IN THE HIGH COURT OF SOUTH AFRICA//ie
(TRANSVAAL PROVINCIAL DIVISION)

DATE: 24 November 2008

CASE NO: 35659/08

In the matter between:

PELSER, W.J	**Applicant**
versus	
THE DIRECTOR OF PUBLIC PROSECUTIONS	
(TRANSVAAL PROVINCIAL DIVISION)	**1st Respondent**
MARIA JOHANNA PRINSLOO	**2nd Respondent**
HERBERT HENRY PRINSLOO	**3rd Respondent**
MARIA JOHANNA LEMSTRA	**4 Respondent**
GERRIT LEMSTRA	**5th Respondent**
IZABEL ENGELBRECHT	**6th Respondent**
HENDRIK ENGELBRECHT	**7th Respondent**

JUDGMENT

NGOEPE JP

[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) are 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 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 accused fell to be considered by various Civil Courts and the Special Income Tax 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 SA393(SCA); *MP Finance Group CC (In Liquidation) v Commissioner SARS*, 2007)5) SA 521 (SCA), SATC, Vol 69, Part 5, page 141; *Janse van Rensburg and Others NNO v Myburgh and Two Others* 2007(6) SA 287 (TPD); *Van Eeden v Engelbrecht*, Case No 2590/02 (O) and Income Tax Case No 1789, (Natal Tax Court) 2 February 2005, SATC, Vol 67 (2005) Part 1, page 205."

[3] The applicant wants, amongst others, a declaratory to the effect 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 section 35(3)(0) of the Constitution of the Republic of South Africa have been violated by the pronouncements made in the judgments referred to above. It is contended that they 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, with the pronouncements made in the various cases referred to above. All these cases were civil matters. This exercise was meant to show that the other Courts had already expressed their views on the alleged illegal activities forming the substance of the charges which the 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 all was that they regarded the activities forming the substance of the indictment as being fraudulent and unlawful,

[5] In the cause 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 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.

[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 the seventh respondent 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 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 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 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 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 iead to absurdities. Not only would an accused person be absolved from criminal prosecution once a civil judgment has been handed 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 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.

[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 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]

[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

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[1] *Danisa* v *British and Overseas Insurance Co. Ltd* 1960(1) SA 800 (D &CLD) p 801 F-G.

[2] *R v Lechudi* 1945 AD 796, p 801.

facts on their behalf. The trial judge would therefore know that the judgments in the civil cases cannot be held 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 the pronouncements made in the civil cases were defamatory of the applicants as the pronouncements were not germaine 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 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 commit an irregularity by allowing itself to be unduly influenced by those factors. The trial should be allowed to proceed, if the accused is 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 criticizing preliminary litigation aimed at circumventing the application of section 35(5) 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 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 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, are having their fees paid for by the Legal Aid Board. In other words, unless it is ordered otherwise, 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 tax payers' money may not be abused in this manner. The Court has noted that it is becoming fashionable to bring this kind of applications. There was one before another Court on 18 November 2008; nobody turned up, and the matter was struck from the roll. In the circumstances 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

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[3] *R v Lee* 1952 (2) SA 67(T), p 69 D E.

[4] *Thint Holdings and Another* v *Director of Public Prosecutions* and *Zuma v Director of Public Prosecutions* Cases CCT 90 & 92/07 (unreported), para [65].

application.

B M NGOEPE

JUDGE PRESIDENT

HIGH COURT OF SOUTH AFRICA,

TRANSVAAL PROVINCIAL DIVISION

Heard on 10 November 2008

Representation for the applicant

Counsel Adv W Smit

Instructed by Attorneys: Lawrence Manzini

Representation for 1st **Respondent**

Counsel Adv D W M Broughton

Instructed by the State Attorney

Representation for the 2nd Respondent **No Submission**

Counsel Adv Pienaar

Instructed by Legal Aid Board

Representation for the 3 Respondent **No Submission**

Counsel Adv Klein

Instructed by Legal Aid Board

Representation for the 4th and 5lh Respondent

Counsel Adv W Smit

Instructed by Attorneys Lawrence Manzini

Representation for the 6lh and 7th Respondent No Submission

Counsel Adv De Beer

Instructed by Legal Aid Board