

SOUTH AFRICA / JUDGMENT

Rudman v Cooney NO and Others (CA 1404/08) [2010] ZAECHGC 130 (3 December 2010) [2010] ZAECHGC 130

COURT

Eastern Cape High Court, Grahamstown

BEFORE

E Revelas, JD Pickering

CASE / FILE NUMBER

CA 1404/08

Source: saflii.org · Research copy typeset by Esheria. Not court-issued or certified.

Source record

REPORTABLE

IN

THE HIGH COURT OF SOUTH AFRICA

(EASTERN

CAPE – GRAHAMSTOWN)

Case No: CA 1404/08

Date

Heard: 20/09/10

Date

Delivered: 3/12/10

In

the matter between

ROYDON

RUDMAN

.....Applicant

and

MR

K COONEY N.O.1st

Respondent

THE

DIRECTOR OF PUBLIC

PROSECUTIONS:	EASTERN CAPE2nd
	Respondent
	ADRIAAN
	BOTHA3rd
	Respondent
	THE
	NATIONAL DIRECTOR OF PUBLIC
	PROSECUTIONS
	4th
	Respondent
	PETRUS
	GYSBERTUS PRINSLOO5th
	Respondent

JUDGMENT

REVELAS J

- [1] This is an application for review in terms of Section 24 of the Supreme Court Act, 59 of 1959. The applicant seeks to set aside the entire proceedings of a criminal trial conducted in the Specialized Commercial Court of the Regional Court, Port Elizabeth, presided over by the first respondent (“the Magistrate”), on the basis of incompetent legal representation.
- [2] The applicant and the third respondent (“Botha”) were both charged with twenty eight counts of fraud, alternatively theft, and one count (count 29) of contravening certain provisions of the Bank Act, Act 24 of 1990 (in effect, operating the business of a bank without being registered as one). The applicant (accused number one) was represented by the fifth respondent (“Prinsloo”), and Botha (accused number two) was represented by Mr Griebenow, also an attorney. Both accused pleaded not guilty to the charges.
- [3] On 7 March 2008 the Magistrate convicted the applicant on all twenty eight counts of fraud and on the count pertaining to the Bank Act. Botha was acquitted on all counts. After the trial was postponed for purposes of sentencing the applicant, the applicant terminated Prinsloo’s mandate.
- [4] On 5 May 2008, the date to which the sentencing proceedings of the trial was postponed, Mr J Oelofse represented the applicant. On the same day an application was made on behalf of the fourth respondent (the National Director of Public Prosecutions) for a confiscation order in terms of the Prevention of Organized Crime Act, Act 121 of 1998. The Magistrate was requested to conduct an enquiry under Section 18(1) of the aforesaid Act into any benefit which the applicant may have derived and to determine the amount of the confiscation order. Mr Oelofse’s request for a further postponement to brief counsel was granted. Thereafter the present application was launched.

- [5] The basis upon which the applicant seeks to review the criminal trial proceedings is that his attorney, Prinsloo, who was appointed by the Legal Aid Board, did not defend him competently and did not act in accordance with his mandate. The applicant contends that as a result of the aforesaid he was deprived of a fair trial. The specific allegations made by the applicant pertaining to Prinsloo's conduct will be dealt with later herein.
- [6] The application is opposed by the second respondent, the Director of Public Prosecutions in the Eastern Cape. The Magistrate, Botha, and the fourth respondent all filed notices to the effect that they would abide by the decision of this Court.
- [7] Prinsloo, initially noted opposition to the application for review, but later withdrew his opposition. He nonetheless deposed to an affidavit wherein he indicated that he would abide the Court's decision, but that he, as an officer of the Court, wished to place certain facts before it in this affidavit, to assist the Court and since it was in the interests of justice to do so. In the affidavit he disputed the allegations levelled against him by the applicant.
- [8] The applicant filed a replying affidavit wherein he took issue with the averments made by Mr Wilhelm Janse de Villiers ("the Prosecutor") in the second respondent's answering affidavit. With regard to Prinsloo's affidavit, the applicant adopted the stance that he was advised that an affidavit by his former attorney was inadmissible and he would "not expend the extra considerable costs in responding to the lengthy affidavit complied by the Fifth Respondent under the guise of an officer of this Court".
- [9] Then, without replying to any of the factual averments made by Prinsloo, the applicant concluded his replying affidavit by seeking a costs order against Prinsloo. When the present review application was argued, Mr van der Linde, counsel for Prinsloo, reiterated that Prinsloo was not opposing the relief sought as such, but that in the event of this Court being inclined to decide in the applicant's favour, Prinsloo would oppose any costs order sought against him.
- [10] The question as to whether Prinsloo's affidavit is admissible as evidence in this matter is of crucial importance to the applicant's case. If held to be admissible, many of the factual averments made by Prinsloo stand unchallenged in terms of the rule enunciated in *Plascon-Evans Paints Ltd*¹ and, as was conceded by Mr Wessels, counsel for the applicant, would dispose of the factual averments which are in dispute, almost entirely.
- [11] Mr Wessels submitted that the affidavit was inadmissible on two grounds. Firstly, because there are no provisions in the Rules of Court for the filing of such an affidavit in the present circumstances. In support of this submission he stressed that Prinsloo was not requested by anyone to assist this Court, neither has he sought its leave to intervene in a different capacity than as cited, and he was also not granted leave to be joined as *amicus curiae*.
- [12] Secondly, Mr Wessels submitted, Prinsloo was precluded from filing such an affidavit by the provisions of Section 201 of the Criminal Procedure Act, Act 51 of 1977 ("the CPA") which prohibits legal practitioners from giving evidence against their clients in criminal

proceedings without their consent. He argued that Prinsloo was still bound by his professional legal privilege because the information he divulged in the affidavit under consideration, was obtained in his capacity as the applicant's legal representative and consequently, their prior communications may not be disclosed.

- [13] The first objection to the admission of Prinsloo's affidavit, namely that the Rules do not make provision for the filing of this type of affidavit by an attorney, does not assist the applicant. The old adage that "the rules are made for the Court, and not the Court for the rules" is entirely appropriate in this instance. Prinsloo has no interest such as a litigant would have in the outcome of the application.

Serious allegations pertaining to his reputation have been made. It is hardly surprising that Prinsloo wishes to dispute the allegations

against him, considering that there must be few legal representatives who would concede their own ineptitude. The notion that an accused may unilaterally make allegations of incompetence against his former legal representative without being gainsaid, unless he risks being mulcted in costs, offends the basic tenets of fairness and justice.

- [14] There can be no bar to the filing of an affidavit by a legal representative in circumstances such as these, provided that allegations made in the affidavit do not stray beyond the parameters of assisting the Court. Only necessary and relevant facts must be placed before the Court with the sole purpose of advancing the interests of justice. When deposing to this type of affidavit, the legal representative must, in my view, respect the privilege which existed between his erstwhile client and himself as far as possible, by confining himself to the issues at hand, guarding against argumentative statements or ones which are not strictly necessary and which serve only to prejudice his former client's case. Prinsloo was not guilty of the aforesaid.
- [15] Mr Pienaar, counsel for the second respondent, also referred us to other cases where legal representatives deposed to affidavits to deal with allegations made by their former clients, without entering the fray for the relief ultimately sought. He submitted that this practice was in fact not infrequent.² Reference was made to instances where the Court, *mero motu* requested a legal representative to depose to an affidavit to deal with suggestions of incompetence.³
- [16] The applicant's second objection to the admission of Prinsloo's affidavit is misguided. There was clearly an imputed waiver by the applicant of the privilege he seeks to hold Prinsloo to. In our law, a distinction has been drawn between an implied waiver and an imputed waiver of the legal professional privilege.⁴ In *S v Tandwa and Others*⁵ Cameron JA (as he then was) described the distinction between the two types of waiver thus:

“Implied waiver occurs (by analogy with contract law principles) when the holder of the privilege with full knowledge of it, so behaves that it can objectively be concluded that the privilege was intentionally abandoned. Imputed waiver occurs where – regardless of the holder’s intention – fairness requires that the court conclude that the privilege was abandoned. Implied waiver entails an objective inference that the privilege was actually abandoned; imputed waiver proceeds from fairness, regardless of actual abandonment”.

- [17] In *Tandwa*, 6 Cameron JA also referred to a passage from the much cited *Wigmore*, 7 where the learned author states that it is a “fair canon of decision” that “when a client alleges a breach of duty by his attorney, the privilege is waived as to all communications relevant to that issue”. The learned Judge of Appeal held that the aforesaid canon was “clearly right” 8 and that where an accused charges a legal representative with incompetence or neglect giving rise to a fair trial violation, “it seems to us most sensible to talk of imputed waiver rather than to cast around to find an actual waiver. Even without an express or implied waiver, fair evaluation of the allegations will always require that a waiver be imputed to the extent of obtaining the

impugned legal representative’s response to them. Rightly therefore counsel on appeal accepted that the advocate’s

affidavit was admissible in assessing the accused’s claims”.

- [18] In my view, the judgment in *Tandwa* authoritatively disposes of the applicant’s objection to the admission of an affidavit on the basis of professional legal privilege.
- [19] For all the aforesaid considerations Prinsloo’s affidavit is admissible as evidence, and is to be considered along with the other affidavits filed of record, as part of the whole matrix of evidence in this application.

The Charges

- [20] The State’s case which forms the basis of the 29 charges against the applicant and Botha, as it appears from the indictment, is briefly the following:
- [21] The applicant was the sole member of a Close Corporation known as Extra Dimensions 1072, which traded as a micro-lending business named Makana Financial Services (“Makana”) in Grahamstown. Botha was his agent, whose principal task was to recruit or lure investors to invest in Makana. These investors were then persuaded to invest in a scheme which was to provide bridging finance to members of the South African National Defence Force (SANDF) who had qualified for severance packages and needed short term loans. The investors were told that all severance packages would be paid into ABSA Bank.
- [22] The investors were advised that it was a term of the bridging finance agreement (only concluded with SANDF members) that members must be ABSA Bank Account holders and that the bridging finance was made available to SANDF members only, and after the necessary confirmation was received from contact persons in the SANDF. Another feature

assuring the low risk attached to this investment, and which was conveyed to the investors, was that the SANDF members had to sign a debit order authorising ABSA Bank to make the necessary transfer to the account of Makana's banking account, held at First National Bank in Grahamstown. Upon receipt of

these severance packages, ABSA Bank was authorized to debit the SANDF members' accounts in favour of the aforesaid banking account of Makana. Garnishee orders issued in respect of the SANDF members, and held by the applicant would also be in place to further facilitate that the monies be paid over to Makana.

- [23] The scheme was to accumulate a 30% return per transaction of which 10% would be paid to the applicant, 10% to Botha and 10%, as well as the full capital investment, was to be returned to, the investor. Mr Paul Michau ("Michau") and Michael du Plessis ("du Plessis") invested in the aforesaid scheme.
- [24] The State alleged that at the time the accused engaged the aforesaid persons in the scheme, they knew full well that no bridging finance was provided for SANDF members, that ABSA Bank was not involved in the scheme to debit monies from such members in favour of Makana, and that there existed no scheme from which the investors could earn a 30% return.
- [25] Du Plessis invested R1 837 000.00 during the period August 2001 to March 2002 and Michau invested R1 200 000.00 during the period 27 March 2001 to 1 April
2002. The fraud allegations concerning the investors du Plessis and Michau, formed the basis of the first twenty five charges.
- [26] The 26th and 27th counts concerned a Mrs Paulina da Silva ("da Silva") who was, by the same assurances and scheme set out above, induced to invest the amount of R110 000.00 in the scheme during March 2002. She was promised a return of 15% on the first R55 000.00 paid over by her and 10% on her second investment of R55 000.00.
- [27] Count 28 concerned a close friend of Botha (also in the micro-lending business), Mr Nicholaas Grobbelaar, who similarly invested R160 000.00 in the so-called scheme in December 2001.
- [28] In count 29 the applicant and Botha were charged with contravening Sections 1, 11(1), 11(2) and 91(4)(a) of the Bank Act, Act 94 of 1990, as amended. They were accused of conducting the business of a Bank (as defined in the Act) by soliciting and accepting deposits from the general public and utilized the money, earned interest thereon and granted loans.
- [29] The applicant pleaded not guilty to the charges. According to him he only conducted a micro-lending business (Makana) in Grahamstown. He borrowed money from investors which he lent to members of the public. He admitted that he received all the monies in the charge sheet, but stated that he repaid most of the monies to his investors.

- [30] Botha also pleaded not guilty, but admitted that he and the applicant ran the operations as set out in the charge sheet, but contended that all monies invested were paid over directly to the applicant.
- [31] Before Botha was acquitted by the Magistrate, and during argument, the State Prosecutor submitted that no case had been made out against Botha. The applicant was convicted in a strongly worded judgment by the Magistrate who severely criticized his credibility.

The Witnesses

- [32] For purposes of this application it is not necessary to sum up the testimony of every witness who testified in detail. However, to evaluate the applicant's complaints of fair trial violations against Prinsloo, a cursory reference to the testimonies of some of the witnesses, as against the versions and statements of the two accused, is required. Persons referred to in this judgment below, will be referred to by their names and surnames when mentioned for the first time. Thereafter they will be referred to by their surnames only.
- [33] Michau, with regard to counts 1–25, testified that he recouped the amounts of R92 000.00 and R22 000.00 (R114 000.00 in total) of the amount of R1 020 000.00 invested by him in the applicant's so-called scheme of providing bridging finance for members of the SANDF who were about to be retrenched (also referred to as "the army scheme"). He was told the scheme was fool proof. He gave evidence that the applicant kept a black book in which he apparently recorded the details all the loans and transactions pertaining to the investments. He testified that he would never have invested in a micro-lending scheme.
- [34] Da Silva testified that she not receive back a cent of the R110 000.00 which she invested in the army scheme. She was introduced to the scheme for SANDF members by Botha. She met the applicant only once but was also aware of the black book. She lost all the money she invested. Prinsloo put to her that the applicant had repaid her all her monies. The applicant later disputed that this version was in accordance with his instructions to Prinsloo.
- [35] Grobbelaar testified that he received back R106 000.00 (R83 000.00 thereof was capital and R23 000.00 the interest thereon) of the R160 000.00 which he had invested in the scheme. He was also introduced to the scheme by Botha.
- [36] Du Plessis testified that it was also through Botha that he invested in the bridging finance scheme, but that it was the applicant who personally provided confirmation of the bridging finance scheme to him. Being involved in a micro-lending business himself, he was adamant that he would never have incurred similar risks by investing in another micro-lending business had he been aware that the scheme involved micro-lending and not bridging finance. Of the R1 837 000.00 invested by him in the army scheme, he received back R189 000.00.
- [37] Du Plessis was the first complainant to become suspicious of the scheme, his suspicions being aroused when he established that approximately 80% of the names of so-called SANDF members and other debtors were false. Subsequent to his enquiries about it the applicant

became anxious. Du Plessis and Botha discussed the situation and requested a banking statement from the applicant which he was unable to provide. A bank account for Makana showed that for a period of 3 months (December 2001 – March 2002) no transfer payment was made from any ABSA clients. He then realized that there was a problem and that the scheme was fraudulent. When he then confronted the applicant at a meeting in Port Elizabeth, the applicant admitted that there were problems with the account and that he was unable to retrieve any monies. He told them that R10 000.00 was stolen from his account and he closed

it. Du Plessis also referred to the black book kept by the applicant and from which Botha compiled a journal. The applicant suggested that they should implement the garnishee orders to save the situation. Du Plessis rejected this suggestion as ludicrous because the persons in question were no longer employed.

[38] Du Plessis also instituted an action for repayment of the monies invested against the applicant and Botha. Attached to Botha's affidavit resisting the summary judgment application, launched by du Plessis which was part of the record in the proceedings before the Magistrate, was a statement signed by the applicant. Therein he noted his acceptance of R160 000.00 from du Plessis, stating that the money would be used solely for purposes of bridging financing with a rate of 30%.

[39] The applicant, in his affidavit resisting the same application for summary judgment as second respondent, contended that he, du Plessis, and Botha in terms of a partnership agreement, carried on the business of micro-lending. (He was unable to prove such a partnership). He testified that this business proceeded satisfactorily until several of the investors wished to recover their investments. They then agreed to cease trading and du Plessis took over all garnishee orders and contracts so that he (as opposed to the applicant himself), could have direct control over the recovery and collection of capital amounts loaned to clients. The applicant also deposed to an affidavit resisting an application for summary judgment launched by Michau.

[40] Botha's evidence corroborated the testimony of du Plessis. They worked together. He also appears to have been deceived by the applicant as to the true nature of the scheme. I will refer to his testimony later in this

judgment.

[41] Captain Craig Townsend was the investigating officer in the case. He has since retired. He testified that he obtained a file with 24 garnishee orders to the value of R97 452.00 in respect of SANDF members. He took a lengthy statement from Botha who also provided him with records of all the amounts received from the investors as were recorded by Botha, who also provided him with the names and identity numbers of members of SANDF. Of the 334 names provided, 74 identity numbers were verified with the Department of Home Affairs. Of these, 46 persons were members of the SANDF who were based in Grahamstown. According to

Botha, the members required bridging finance. However, the applicant indicated to him that the business he and Botha were involved in, was

micro-lending, as opposed to bridging finance.

- [42] Townsend testified that the applicant informed him that he had destroyed his black book at the behest of some of the investors, without any reason being given. He never had insight into the information stored on the computer he had confiscated, and that his successor who dealt with it did not seem to attach any significance to its contents.
- [43] Mr George Gerrits, the manager of ABSA Bank in Grahamstown, knew nothing of any scheme. This witness was not cross-examined by Prinsloo, nor Griebenouw.
- [44] According to Ms Lucille Parkin of the National Defence Force's department of Human Resources, only 6 members were paid severance packages between May 2001 and April 2002. Although she was well acquainted with the applicant she knew nothing of any scheme involving the applicant and army members. She was also not cross-examined.
- [45] Two former employees of the applicant also testified. They were Mr Christopher Heathcote and Mr Eugene Rossouw. Heathcote testified that the applicant was definitely only involved in micro-lending, but the applicant had once mentioned to him that a scheme, such as the army scheme, would have been a good scheme. Rossouw said he was not aware of any army scheme. When he worked for the applicant he dealt with micro-lending and garnishee orders. Heathcote was not cross-examined either.
- [46] Both Rossouw and Heathcote testified that the applicant kept a black book. According to Rossouw, it contained the names of SANDF members, who had lent money from the applicant. He said the applicant had on a few occasions threatened him not to say anything, presumably about things he knew about the applicant which would prejudice him. Rossouw denied that he was offered R500 000.00 to hand over the black book to du Plessis, as put to him by Prinsloo. He testified of one occasion when the applicant bet R10 000.00 on the horses.
- [47] An employee of Telebet (a horse racing and betting agency), Mr John Steward, testified as to the applicant's betting habits. According to him the applicant bet approximately R760 000.00 during the relevant period and won R552 742.00 in total. This evidence was led to provide an explanation as to how the investors' monies were misappropriated by the applicant.
- [48] Two SANDF members were also called to testify. They were Mr Adeon Reynard and Charles Blaauw who entered into short term loans. Reynard testified that he did not deal with the applicant. Blaauw disputed that he loaned R50 000.00 from the applicant. He said it was R1000.00 but could not prove it.
- [49] Mr Tinus van Rooyen testified as the applicant's witness. The gist of Mr van Rooyen's evidence was that he, as regional manager of Tutukani Schemes, (a subsidiary of SAAMBOU Bank Limited) approached the applicant to act as an agent for Tutukani in lending amounts

of money to the public, which would not exceed R20 000.00. During cross-examination he said that Tutukani Schemes had consisted of two separate sections. The one was a cash loan section. Du Plessis, was its branch manager. The other section comprised schemes or agencies which dealt only with the processing of loan applications. Actual cash was never dealt with. He confirmed however, that the applicant was only involved in micro-lending and not with bridging finance.

The Applicant's Complaints Against Prinsloo

- [50] The applicant made it clear that he had no part in Prinsloo becoming his legal representative. He explained that because he was unable to pay the fees of his former attorney and the senior counsel the attorney intended to brief, he was obliged to apply for legal aid. Ms Jarman was the first attorney appointed by the Legal Aid Board to defend him, but she withdrew. Prinsloo was then appointed in her place. According to him he hardly had any contact with Prinsloo during the trial.
- [51] The applicant contended that Prinsloo did not represent him in accordance with the standard expected in a trial of this nature and complexity, and did not act in accordance with his instructions. Consequently he did not have a fair trial.
- [52] The first example the applicant gave of Prinsloo's alleged incompetence was the fact that on the first day of the trial, 5 June 2006, the Magistrate issued a warrant for his arrest and his bail was forfeited due to him being absent on Prinsloo's advice. Prinsloo had misread a letter from the Prosecutor, who advised him of the trial date. The Prosecutor added that he would be in another Court on 7 June 2006, but that the trial would continue on 8 June, the day thereafter. Prinsloo understood the letter to mean that the matter would not proceed on 5 June and did not attend Court on 5 June. The error was quickly detected and acted upon by Prinsloo who explained to the Magistrate on 6 June, what had happened. The applicant was reassured by Prinsloo, whose explanation was accepted by the Court and the applicant was never arrested.
- [53] The applicant argued that Prinsloo's error, (even though no harm was done), was an indication that Prinsloo did not pay enough attention to the documentation in this case, explaining why Prinsloo also did not heed his verbal instructions.
- [54] The applicant also alleged that Prinsloo only briefly consulted with him for 45 minutes on the morning of 6 June 2006, before the trial commenced. According to the applicant, this short consultation, the only one in preparation for the trial, was insufficient for purposes of defending him adequately in a complex trial.
- [55] Prinsloo, in his affidavit, disputed that he only had a brief consultation with the applicant on 6 June 2006. According to him, he consulted with the applicant for more than 4 hours on 22 November 2005 and studied the file with all the relevant documentation which he obtained from the applicant's previous attorney, Ms Jarman.

- [56] The applicant attacked Prinsloo's cross-examination of the State witnesses. He argued that Prinsloo's cross-examination of the complainants, Michau in particular, was inadequate because not enough questions were put to him. Evidence about certain meetings and discussions and the handing over of money to the applicant was left unchallenged. He criticized Prinsloo for not canvassing an affidavit deposed to by him (the applicant) as well as his police statement with Michau. Insofar as da Silva was concerned, the applicant denied that his instructions to Prinsloo were that she had been refunded by him in respect of all monies invested by her. He branded Prinsloo's cross-examination of Botha as superficial. According to him, there was hardly any communication between him and Prinsloo during the trial.
- [57] The applicant also said that he was taken by complete surprise by the evidence of the Police Captain, Townsend, who gave evidence about incriminating verbal statements he allegedly made to him. He also criticized Prinsloo's failure to gain access to the data on the computer confiscated by the police. According to the applicant, Prinsloo's failure to challenge Townsend's evidence was highly prejudicial to him, and similarly his failure to challenge the testimonies of Heathcote and Parkin. The applicant pointed out that the Magistrate was constrained to enquire from Prinsloo what the applicant's instructions were in regard to Exhibit Z because he did not cross-examine Blaauw about it. What the applicant failed to mention was that Prinsloo indeed cross-examined Blaauw about the loan reflected in the exhibit in question, before and after the Magistrate's intervention. The applicant was particularly aggrieved by Prinsloo's failure to contest Heathcote's evidence about the black book he kept in which he allegedly recorded all the loan transactions.
- [58] The applicant alleged that Prinsloo, when cross-examining du Plessis, failed to deal with his version as set out in an affidavit deposed to by himself (Exhibit I in the trial), their meeting with Eugene Roussouw and the alleged offer of R500 000.00 which was made by du Plessis to Roussouw for the black book.
- [59] Prinsloo was also criticized for not eliciting evidence that was favourable to his case from several of the State witnesses, for not endeavouring to obtain documentation regarding the loans made to Reynard and Blaauw (SANDF members) and for not cross-examining Blaauw properly on Exhibit Z, which reflected that he owed the applicant R65 000.00 (R50 000.00 plus interest).
- [60] The applicant also identified eight witnesses with whom he wanted Prinsloo to consult with as potential witnesses, two of them in particular, Mr Aurret van der Merwe, a former employee who operated his computer, and Mr Coltman, his attorney at the time he entered into the alleged partnerships with the investors. Of these potential witnesses, only Mr Tinus van Rooyen testified at the hearing. The latter confirmed the applicant's version to the extent that the applicant had been involved with micro-lending and not with bridging finance.

[61] The applicant's main complaint against his former legal representative was that Prinsloo made certain admissions at the onset of the proceedings on his behalf which were not in accordance with his instructions. After the applicant's plea of not guilty was recorded by the Magistrate, the following exchange took place between Prinsloo and the Magistrate:

"MNR PRINSLOO Edele ja, ten opsigte van klagtes namens beskuldigde 1, klagtes 1 tot 28, is my instruksies dat die beskuldigde oor die tydperk soos aangedui in die klagstaat 'n mikro leningsbedryf bedryf het in Grahamstad; dat hy geld by beleggers geneem het, die geld uitgeleen het oor ... die geld uitgeleen aan die publiek teen 'n ooreengekome rentekoers; dat hy sy beleggers terugbetaal het, die grootste gedeelte daarvan terugbetaal het, maar met die sluiting van sy besigheid in Maart 2001, 2002 herstel, een van sy beleggers, Mnr du Plessis beheer geneem het oor sy dokumentasie wat sy skuldbewyse ingesluit het en hy toe nie verder in staat was om geld terug te vorder wat hy aan die publiek uitgeleen het nie. Ten opsigte van klagte 29 is my instruksies dat hy sy swygreg wil uitoefen. Dankie Edele.

HOF Eerstens Mnr Rudman bevestig u dan die verduideliking wat namens u gegee is?

BESKULDIGDE NOMMER 1 Dis korrek Edelagbare.

HOF Beskuldigde bevestig dan die verduideliking. Dit blyk dan dat die volgende nie in geskil is op klagtes 21, ag 1 tot 28 wat betref beskuldigde nommer 1 nie, naamlik dat op die datums en plekke soos genoem in klagtes 1 tot 28 beskuldigde dan wel die bedrae geld soos in die klagstaat gemeld, ontvang het vanaf die persone soos genoem in daardie klagtes. Kan dit so as erkenning notuleer word Mnr Prinsloo?

MNR PRINSLOO Ja Edelagbare (onduidelik).

HOF Daardie feite op daardie klagtes word dan so formeel ingevolge Artikel 115(2) B (sic) as erkenning notuleer".

MNR PRINSLOO Soos die hof behaag".

[62] The applicant alleged that he was not requested to confirm the admissions which later came as another complete surprise to him, particularly since the Magistrate relied on these admissions to convict him.

[63] The above extract of the proceedings indeed does not reflect that the applicant was asked to confirm whether the admissions were in accordance with his instructions. Mr Wessels argued that this omission was in contravention of Section 115(3) of the Criminal Procedure Act, 51 of 1977 ("the CPA"), which constituted an irregularity in the proceedings, sufficiently serious to justify the setting aside of such proceedings.

[64] Section 115 of the CPA, prescribes the procedure to be adopted when an accused pleads not guilty to the offences charged in a summary trial. Section 115(2) makes provision for the questioning of an accused by the Court and the noting of admissions, subject to the consent of the accused. The section is couched in permissive terms and does not require an enquiry in any specific manner or form. However, Section 115(3) is peremptory. [65] It provides for the situation "[w]here the legal adviser of an accused, on behalf of the accused replies,

whether in writing or orally, to any question by the court under this section”, and in such circumstances “the accused shall be required by the court to declare whether he confirms such reply or not”. (Emphasis added).

- [66] If Section 115(3) was indeed flouted, this was done by the Magistrate and not Prinsloo. However, after the cross-examination of da Silva, Prinsloo handed in a signed and typed statement which was headed: ERKENNINGS INGEVOLGE ARTIKEL 220 VAN WET 51/77. It read as follows:

“Ek, R Rudman erken dat:

Nie ek, of die besigheid (Makana Financial Services) was op enige stadium as ‘n Bank in terme van die Bank Wet 94 van 1990 geregistreer nie.

Op geen stadium het ek en/of Makana Financial Services oorbruggingsfinansiering aan enige Weermaglid vir skeidingspakette voorsien nie.

Die ses lede (soos na verwys in Parkin se verklaring) het nie enige oorbruggingsfinansiering by my en/of Makana Financial Services

verkry nie.

Die geld wat ek vanaf beleggers ontvang het was slegs as uitleen geld aangewend in die gewone bedryf van ‘n mikroleningsbesigheid”.

- [67] The Magistrate then asked the applicant the following: “Mnr Rudman, bevestig u dit so?” The applicant’s answer is not audible, but he did respond. Then the Magistrate notes: Goed beskuldigde bevestig dit. Dis bewysstuk H”.
- [68] The record plainly shows that it is highly improbable that the applicant did not confirm these written admissions during the exchange quoted above.
- [69] The relevant question remains whether Prinsloo received instructions from the applicant to make the admissions on behalf of the applicant. The applicant’s signed statement quoted above, suggests that he did. Furthermore, Prinsloo stated in an unchallenged affidavit that he made the admissions in question on the express instructions of the applicant.
- [70] Prinsloo made the point that over a period of two years, the applicant would draw his attention to aspects which he deemed important. He found it strange that only after his convictions the applicant found it necessary to raise these complaints for the first time. The second respondent also advanced this submission.
- [71] The effect of the applicant’s plea explanation was that the investment monies were earmarked for the micro-lending scheme conducted in Grahamstown. The applicant admitted that these investments were made, that the monies from such investments were lent to members of the public at a specific interest rate. To this the applicant added, that most of the members were repaid until such time as his documentation was taken over by Mr du Plessis, whereafter the applicant was not able to repay these monies. It was also

admitted that the applicant received the monies, and not someone else.

- [72] As the second respondent put it, these admissions, made in the applicant's presence in plain language, were not difficult to understand. The applicant is not an unsophisticated or illiterate person. He is on the contrary, a shrewd businessman who must understand risks, given the type of business he was involved in. He must have appreciated the consequences of those admissions.
- [73] Prinsloo's evidence that he acted in accordance with the applicant's instructions, and that the applicant would throughout the protracted duration of the trial, draw his attention to matters he regarded as important, must be accepted. His assertion is clearly borne out by the record of the proceedings.
- [74] For example, before cross-examining Townsend, Prinsloo sought the Magistrate's permission to confer with the applicant, whom he said, "(h)et my aandag hier probeer trek. Ek wil net by hom uitvind wat aan die gang is". The recording machine was then switched off for a while, then Prinsloo thanked the Magistrate and resumed his cross-examination.
- [75] After Prinsloo's in depth cross-examination of du Plessis, probably the most crucial state witness, Prinsloo requested the Magistrate for another opportunity to take instructions from the applicant. He said "daar is net iets wat beskuldigde my net (sic) op attent wil maak. Kan ek net instruksies neem?" He then took instructions and proceeded to cross-examine du Plessis on the accounts into which certain payments were made.
- [76] Also, at the end of Griebenouw's cross-examination of du Plessis, Prinsloo also requested a short adjournment from the Magistrate who pointed out "Ek het gesien u kliënt (referring to the applicant) trek u aandag daar terwyl Mnr Griebenouw besig was". The machine is then switched off again, clearly for purposes of giving Prinsloo an opportunity to speak to his client. He then informed the Magistrate that he had no further questions. Clearly, after a discussion with the applicant, Prinsloo decided not to ask further questions arising from Griebenouw's cross-examination of du Plessis. The aforesaid example puts paid to the applicant's complaint that Prinsloo failed to cross-examine on incriminating statements which emerged during Griebenouw's cross-examination of du Plessis.
- [77] The applicant's accusation that Prinsloo ignored his instructions and hardly communicated with him during the trial, can be roundly rejected as untruthful. The remainder of the allegations and complaints made by the applicant against Prinsloo are also devoid of any merit. As pointed out before, the applicant's failure to file a replying affidavit leaves Prinsloo's response to the allegations unchallenged. The record also supports Prinsloo's responses to the applicant's accusations as set out in his affidavit.
- [78] It is by no means insignificant in this matter that the applicant has not proffered any suggestion as to which of the admitted facts were prejudicial to him and why they were. Neither did he provide those admissions he indeed wanted to have made on his behalf, with reference to facts and an actual proper defence. On the versions he gave during the trial,

(even those in conflict with each other) one thing is clear, he did accept monies from the complainants concerned. In that context it is difficult to understand how Prinsloo had sinned by making admissions to that effect on the applicant's behalf.

- [79] The second respondent did not oppose the review application on the ground that it was brought in medias res. He chose to challenge the application on the merits, defended Prinsloo's conduct during the trial, and disputed the allegations made by the applicant against Prinsloo. The second respondent submitted that the Magistrate had no choice but to find the applicant guilty and referred to the Magistrate's comment in his judgment that the applicant was one of the worst witnesses he had ever observed, deviating from his own affidavits, his plea explanation and in cross-examination from his own evidence in chief.
- [80] It was further argued that, even if Prinsloo had been remiss or incompetent (which was not admitted) the applicant could not have been prejudiced thereby, since the evidence against him was so overwhelming that it would not have made any difference who had defended him. The flaw in this argument is that the possibility exists that if an accused was competently defended, the evidence against him might not have been so overwhelming. Therefore, Prinsloo's conduct still needs to be evaluated in the context of the accusations made.

- [81] The following passage in *S v Halgryn*⁹ is applicable to such an evaluation:

"Convicted persons are seldom satisfied with the performance of their defence counsel. The assessment must be objective, usually, if not invariably, without the benefit of hindsight. Compare S v Louw 1990(3) SA 116(A) at 125D-E. The Court must place itself in the shoes of defence counsel, bearing in mind that the prime responsibility in conducting the case is that of counsel who has to make decisions, often with little time to reflect (cf R v Matonsi 1958(2) SA 450(A) at 456C as explained by S v Louw (supra)). The failure to take certain basic steps, such as failing to consult, stands on a different footing from the failure to cross-examine effectively or the decision to call or not to call a particular witness. It is relatively easy to determine whether the right to counsel was rendered nugatory in the former type of case but in the latter instance, where counsel's discretion is involved, the scope for complaint is limited. As the US Supreme Court noted in Strickland v Washington [1984] USSC 146; 466 US 668 (1984) at 689:

"Judicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has been unsuccessful, to conclude that a particular act or omission of counsel was unreasonable".¹⁰

- [82] The applicant's complaint that Prinsloo hardly consulted with him, ignored his instructions and made admissions contrary to his mandate, falls within the first category referred to in the above passage quoted from the Halgryn judgment. It was indeed "relatively easy" to determine on the facts presented, that the applicant's complaints about his instructions and mandate to Prinsloo were baseless, as illustrated above.

- [83] I will now deal with the second category of complaints where the legal representative's discretion is involved. Prinsloo suggested, properly in my view, that the applicant should have specified in his affidavit, which facts he should have put to the witnesses, what evidence he should have elicited, what aspects should have been cross-examined on and what the witnesses who were not called, would have testified about.
- [84] Prinsloo explained that the applicant never pointed out to him what the significance of the testimonies of Coltman and van der Merwe would have been in his case. Other possible or potential witnesses were not called, because Prinsloo said he felt their evidence was in his opinion, not necessary. He also deemed access to the applicant's computer data unnecessary because the State placed no reliance on it. This view is consistent with Townsend's testimony.
- [85] The applicant also expressed his doubts as to whether Prinsloo grasped the relevance and importance of garnishee orders being issued in respect of the SANDF members to his case, since Prinsloo did not pursue this aspect during his conduct of the applicant's defence.
- [86] Prinsloo responded that he explained to the applicant that the garnishee orders could only be enforced by an order of Court and only in respect of persons who had fixed employment. Obviously, SANDF members who were about to receive a retrenchment package upon the termination of their services did not fall in that category. Any evidence led on the issue of garnishee orders would therefore have held a limited advantage for the applicant's case.
- [87] Prinsloo disputed that his cross-examination of any of the State witnesses was inadequate. He pointed out that his lengthy cross-examination of Michau had caused the latter to lose his temper to the extent that the Magistrate intervened and offered him an opportunity to regain his composure. When he chose not to challenge certain parts of the evidence of some witnesses he said, it was because their evidence was not at variance with the applicant's instructions, or he did not think that cross-examination was necessary.
- [88] Prinsloo denied ever giving the applicant the assurance that he would be acquitted, as alleged by the applicant, and remarked on how irresponsible such conduct on the part of a legal representative would be.
- [89] It is clear that in respect of the remaining category of complaints (referred to in passage quoted from Halgryn above), where Prinsloo's discretion was involved, the scope for complaint was limited further. The applicant is therefore in an even weaker position to prove ineptitude on the part of Prinsloo, than in respect of the first category. Further, in the absence of a replying affidavit from the applicant, Prinsloo's stated reasons for not cross-examining on certain aspects and not calling specific witnesses to testify, must be accepted. The record shows that Prinsloo spent a substantial period on cross-examining the most important State witnesses, such as Michau and du Plessis.

- [90] The applicant also attempted to convey that if he was represented by Griebenouw, instead of Prinsloo he would have been acquitted, along with Botha. He repeatedly referred to Griebenouw's excellent cross-examination of the State witnesses and his capable defence of Botha. In fairness to Prinsloo, it must be emphasized that the applicant and Botha played different roles in the scheme.
- [91] No case was made out against Botha. It was apparent from all the evidence led that Botha's friends were recruited to invest. Du Plessis had also worked with him. Botha never handled cash. He had no authority to sign and had no access to any banking accounts. He was a go-between and middleman. The first time Botha realized that the scheme was not all it was made out to be by the applicant, was when the latter phoned him, with a concern that Du Plessis, shortly after making a deposit, withdrew money from the account and the applicant indicated that he could not keep every thing "up to date" and shortfalls had developed. Botha advised Du Plessis to obtain all banking statements from the applicant who could not provide any such statements. Thereafter the whole lending scheme collapsed.
- [92] The evidence against the applicant on the other hand, was quite damning, although the case against him was quite simple. It amounted to a determination as to whether the applicant held out to investors that the monies were to be invested in a bridging finance scheme, or in his micro-lending scheme. All the witnesses and Botha testified to the effect that the applicant represented to them that the monies would be invested in a bridging finance scheme, and not a micro-lending scheme. Several documents referred to and signed by the applicant himself, also referred to bridging finance. The applicant contradicted himself on this very important aspect.
- [93] In my view, no case of incompetence has been made out against Prinsloo. The applicant's application for this review before sentence, is no more than a cynical and opportunistic attempt to escape the inevitable at the expense of his former legal representative's reputation, and it should not succeed.
- [94] Consequently, the application is dismissed with costs.

E REVELAS

Judge of the High Court

Pickering J: I agree.

JD PICKERING

Counsel for the Applicant: Adv JW Wessels

Instructed by: Wheeldon Rushmere & Cole

Grahamstown

Counsel for Second Respondent: Adv BJ Pienaar

Instructed by: The State Attorney (Port Elizabeth c/o DPP, Eastern Cape, Grahamstown

Counsel for Fifth Respondent: Adv van der Linde

Instructed by: Messrs Nolte Smit

Date Heard: 20 September 2010

Date Delivered: 3 December 2010

11984(3) SA 623(A)

2Somaar v The Honourable Mr Justice Kroon and Others [2006] JOL 18095 (SE).

3Phillips v Manser 1 All SA 198 (SE) 200d-201f, S v Mponda 2007(2) SACR 245 at 258a-f and 259 para [42] a-c. Also compare: S v Toba and Another 2008(1) SACR 415 (E)

4Peacock v SA Eagle Insurance Co Ltd 1991(1) SA 589 (C) at 591-592 (Farlam AJ) and Harksen v Attorney-General, Cape, and Others, 1998 (2) SACR 681 (C) para [61].

5 2008

(1) SACR 613 at paras [17] and [18] 625a-626b.

6Para

[19] page 625 b-c.

7John Henry Wigmore Evidence in Trials at Common Law (revised by JT McNaughton, 1961) vol 8 in para 2328.

8Tandwa Para [20], 625 c-e.

92002(2) SACR 211 (SCA) at 216, para [14] i-j and 217 a-b.

10Strickland has been followed in numerous cases. Of these, the following three cases are similar to the present matter: Tandwa (supra) at 615 at para [7], S v Mofokeng 2004(1) SACR 349 (W) at 355 para [14] c-d, S v Le Grange 2009(2) SA 434 (SCA) at para 24.

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.saflii.org/za/cases/ZAECGHC/2010/130.html>

CASE PAGE <https://chat.esheria.ai/case-law/south-africa/rudman-v-cooney-no-and-others-unknown-topic-aecghc-2010--6a3ea5213b1caa9129817569>

Prepared on 12 October 2026 · Esheria