurcated approach was really necessary.

I agree, with respect, with the conclusion of **HEHER J** that when a person's legal right has been infringed the existence or otherwise of a civil remedy does not by itself determine the question whether he has *locus standi* under sec 7 of the Act. The further question whether in the instant case the appellant proved that he had a substantial and peculiar interest in the issue of the trial I shall, for the moment, leave in abeyance.

In the view which I take of the matter it is unnecessary for me to express an opinion on the correctness or otherwise of the finding of the Court *a quo* that no causal connection existed between the injury of which the appellant complained and the respondent's fraud. For the purposes of argument I shall assume in favour of the appellant that there was such a causal connection.

In the end **HEHER J** was driven to the conclusion that the appellant lacked *locus standi* as a private prosecutor on the ground that any injury which he

may have suffered in the instant case is not an injury cognisable under sec 7 of the Act. With that finding I entirely agree. It is no doubt so that in pressing for the conviction of the respondent the appellant is not seeking civil enforcement of an illegal contract. The essential fact of the matter however remains that any representation which the respondent may have made as to his own state of mind which induced the appellant to accept the former's cheques was part and parcel of the whole illegal transaction in which they were both engaged. Viewed from any angle the conclusion seems to me inescapable that what the appellant is trying to do through the machinery of a private prosecution is to found a case in criminal law based on his own iniquity. Closely allied to the rule of our law *ex dolo malo non oritur actio* is the maxim *nemo auditur propriam turpitudinem allegans* (no one is heeded who adduces his own infamy) **cf Cod**.7.8.5. In prosecuting the respondent that is precisely what the appellant is seeking to do. He is in law not entitled to do so.

I return to the question whether it was necessary for the Court below to undertake separate inquiries into (1) substantial and peculiar interest ; and (2) the injury out of which such interest arises. This dissociation seems to me, with respect, to be somewhat artificial. If (as the Court *a quo* correctly found) the injury of which the appellant complains is not one which falls within the purview of sec 7(1) of the Act that finding must, I consider, at once be destructive of the existence on the part of the appellant of any "substantial and peculiar interest" in the issue of the trial, because the "interest" is one which in terms of the subsection "arises out of" the "injury". In my view the two concepts are indissolubly linked. In the absence of an injury cognisable under sec 7(1) there can be on the part of a private prosecutor no room for any interest (substantial and peculiar or otherwise) in the issue of the trial.

For the reasons aforegoing the Court below correctly upheld the order of the

regional magistrate discharging the respondent at the close of the prosecution's case. The appeal is dismissed with costs, including the costs of two counsel.

G G HOEXTER

HEFER JA)

HOWIE JA)

concur

SCHUTZ JA)

NGOEPE AJA)