PELSER v DIRECTOR OF PUBLIC PROSECUTIONS, TRANSVAAL, AND OTHERS 2009 (4) SA 52 (T)

Citation 2009 (4) SA 52 (T)

Case No 35659/2008

Court Transvaal Provincial Division

Judge Ngoepe JP

Heard November 10, 2008

Judgment November 24, 2008

Counsel *W Smit* for the applicant.
DWM Broughton for the first respondent.
No appearance for the second to seventh respondents.

Annotations Link to Case Annotations

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Flynote : Sleutelwoorde

Criminal procedure - Trial - Stay of prosecution - On ground that constitutional rights of accused to be presumed innocent and right to fair trial violated by pronouncements in civil cases dealing with matters forming F basis of indictment against accused - No basis for finding that trial judge in criminal trial would be influenced by pronouncements in civil cases - Judge to decide case on evidence adduced in criminal trial - Trial judge would know that judgments in civil cases may not be held against accused in criminal trial where accused not party to those civil proceedings - Application ill-conceived and baseless - Application dismissed.

G **Costs** - Counsel's fees - Disallowance - Application for permanent stay of prosecution of criminal charges dismissed as ill-conceived and baseless - Counsel for applicant having advised applicant to initiate application - Counsel's fees would be paid by Legal Aid Board - Taxpayers' money not to be abused in this manner - Ordered that counsel for applicant not entitled to payment of fees in connection with application.

Headnote : Kopnota

H The applicant, together with the second to seventh respondents, were the accused in a criminal trial pending before the High Court. The charges related to certain financial activities conducted by the accused or companies associated with them. These activities had also resulted in a number of civil I cases before the civil courts. In an application for the permanent stay of the prosecution, the applicant alleged that his constitutional rights and those of his co-accused to be presumed innocent had been violated; that their right to a fair trial, and their right of appeal or review in terms of s 35(3)*(o)* of the Constitution of the Republic of South Africa, 1996, had been violated by the pronouncements made in the judgments referred to above. It was J contended that they would therefore not receive a fair trial in the impending criminal case against them, and therefore that this court should issue an

order that their prosecution be permanently stayed. It was further A contended that the trial judge would be biased against the accused as a result of the pronouncements made by the various courts in the various civil cases. The gist of these pronouncements was that the activities forming the substance of the indictment were fraudulent and unlawful. It appeared that the civil cases in question had been decided on the basis of agreed facts and that the accused had not been party to the agreed facts. B

Held, that, in effect, what the applicant contended was that, once a civil case had been decided and certain findings made, a criminal prosecution in respect of the same conduct should not be allowed to proceed as the accused would be prejudiced by the prior civil court judgment against the accused (defendant). The premise of the application was that the trial judge would be influenced by the pronouncements in the various civil cases, and C therefore fail to adjudicate in the criminal trial objectively, with an open mind and with the necessary impartiality. There was no basis for this. It was trite law that decisions by the one court were not binding on the other court; they were mere opinions; this was particularly so with regard to factual findings as *in casu*. Furthermore, the standard of proof in criminal trials is higher than in civil trials. (Paragraph [8] at 55H - J.) D

Held, further, that the criminal trial would be heard by a judge who was a trained judicial officer and he knew that he had to decide every case which came before him on the evidence adduced in that case. He knew further that a decision on facts in one case was irrelevant in respect of any other case, and that he had to confine himself to the evidence produced in the case he was actually trying. (Paragraph[9] at 56C - D.) E

The dictum in *R v Lechudi* 1945 AD 796 at 801 applied.

Held, further, that the trial judge would know that the judgments in the civil cases could not be held against the accused in the criminal trial as the accused were not party to those civil proceedings. (Paragraph [10] at 56E - H.)

Held, further, that the application was ill-conceived. An accused person may not apply for a permanent stay of prosecution on the ground that he/she F was likely to be prejudiced by external factors, in this case pronouncements in civil matters. Such an argument assumed that the trial court would commit an irregularity by allowing itself to be unduly influenced by those factors. The trial should be allowed to proceed. (Paragraph [11] at 56I - 57A.)

Held, further, that counsel for the applicant should be denied his entire fees in connection with the application. Counsel had advised the applicant to initiate G the application because he believed that the applicant's right to a fair trial had been violated by the pronouncements made in the various civil courts. The application was clearly baseless. Furthermore, as counsel for the applicant was going to be paid by the Legal Aid Board, taxpayers' money should not be abused in this manner. (Paragraph [12] at 57C - F, paraphrased.) Application dismissed and order issued that applicant's counsel should not be entitled to H payment of any fees in connection with the application.

Cases Considered

Annotations

Reported cases

Danisa v British and Overseas Insurance Co Ltd 1960 (1) SA 800 (D): dictum I at 801F - G applied

R v Lechudi 1945 AD 796: dictum at 801 applied

R v Lee 1952 (2) SA 67 (T): dictum at 69D - E applied

Thint (Pty) Ltd v National Director of Public Prosecutions and Others; Zuma and Another v National Director of Public Prosecutions and Others 2009 (1) SA 1 (CC) (2008 (2) SACR 421): dictum in para[65] applied. J

NGOEPE JP

Statutes Considered

A Statutes

The Constitution of the Republic of South Africa, 1996, s 35(3)*(o)*: see *Juta's Statutes of South Africa 2007/8* vol 5 at 1-26.

Case Information

Application for a permanent stay of prosecution. The facts appear B from the reasons for judgment.

W Smit for the applicant.

DWM Broughton for the first respondent.

No appearance for the second to seventh respondents.

C *Cur adv vult*.

Postea (November 24).

Judgment

Ngoepe JP:

D [1] This is an application for the permanent stay of criminal prosecution. The applicant, together with the second, third, fourth, fifth, sixth and seventh respondents (they were all joined by the applicant), is the accused in a criminal case now pending at this court. The charges follow certain financial activities conducted by the accused or companies associated with the accused. In substance, the charges relate to what can E be described as a multiplication scheme or a so-called pyramid scheme. It is, however, not important whether or not their activities are described as a pyramid scheme or a multiplication scheme.

[2] The activities forming the substance of criminal charges against the F accused fell to be considered by various civil courts and the Income Tax Special Court. At least one of the cases even reached the Supreme Court of Appeal, and others have been reported. To quote the applicant, these cases include:

> *'Fourie NO v Edeling NO* [2005] 4 All SA 393 (SCA); *MP Finance Group CC (In Liquidation) v Commissioner, South African Revenue Service* G 2007 (5) SA 521 (SCA), 69 SATC 141; *Janse van Rensburg and Others NNO v Myburgh and Two Others* 2007 (6) SA 287 (T); *Van Eeden v Engelbrecht*, case No 2590/02; and *Income Tax Case 1789* (Natal Tax Court, 2 February 2005, (2005) 67 SATC 205).'

[3] The applicant wants, amongst other things, a declarator to the effect H that his constitutional rights and those of his co-accused to be presumed innocent have been violated; that their right to a fair trial, and their right of appeal or review in terms of s 35(3)*(o)* of the Constitution of the Republic of South Africa, 1996, has been violated by the pronouncements made in the judgments referred to above. It is contended that they I will therefore not receive a fair trial in the impending criminal case against them, and therefore that this court should issue an order that their prosecution be permanently stayed. To bolster his case the applicant made a comparative study of the allegations contained in the indictment, and the pronouncements made in the various cases referred to above. All these cases were civil matters. This exercise was meant to J show that the other courts had already expressed their views on the

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alleged illegal activities forming the substance of the charges which the A accused are facing in the criminal case.

[4] It was submitted that the trial judge would be biased against the accused as a result of the pronouncements made by the various courts in the various civil cases referred to above. The applicant quoted these pronouncements extensively in his founding affidavit. The gist of them B all was that they regarded the activities forming the substance of the indictment as being fraudulent and unlawful.

[5] In the course of his submissions, counsel for the applicant informed the court that the

various civil cases referred to above had been decided on the basis of agreed facts and that the accused were not party to the C agreed facts. Nor, we were told, did the accused authorise anybody or give power of attorney to anybody to agree on their behalf, or to be party to the agreed set of facts. In this respect, it was also argued that the pronouncements were made in the absence of the accused and were therefore defamatory. D

[6] In bringing the application, the applicant purported to be acting on behalf of a group or class of people, namely all the accused in the criminal trial. A point *in limine* was taken by the State on the ground that the applicant had not made out a case of class representation. The court then gave the applicant and/or any of the second to seventh respondents E the opportunity to file an appropriate notice or document, once judgment was reserved, in order to provide the basis for class action. This would be done within two days of the judgment being reserved. Because of the fact that even if the applicant was not acting in a representative capacity the court would in any event still be seized with the applicant's application on his own behalf, the court directed the parties to argue the F merits of the case together with the point *in limine*.

[7] Judgment was indeed reserved, and the applicant delivered a notice within the two days as directed. The notice did not take the matter any further as the applicant merely repeated his own word that he was acting on behalf of the other accused. None of the respondents joined in. The G cases must therefore be decided on the premise that the applicant is acting on his own.

[8] The application was vehemently opposed by the State. It has always been without merit. In effect, what the applicant is contending is that, once a civil case has been decided and certain findings made, a criminal H prosecution in respect of the same conduct should not be allowed to proceed as the accused would be prejudiced by the prior civil court judgment against the accused (defendant). The premise of the application is that the trial judge would be influenced by the pronouncements in the various civil cases referred to above, and therefore fail to adjudicate I in the criminal trial objectively, with an open mind and with the necessary impartiality. There is no basis for this. It is trite law that decisions by the one court are not binding on the other court; they are mere opinions; this is particularly so with regard to factual findings as *in casu*. Secondly the standard of proof in criminal trials is higher than in civil trials. The applicant's submission could lead to absurdities. Not J

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A only would an accused person be absolved from criminal prosecution once a civil judgment has been handed down against him/her in respect of the same conduct, but the reverse would also have to occur: once a criminal conviction has been made against an accused person in respect of a particular conduct, a subsequent civil trial in respect of the same B conduct could likewise be deemed to be unfair to the accused (defendant) as a result of the perceived influence of the criminal verdict. This argument would make nonsense of the well-established principle of our law that one conduct can give rise to both civil and criminal liability, both of which are prosecutable against the perpetrator.

C [9] Furthermore, the criminal trial is of course going to be heard by a judge, the indictment having been served already.

> 'A Judge is a trained judicial officer and he knows that he must decide every case which comes before him on the evidence adduced in that case. He knows further that a decision on facts in one case is irrelevant in respect of any other case, and that he must confine himself to the D evidence produced in the case he is actually trying.'[1]

The trial judge would also be aware that the State would still have to prove the facts required for the criminal conviction, despite the judgments in the civil matters.[2]

E [10] The applicant's submissions are also incomprehensible, given the fact their counsel submitted that the applicant and his co-accused were not party to the civil cases referred to above, and had not given anybody the authority to admit to any facts on their behalf. The trial judge would therefore know that the judgments in the civil cases cannot be held F against the accused in the criminal trial as the accused were not party to those civil proceedings.[3] One

would have thought that the criminal trial would be one occasion where the accused would have the opportunity, if so advised, to state their own facts and cause the court to come to a finding different from any made, without their input by the civil courts referred to above. Another point: it was submitted for the applicant that G the pronouncements made in the civil cases were defamatory of the applicants as the pronouncements were not germane or relevant to the resolution of the cases then to be decided. If the pronouncements were indeed not relevant, it would mean that they were all obiter dicta and therefore even less binding or influential on the subsequent criminal H trial.

[11] This was an ill-conceived application. An accused person may not apply for a permanent stay of prosecution on the ground that he/she is likely to be prejudiced by external factors, in this case pronouncements in civil matters. Such an argument assumes that the trial court will I commit an irregularity by allowing itself to be unduly influenced by those

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factors. The trial should be allowed to proceed. If the accused is A acquitted, that would of course be the end of the matter. If convicted, the accused would consider the motivation therefor, and then decide on what to do; it is not for nothing that presiding officers are compelled to give reasons for their verdicts. Although Langa CJ[4] was criticising preliminary litigation aimed at circumventing the application of s 35(5) B of the Constitution, the present application deserves the same censure. Counsel for the State is justified in his submissions that the applicant's attempt was aimed at delaying the criminal trial, and was an abuse of court process.

[12] Counsel for the State argued that applicant's counsel be denied fees C or costs relative to this entire application, this on the ground that the application was frivolous and an abuse of the judicial process. This issue was fully argued. Mr *Smit*, for the applicant, conceded that he was the one who advised the applicant to initiate this application because he believed that the applicant's right to a fair trial had been violated by the pronouncements made in the various civil courts. He persisted before D this court that that was still his view. This was clearly a baseless application and the court agrees that Mr *Smit* should be denied his entire fees in connection with the application. It is important, in this respect, to note that the applicant, as with the other accused, is having his fees paid by the Legal Aid Board. In other words, unless it is ordered otherwise, E Mr *Smit* is going to be paid by the Legal Aid Board for his services in respect of this application. The court agrees with counsel for the State that the taxpayers' money may not be abused in this manner. The court has noted that it is becoming fashionable to bring this kind of application. There was one before another court on 18 November 2008; nobody turned up, and the matter was struck from the roll. In the circumstances F the following order is made:

(a) The application is dismissed.

(b) Applicant's counsel, Mr *Smit*, shall not be entitled to the payment of any fees in connection with this application. G

Applicant's Attorneys: *Legal Aid Board*.

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1 *Danisa v British and Overseas Insurance Co Ltd* 1960 (1) SA 800 (D) at 801F-G.
2 *R v Lechudi* 1945 AD 796 at 801.
3 *R v Lee* 1952 (2) SA 67 (T) at 69D-E.
4 *Thint (Pty) Ltd v National Director of Public Prosecutions and Others; Zuma and Another v National Director of Public Prosecutions and Others* (cases CCT 89/2007 and CCT 91/2007 (unreported) para 65). This case has now been reported at 2009 (1) SA 1 (CC) (2008 (2) SACR 421)—Eds.

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