

SOUTH AFRICA / JUDGMENT

Grau v Van Zyl Inc (26612/11) [2013] ZAGPJHC 184 (3 June 2013)

[2013] ZAGPJHC 184

COURT

South Gauteng High Court, Johannesburg

BEFORE

P L Carstensen

CASE / FILE NUMBER

26612/11

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REPUBLIC
OF SOUTH AFRICA
SOUTH
GAUTENG HIGH COURT
JOHANNESBURG
CASE NO: 26612/11

In the matter between:

GRAU:	FRANCOISE
	Plaintiff/Respondent
	and
	LEVIN VAN ZYL INC.
	Defendant/Applicant

JUDGEMENT

CARSTENSEN AJ:

1. The Plaintiff has instituted action against the Defendant on the basis that the Defendant, a firm of attorneys who acted for the Plaintiff in an action against the Road Accident Fund, allowed her claim to prescribe.
2. The Defendant launched an application for security for costs on the basis that:
 - 2.1. the Plaintiff is a peregrines, resident in Switzerland; and
 - 2.2. the Plaintiff does not own any immovable property within the Republic of South Africa,

3. The Plaintiff opposed the application on three grounds.
4. Firstly, that the amount claimed as security, being the sum of R350 000.00 is unreasonable and that the Defendant, at all times, ought to have referred the matter to the Registrar to determine such amount. At the hearing the Defendant's counsel, Mr Pretorius, advised that he would not be seeking that this court to determine the amount of R350 000.00, but rather in the event of the court directing that the Plaintiff provide security, that the amount must be determined by the Registrar. Consequently, the objection and opposition to the amount claimed is of no further consequence.
5. Secondly, the Plaintiff contended that the application for security was premature as a consequence of the fact that the amount for security had not been fixed by agreement or by the Registrar.
6. I do not believe that there is any justification for this ground of opposition. Rule 47(3) provides that:

"if the party from whom security is demanded contests his liability to give security or if he fails or refuses to furnish security in the amount demanded or the amount fixed by the Registrar within 10 days of the demand or the Registrar's decision, the other party may apply to court on notice for an order that such security be given and that proceedings be stayed until such order is complied with".
7. The Defendant did not seek that the proceedings be stayed. Had the Defendant sought a stay, then indeed the application would have been premature as the Registrar had not determined the amount of security. *SASKO Beperk v Futurus Construction (Pty) Ltd*, 1988 (4) SA 170 (W) at 174 D to E.
8. Due to the fact that the Plaintiff contests her liability to give security, the Defendant was entitled to approach the court under the provisions of Uniform Rule 47(3).
9. Thirdly, the Plaintiff opposed the application on the basis that the application had been launched for improper purpose, particularly that the relief sought solely for the purpose of frustrating the Plaintiff's action against the Defendant and in this regard, the court's attention was, inter alia, brought to four aspects by Mr Dos Santos Soares on behalf of the Plaintiff:
 - 9.1. firstly, that the Defendant required numerous and unnecessary experts;
 - 9.2. secondly, that the Defendant provided no substantiation for the amount of security claimed;
 - 9.3. thirdly, that the application was brought prematurely and done so solely to generate unnecessary costs; and
 - 9.4. fourthly, that the Defendant's attitude was obstructive towards the prosecution of the action and in this regard the Plaintiff referred to a number of items of correspondence passed between the parties.

10. It certainly does appear from the correspondence that the Defendant is being unnecessarily un-cooperative, particularly in light of the numerous suggestions made by the Plaintiff to limit the issues and the costs. To this extent, I must add that although Plaintiff's mandate to the Defendant in respect of her Road Accident Fund action is disputed in the answering affidavit, that aspect was not expressly disputed in the correspondence. In fact, it appears to be conceded in the Defendant's letter of the 31st of August 2011 and indeed, impliedly so the other items of correspondence.
11. However, I am unable to find as urged by the Plaintiff's counsel that the application was brought solely to frustrate the Plaintiff's action.
12. In addition, although the Plaintiff's income is set out in the papers at R48 000.00 per month, there is nothing to indicate that she is impecunious or has insufficient assets which would satisfy an appropriate amount as security for costs.
13. I am also mindful that the underlying principle is that in an action instituted by a peregrines, the court is entitled to protect the incular to the fullest extent. Saker & Co. Ltd v Grainger, 1937 AD 223.
14. Consequently, I am of the view that the Defendant is entitled to security for costs.
15. It is however, also my view that this application could have and ought to have been avoided. Although the application was launched on the 28th of September 2012, on the 5th of October 2012 (over 7 months ago), the Plaintiff advised that if the Defendant would agree that the Registrar determine the final amount of security, the application would not be opposed. At the hearing of argument, Mr Pretorius for the Defendant immediately, and correctly in my view, advised that the relief which the Defendant would be seeking was that the Registrar determine the amount.
16. If that approach had been taken earlier, even the answering affidavit would not have been necessary. Consequently, the Defendant is not entitled to its costs.
17. In the result:
 - 17.1. the Plaintiff is ordered to provide security for costs in an amount to be determined by the Registrar, alternatively the Taxing Master, of the above Honourable Court;
 - 17.2. each party is directed to pay their own costs of this security for costs application.

P L CARSTENSEN

ACTING JUDGE OF THE

HIGH COURT

HEARD: 29 MAY 2013

DELIVERED: 3 JUNE 2013

COUNSEL FOR PLAINTIFF: ADV. E. DOS SANTOS SOARES

INSTRUCTED BY: WOLMARANS INC.

COUNSEL FOR DEFENDANTS: ADV. W.G. PRETORIUS

INSTRUCTED BY: MALULEKE, MSIMANG & ASS.

(jmt.30.5.13)

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