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SOUTH AFRICA / JUDGMENT

## Van Zyl v Von Zyk Investments (Pty) Ltd and Others (49107/2015) [2018] ZAGPPHC 430 (12 June 2018) [2018] ZAGPPHC 430

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COURT

North Gauteng High Court, Pretoria

BEFORE

B Neukircher

CASE / FILE NUMBER

49107/2015

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### Source record

IN

THE HIGH COURT OF SOUTH AFRICA

(GAUTENG

DIVISION, PRETORIA)

(1)

NOT REPORTABLE

(2)

OF INTEREST TO THER JUDGES

(3)

REVISED

Case

number: 49107/2015

Date:12/6/2018

In

the matter between:

JAN  
JACOB VAN  
ZYL  
APPLICANT  
And  
VON  
ZYK INVESTMENTS (PTY)  
LTD  
1st  
RESPONDENT  
HARTZENBERG  
INC  
ATTORNEYS  
2ND  
RESPONDENT  
A  
J VAN  
ROOYEN  
3rd  
RESPONDENT  
GROSSKOPF  
ATTORNEYS  
4th  
RESPONDENT  
SHERIFF,  
CENTURION  
EAST  
5th  
RESPONDENT

## JUDGMENT

NEUKIRCHER, J:

[1] The facts of this matter and the conduct of the legal representative of the First Respondent is truly lamentable. One expects that, as an officer of the Court, over and above simply taking instructions from clients and executing on them, an attorney would consider the effect of those instructions and act accordingly, even if this means that he must advise his client that the course of conduct cannot be executed in the manner instructed.

[2] And so to this matter.

3.1 on 28 October 2008 the Applicant obtained judgment against First Respondent under case no 46194/2007 before Botha J in the amount of R250 000 plus interest and costs;

3.2 an appeal noted by First Respondent lapsed;

3.3 eventually after several unsuccessful attempts to obtain payment and an application, an immovable property owned by First Respondent was declared executable by this Court on 9 February 2015;

3.4 it appears that (with interest) the outstanding judgment has now reached the amount of ± R500 000 and the costs order obtained against First Respondent was taxed in the amount of R26 090-51;

3.5 at some stage in 2008 the First Respondent also obtained a costs order against the Applicant. This amount was settled telephonically for R17 283-77; and

3.6 thus the difference between the 2 costs orders is RS 806-74 which First Respondent still owes Applicant in respect of costs if set-off is applied.[1] .

[4] Suddenly, on 4 February 2015 the Sheriff served a writ of execution on the Applicant's attorneys of record in respect of an amount of R17 283-

77. Why the writ was served on the Applicant's attorneys and not on the Applicant himself is a mystery.

[5] Attempts by Applicant's attorney to engage with the Second Respondent[2] regarding the writ were futile as no response was received to the letters written by the Applicant's attorney.

[6] Then, on 8 June 2015 the Applicant's attorney received a "Notice of Appointment as Attorney of Record" from the Fourth Respondent - this firm now purported to act as the Applicant's attorneys of record. Interestingly enough, on the top right hand corner of this notice, the stamp of the Second Respondent appears with his telephone number and docex details; the email address of the Fourth Respondent is stated to be admin@harztlaw.co.za, which is Second Respondent's email address, but the Fourth Respondent is "Grosskopf Attorneys" and the reference is "J

Nysschens/tbc".

[7] Together with this notice a further notice was served by the Fourth Respondent in which the Applicant purportedly abandons the judgment and costs order he obtained against First Respondent " ... due to the fact that the parties have settled the matter amongst themselves".

[8] Needless to say, the Applicant denies ever appointing Fourth Respondent as his representative and disavows any knowledge of the notice abandoning his judgment and costs orders against First Respondent. He also denies ever giving such an instruction to anyone. In fact, on 12 June 2015, the Applicant's attorney sent correspondence to Second and Fourth Respondents questioning those notices and on the same date an email was received from Fourth Respondent stating that they had " no knowledge of the case and would revert".

[9] Then on 17 June 2015 the Fourth Respondent sent correspondence to Applicant's attorney in which the following was informed:

9.1 that Fourth Respondent acts for Third Respondent;

9.2 that Fourth Respondent does not act and has not taken steps on behalf of Applicant;

9.3 on 15 April 2015 the Third Respondent purchased the Applicant's claim against First Respondent at an auction and that the First and Third Respondents have reached a compromise/agreement which puts an end to the matter.

Interestingly enough no details of this "settlement" have been given.

[10] On 17 June 2015 the Second Respondent sent an email that states: "Ons het behoorlik namens ons klient beslag gele op sy reg titel en belang by u kantore en die verkoping daarna ook behoorlik geadverteer. U het dus kennis gedra van die beslaglegging en verkoping".

[11] The Applicant states no such notice was given to him. The Applicant's claim was sold for an amount of R4 500-00.

[12] In addition to all the relief sought by the Applicants a de bonis propriis attorney and client costs order is sought against Second Respondent. The Second Respondent's defence to the costs order sought against him is that he was merely "following instructions". He states:

" ... the attachment and consequent sale in execution was not even attended to on advice of the Second Respondent, but rather based on

advice that the First Respondent obtained from an independent third party where after it instructed the Second Respondent to proceed with such steps."

[13] The Third and Fourth Respondents abide by the decision of this Court.

[14] Mr Kotze appeared for First Respondent today. He informed me that his instructions were to ask for a postponement so that the First Respondent could file a supplementary affidavit however, he could not tell me why it was necessary for this affidavit to be filed when his client had already filed an answering affidavit on 10 September 2015 and a supplementary affidavit on 17 September 2015.

[15] Mr Kotze informed me that, according to his instructions the matter involved an immovable property and his client would be substantially

prejudiced were he not to be given this opportunity.

[16] The immovable property concerned was declared executable by this Court on 9 February 2015. That horse has already bolted.

[17] Given that Mr Kotze could not give me any reason why a further affidavit should be filed or what the content would be, I refused the postponement.

[18] He informed me that he was only briefed to move the postponement and there was therefore no further appearance for First Respondent. Even though I did invite Mr Kotze to make submissions on behalf of First Respondent he informed me that he had not been briefed with the papers and was therefore unable to make any submissions on First Respondent's behalf.

[19] The question here is whether set-off in respect of the two costs orders automatically applied. One must bear in mind that:

19.1 the Applicant had a liquid judgment against First Respondent for R250 000 plus interest and costs. Those costs were taxed in the amount of R26 090-51;

19.2 nowhere in the papers before me is the latter amount denied;

19.3 the Applicant himself states that the costs order that was obtained against him was settled in the amount of R17 283-77.

[20] It is trite that set-off comes into operation when two parties are:

- (a) mutually indebted to each other; and
- (b) both debts are liquidated and due[3].

[21] It is also clear that, in these circumstances, set-off will automatically apply as the one debt will extinguish the other as effectually as if payment had been made[4].

[22] Thus it was unnecessary for anything further to be done by Applicant other than confirm this in correspondence which was done.

[23] The Second Respondent was well aware when he caused the sale of the Applicant's claim to proceed in 2015 that he had no cause to do so. He should have informed his client that there was no claim to attach as the debt of R17 283-77 had been extinguished by Applicant's judgment and larger costs order and that fact that he failed to do so shows, in my view, a remarkable lack of insight and a gross dereliction of his duty as an officer of this Court. It also, in my view, verges on dishonesty.

[24] Furthermore, that sale only took place in 2015 which is 6 years after the fact.

[25] Rule 66(1) provides as follows:

"After the expiration of three years from the day whereon a

## judgment

has been pronounced, no writ of execution may be issued unless the debtor consents to the issue of writ or unless the judgment is revived by Court on notice to the debtor, but in such case no new proof of the debt shall be required ....."[5]

Given this and absent consent by the Applicant or a Court order, the Sale in Execution should never have taken place as the judgment was stale and the sale must be set aside.

[26] The fact that there is no evidence before me pointing to any correspondence written by Second Respondent demanding payment and informing Applicant of his instructions should payment not be made demonstrates an undesirable trait in the Second Respondent which is borne out by the 2 notices dated June 2015 which are clearly meant to mislead this Court and gain an advantage for his then client, the First Respondent.

[27] The fact is that Grosskopf Attorneys (Fourth Respondent) have disavowed any knowledge of either the Notice of Appointment of Attorney of Record or the Notice of Abandonment. The Applicant claims that these notices were drafted by Second Respondent. The Fourth Respondent's

explanation of these notices is that, on instructions from their client, the Third Respondent, they requested Second Respondent to provide details of the matter including all parties and their legal representatives. A notice containing these was received from Second Respondent and edited by Fourth Respondent but they failed to properly edit the notice when serving it.

[28] The notices specifically state:

28.1 that Fourth Respondent acts for Applicant - which they themselves state in an email and other correspondence is incorrect; and

28.2 the second notice constitutes an abandonment of Applicant's claim by the Applicant. Nowhere has Third Respondent been substituted as the holder of rights, nor is there any explanation as to how the Third Respondent (or Fourth Respondent) is entitled to abandon a claim belonging to another person.

[29] The Fourth Respondent was already in receipt of correspondence from Applicant's attorney (Van Zyls Inc) regarding the matter. Why they then wrote to Second Respondent instead of Van Zyls Inc is unclear.

[30] It is clear thus that there was something very untoward that occurred and the Fourth Respondent's explanation is simply unconvincing.

[31] What aggravates the situation is that at no stage was either of the aforementioned 2 notices withdrawn by the Fourth Respondent which is the least one would have expected when they realised what had occurred.

[32] The Second Respondent is an admitted and practising attorney and his conduct is expected to be beyond reproach. A Court relies on his integrity and bona fides - these are sorely lacking here. In fact his clear recklessness and misconduct is deserving of the censure of this Court. It is this misconduct which is the causa causans of this entire chain of events and which gave rise to this application. His blatant disregard for the Court rules and his obdurate refusal to see his hand in this matter leads me to the irrefutable conclusion that nothing less than an appropriate cost order as well as a referral to the Law Society of the Northern

Provinces for investigation into his conduct will suffice.

[33] It is clear that any notice directed by Fourth Respondent to Applicant was void - this is on their own version that they never, at any stage, represented Applicant and thus such a declaratory must follow.

[34] I am thus also of the view that the abandonment and sale of the Applicant's claim was improper and without cause and must be set aside.

[35] Accordingly the following order is granted:

35.1 The Notice of Appointment of the Fourth Respondent as attorney of record for Applicant/Plaintiff dated 5 May 2015 is set aside.

35.2 The Notice of Abandonment of Claim by Applicant/Plaintiff dated 7 May 2015 is set aside.

35.3 The First Respondent's Writ of Execution dated 4 February 2015 is set aside.

35.4 The sale in execution held on 15 April 2015 is set aside.

35.5 The Second Respondent is ordered to pay the costs of this application on the attorney and own client scale de bonis propriis.

35.6 The conduct of Mr Ferdinand Hartzenberg in the conduct of this matter is referred to the Law Society of the Northern Provinces for a full investigation.

B NEUKIRCHER

ACTING JUDGE OF THE HIGH COURT

DATE OF HEARING:

5 JUNE 2018

DATE OF JUDGMENT:

12 JUNE 2018

ATTORNEY FOR APPLICANT:

VANZYL INC ATTORNEYS

ADVOCATE FOR APPLICANT:

ADV R F DE VILLIERS

ATTORNEY FOR FIRST RESPONDENT: HARTENZENBERG INC

ADVOCATE FOR FIRST RESPONDENT: ADV D KOTZE

ATTORNEY FOR SECOND RESPONDENT: HARTZENBERG INC

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ADVOCATE FOR SECOND RESPONDENT: ADV D R DU TOIT

- [1] So Applicants arguments goes
  - [2] The attorneys representing First Respondent who caused the writ to be issued
  - [3] Amler's Precedents of Pleadings, 7th edition, page 351
  - [4] Great North Farms (Edms) Bpk v Ras 1972(4) SA 7 (T); Joint Municipal Pension fund (Transvaal) v Pretoria Municipal Pension Fund 1969(2) SA 78 (T)
  - [5] Segal and Another v Segil 1992(3) SA 136 (CPD) where it was stated that the legitimacy of this rule is beyond question.
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**ORIGINAL SOURCE**      <https://www.saflii.org/za/cases/ZAGPPHC/2018/430.html>

**CASE PAGE**              <https://chat.esheria.ai/case-law/south-africa/van-zyl-v-von-zyk-investments-pty-ltd-and-others-unknown-topic-agpphc-2018>

Prepared on 12 October 2026 · Esheria