
SOUTH AFRICA / JUDGMENT

Van Zyl v Wilson and Another (5772/2015) [2015] ZAE CGHC 140 (4 December 2015)

[2015] ZAE CGHC 140

COURT

Eastern Cape High Court, Grahamstown

BEFORE

J.D. Pickering

CASE / FILE NUMBER

5772/2015

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IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE, GRAHAMSTOWN)

Case no: 5772/2015

Date heard: 3 December 2015

Date delivered: 4 December 2015

In the matter between

NICOLAAS JOHANNES VAN ZYL

Applicant

vs

LANCE ALLAN WILSON First

Respondent

AUDIE ATTORNEYS

Second Respondent

JUDGMENT

PICKERING J:

- [1] On 21 April 2015 applicant and first respondent entered into a written deed of sale in terms of which applicant purchased from first respondent certain immovable property being erven 344 and 345, Bathurst, for a purchase price of R830 000,00. The purchase price was duly paid by applicant to first respondent and the property was transferred into the name of applicant on 29 June 2015.
- [2] It is common cause that there is, on erf 344, a wooden house, built on stilts. Applicant avers that shortly after taking occupation of the house he discovered that the house seemed to "shift and sway slightly" when a mild wind blew but that this became more pronounced in a strong wind. Because he had never lived in a house of this nature before he and his partner, one Marcia Williams, assumed that this was normal.
- [3] On 1 November 2015, however, Bathurst experienced a severe storm. According to applicant the house moved and swayed to such an extent that he and Williams feared for their safety. Water poured into the house and it was later discovered that certain of the roof sheets and been incorrectly installed. It was further discovered that the twenty four poles upon which the house was resting had no foundations, despite the approved plans having indicated a requisite foundation of 400x400x300 around and underneath each pole. The house shifted so dramatically that, according to applicant, although it was south facing it now tilted towards the north.
- [4] According to the report of a Civil and Structural Engineer, extensive remedial work will be required in order to restore the house to a habitable state. The report states that one of the supporting poles was excavated in order to inspect and assess the "founding conditions". It was found that the pole had merely been dug into the ground with no concrete foundation pad to carry the load. When the founding material under the poles was saturated by the overflow from the water tank situated under the floor of the house the bearing capacity of the founding material was exceeded and this caused subsidence which was clearly visible along the ground floor level. According to the report the dynamic effects of wind loading on the structure will cause the poles to lift and sag continuously . The report recommended that it was necessary to relocate the water tanks under the house and shape the ground level to drain storm water away from the founding material as well as to prop the structure around the supporting poles and excavate the poles three at a time, to expose the founding material to a depth of 300mm below the pole end. It would then be necessary to cast a 600x600x300 thick class 20/ 15 mass concrete pad footing below each pole before removing the props after seven days. The process would then have to be repeated with each set of three poles. The cost of the remedial work is estimated at being in excess of R250 000,00.
- [5] With regard to the lack of foundations applicant states that he spoke on 17 November to first respondent's father, Mr. Peter Wilson, who had been involved with the building of the house. Applicant avers that Wilson told him that he had been out of town when the foundations were laid and that on his return he had discovered that the builder had dug linear trenches for the foundations as for a traditional home, instead of holes for the poles of a raised house,

as specified on the plans. Applicant avers that Wilson further told him that this had caused the whole area of the building site to become unstable, as they now had to cover the linear trenches and dig the holes. They therefore compacted the ground as best they could and dug the twenty eight holes for the poles. Wilson admitted to applicant that the concrete foundations had never been laid as set out on the plans because he and the builder felt that it was sufficient merely to dig the holes.

- [6] In the light of these events applicant launched an urgent application on 20 November 2015, citing Lance Allan Wilson and Audie Attorneys as first and second respondents respectively, in which, inter alia, the following relief was sought:

"2. That a Rule Nisi do hereby issue, calling upon the respondent to show cause, if any, on Tuesday 151 December 2015 why a final order in the following terms should not be made:

2.1 That the second respondent be interdicted from releasing the purchase price, the amount being R830 000,00, held in the second respondent's trust account, and freezing the amount in the trust account as an investment, pending the finalisation of the action to be instituted against the first respondent, as described in paragraph 2.3 hereof.

2.2 That the first and/or second respondent be and is hereby interdicted from dealing with or disposing of the purchase price held in trust by the second respondent, unless same is done with the prior written consent of the applicant having been obtained, pending the finalisation of the action proceedings between the parties as described in paragraph 2.3; and

2.3 The applicant be directed to serve the summons out of a court with competent jurisdiction on the first respondent within two months of date of service of this order on first respondent for cancellation of the agreement and, inter alia, repayment of the purchase price to the applicant, alternatively a reduction in the purchase price."

- [7] In his founding affidavit in support of the relief sought applicant states that he would never have purchased the property had he known of the defects of which, so he alleged, first respondent was aware and that it was as a result of the fraudulent misrepresentations by first respondent as to the state of the house that he was induced into entering the deed of sale.

- [8] An order in the terms as set out above was duly granted by Tshiki J on 20 November 2015. It then transpired, however, that the funds referred to in the order had already been released by second respondent and paid into another account nominated by first

respondent the previous day, namely 19 November 2015, consequent upon an instruction by first respondent to second respondent to pay the funds out. That development rendered the order of 20 November moot. It will therefore be discharged.

- [9] Applicant then launched a further application on 24 November

2015. This application served before Schoeman J. On the same day Schoeman J granted a Rule Nisi in the following terms:

"

1. 1 That the first and/or second respondent disclose to the applicant the name of the banking institution and bank account number to which the proceeds of the sale between applicant and first respondent, which was held in trust by second respondent, was paid to by second respondent, within 3 hours of service of this order upon it;

1.2 That the first and/or second respondent provide to the applicant the proof of payment relating to the proceeds of the sale between

applicant and first respondent, which was held in trust by second respondent and allegedly paid to first respondent, within 3 hours of service of this order upon it."

[10] In response thereto the second respondent , acting in terms of Uniform Rule of Court 6(12) (c) anticipated the return day referred to in the order of 24 November and sought the following relief:

" That the order granted by the Honourable Madam Justice Schoeman on 24 November 2015 be varied in the following way:

1.1 By the deletion of the words "and/or second respondent" in paragraph 1.1 thereof,·

1.2 By the deletion of the words "and/or second respondent " in prayer 1.2. thereof "

[11] In support of the application for a reconsideration of the order Mr. Heinrick Audie, a partner of second respondent, avers that the mandatory effect of the interdict places the second respondent in an extremely compromised position because, so he states, service of the order has not been effected upon first respondent and, accordingly, if second respondent were to comply therewith first respondent would be denied his right to oppose the relief sought. He avers further that first respondent has been a client of second respondent for approximately ten years and that, as the attorneys of first respondent, second respondent is "under an ethical and contractual duty of confidentiality' not to disclose the affairs of the first respondent. He avers that "should second respondent comply with the order it would violate 'the confidentiality and/or attorney client privilege."

[12] He avers further that the underlying knowledge of the fact that the purchase price moneys were being held in a trust investment account by second respondent only came to applicant because of an unethical breach of confidentiality by applicant's partner, Williams, who is the person who brokered the sale transaction between applicant and first respondent. He avers that Williams commenced employment with second respondent in its property division on 4 August 2015 and, as an employee of second respondent, gained information of the fact that second respondent was holding the moneys on behalf of first respondent. She then supplied this information to applicant and applicant's attorney, Mr. Woollgar . Mr. Audie avers that Mr. Woollgar then approached Ms. Liesl Erasmus, the other partner of

second respondent, on 19 November 2015; advised her that he acted for applicant and had received information from Williams concerning the moneys; and requested her to confirm this which she did. Mr. Audie avers that as it was apparent that Williams had already leaked the confidential information concerning the whereabouts of the moneys to applicant Ms. Erasmus had no choice but to confirm that she did indeed hold them on behalf of first respondent in a trust investment account.

- [13] Williams, however, denies that she obtained the information because of her employment with second respondent. She avers that after the major storm of the 1 November she had contacted Ms. Erasmus on 2 November 2015 because second respondent was the transferring attorney in order to bring the defects to her attention. Ms. Erasmus advised Williams "off the record" that the purchase price was still being held in the trust account of the second respondent. Furthermore, applicant and Williams state

that she and first respondent held various Skype conversations during negotiations in the course of which first respondent stated that he had to come to South Africa at some point to clear the funds in accordance with legislation, the implication being that the funds were still with second respondent. Those averments have not been denied by second respondent. In the light of this applicant avers that the information that the funds were still being held by first and second respondent was supplied by second respondent themselves. Audie states further that, after the approach by applicant's attorney, Mr. Woollgar, to Ms. Erasmus, he immediately informed the first respondent of the breach of confidentiality and as a consequence thereof first respondent instructed second respondent to pay his monies to a nominated account. He reiterates that it was for this reason that the funds were transferred on the 1st November. He avers that at that time neither first respondent nor he himself had knowledge of applicant's intention to bring the first application and that the funds were not transferred with the intention of frustrating that order.

- [15] I regret to have to state, with respect to Mr. Audie, that I find this explanation disingenuous. Second respondent was aware from 2 November of the dispute between applicant and first respondent arising out of the alleged defects of the house. On Mr. Audie's own evidence Mr. Woollgar approached his partner, Ms. Erasmus, on 19 November 2015; told her he was acting for applicant; and requested

confirmation that second respondent was holding the moneys on behalf of first respondent. In these circumstances the fact that applicant's attorney was, in effect, "nosing around", seeking confirmation of the whereabouts of the funds, must have alerted him to the possibility of litigation. He must, in my view, have asked himself what the purpose was of Mr. Woollgar's approach to Ms. Erasmus if it was not with a view to litigation.

- [16] Equally, the question arises as to why the alleged breach of confidentiality in this regard should have occasioned him such

concern unless he suspected that something was brewing. In the ordinary course of events the fact that a purchaser of a property had obtained information that the purchase funds were still in the trust account of the transferring attorney would have been a matter of no concern whatsoever to persons in the position of first and second respondent.

[17] Mr. Paterson S.C., who appeared on behalf of the respondents, submitted firstly that there had not been proper service of the

application papers on first respondent and that the application for relief against him should accordingly be postponed in order for proper service to be effected upon him.

[18] It is common cause that first respondent is domiciled and resident in the Netherlands. The application papers were served upon him by the Sheriff at the offices of second respondent. Applicant contends that such service was in compliance with the terms of clause 11 of the Deed of Sale which provides:

"Domicilia

For all purposes of this agreement the Seller and the Purchaser respectively elect as their domicilium citandi et executandi the addresses as set out on the first page of this agreement which forms part of this agreement."

[19] The address of first respondent on the first page of the agreement is given as "clo Audie Attorneys." Mr. Paterson submitted that, when used in the context of a contract, the choice of a domicilium usually has reference to the delivery of notices in terms of the contract or for the purposes of delivery of executory process such as in the case of mortgages. He submitted that it was not envisaged when a domicilium citandi et executandi was chosen, that process such as the contemplated action or the present application would fall within the ambit of the clause.

[20] I disagree. It is clear, in my view, that had applicant committed a breach of the agreement in any respect first respondent would have been entitled to rely upon the provisions of clause 11 in seeking to enforce his rights in terms of the agreement. Similarly, in my view, where the applicant alleges a breach of the agreement on the basis of latent defects in the property sold and seeks cancellation of the agreement together with an order for restitution, the provisions of the clause are of application. Such an action, in my view, is clearly a matter which arises out of the agreement and is therefore a matter contemplated in clause 11. This is all the more so when it is considered against the background that first respondent has been a client of second respondent, and still is, for a period in excess of ten years.

[21] In my view therefore there has been proper service on the first respondent who has failed to enter an appearance to oppose this application.

[22] Mr. Paterson then submitted that the evidence relating to the presence of the funds in second respondent's trust account had been improperly obtained through the breach of Williams' duty of confidentiality to her employer. In my view, however, the matter is not nearly as clearcut as Mr. Paterson would have it. As submitted by Ms. van der Merwe, conclusions were in all probability

drawn by applicant and Williams as to the whereabouts of the money in consequence of their conversations on Skype with first respondent.

Furthermore, Ms. Erasmus herself confirmed to Mr. Woollgar that the money was in the trust account. She was under no obligation to do so. I am satisfied therefore that the information was not improperly obtained.

[23] I turn then to consider Mr. Paterson's submissions as to the confidentiality of the information sought by applicant. Mr. Paterson conceded, correctly with reference to Lane and Another N.N.O v Magistrate, Wvnberg 1997 (2) SA 869 (C) that the effecting of transactions on a trust account would not fall within the ambit of advice given in confidence which might

therefore be subject to the usual legal professional privilege. He submitted, however, that the claimed confidentiality in the present matter arose from an implied term in the relationship between an attorney and client in relation to the client's

dealings on his trust account. Such implied term, so he submitted, was similar to that incorporated into the relationship between a banker and his customer, which latter implied term, he submitted, has been incorporated into our law. See *Tournier v National Provincial and Union Bank of England*

[1924] 1 KB 461 (CA) referred to in *Densam (Pty) Ltd v Cywilnat (Pty) Ltd*

[1990] ZASCA 120; 1991 (1) SA 100 (A) at 1091 - 110C. In the *Tournier* case supra it was held that the implied term in the banker customer relationship prohibited a bank from disclosing the affairs of its customer to a third party but that such duty of secrecy was not absolute. One of the qualifications thereof was stated to be in circumstances where the disclosure was under compulsion of law.

[24] Mr. Paterson submitted that such a term should therefore be read into the relationship of an attorney to his client in relation to the management of the trust account and that this would preclude an attorney from disclosing the affairs of the client to a third party except, for example, under compulsion of law. I have some doubt as to the correctness of these submissions, not only with regard to the existence of such an implied term in the attorney and client relationship but also in respect of Mr. Paterson's submission that the *Tournier* principle has been incorporated into our law in respect of a banker customer relationship. As was pointed out by Ms. van der Merwe, Botha JA in *Densam's* case supra at 110 C, simply assumed in favour of the appellant, without deciding, that "the Bank was contractually obliged to it to maintain secrecy and confidentiality about its affairs, in accordance with the

decision in Tournier 's case."

- [25] However, even on the assumption that Mr. Paterson is correct in this regard then, as he himself conceded, this still begs the question as to when the attorney should be placed under compulsion of law and order him or her to divulge the alleged confidential information in a case such as the present. Mr. Paterson was unable to refer me to any South African authority in support of his contentions nor have I found any. He submitted, however, that in the present case the Court would only so order if the applicant had established a right as against the first respondent to such information.
- [26] In submitting that applicant had no such right Mr. Paterson referred extensively to the principles and requirements relating to anti-dissipation interdicts as set out in particular in *Knox D'Arcy Ltd and Others v Jameson and Others* 1994 (3) SA 700 (W); 1995 (2) SA 579 (W) and [1996] ZASCA 58; 1996 (4) SA 348 (A).
- [27] In my view, however, this submission overlooks the nature of the present application which is an application for information as to the whereabouts of the moneys in order to enable applicant to launch an anti- dissipation interdict application in future. It is not itself an application for an anti-dissipation interdict. In his answering affidavit Mr. Woollgar makes reference to second respondent being a party to the "preservation application ." In reply hereto Mr. Audie states, correctly, that "second respondent 's objections are not directed at the first order granting a preservation order. The objection is against the citation in the second application and order."
- [28] In these circumstances the merits or otherwise of any anti-dissipation interdict which may be brought if the funds are located are not pertinently relevant, save to the extent that I must be satisfied that a prima facie case has been made out on the papers for such an interdict. Obviously, if it appeared in the present matter that there was no merit whatsoever to the proposed anti- dissipation interdict the orders sought herein would fall to be dismissed.
- [29] I am satisfied in all the circumstances of this matter that a bona fide prima facie case, even if open to some doubt, has been made out by applicant for the future granting of an anti-dissipation interdict in order to protect his interests. When regard is had to the alacrity with which the funds were removed from the trust account after Mr. Woollgar's query thereanent it seems to me that applicant has demonstrated a very real probability that first respondent has an intention to frustrate applicant's action. In all the circumstances, however, it would be inappropriate for me to say any more concerning the merits of any such proposed interdict.

[30] The fact that applicant has made out such a prima facie case would, however, be of little comfort to him in the absence of any knowledge as to the whereabouts of the funds. As submitted by Ms. van der Merwe, without this information, and in the light of the fact that first respondent resides overseas and has no other assets in South Africa, the applicant may be left without any recourse and any subsequent judgment in his favour may very well be hollow.

[31] In these circumstances it seems to me that what was stated in *Stuart v Ismail* 1942 AD 327 is of application. The head note thereof, at page 327, reads as follows:

"The power of the Court to order a person in possession of the necessary information to disclose the names of persons for the purpose of an action which the applicant intends to bring exists when justice would be defeated without such a disclosure and is not confined to cases where information is required of the names of members of an unincorporated body."

[32] At page 315 *Centlivres JA*, as he then was, referred to the case of *Hart v Stone* 1883, 1 BAC 309 where de Villiers CJ stated at 313 - 4 as follows :

"If, however, he had referred to the 11th book of the Digest, he would have found in the first title numerous instances in which an 'interrogation in jure', as it was called, was allowed, at all events before the time of Callistratus. Voet, in his Commentary on the title, treats fully upon the subject, and shows that even under the Dutch law - whatever might have been the law of the province of Holland proper - the Judges had very large powers of ordering a disclosure of facts where justice would be defeated without such a disclosure. "

[33] *Centlivres JA* stated further, at 332 that:

"The answer to this contention is that the principle underlying the procedure sanctioned by the Courts in these cases is that the Courts have, as stated in the passage quoted above, 'very large powers of ordering a disclosure of facts where justice would be defeated without such a disclosure.' In the present case it is not disputed that the respondent bona fide intends to bring his action and it is obvious that he cannot bring that action unless he knows the names and addresses of the executive committee."

[34] In the matter of *Ex parte Matshini and Others* 1986 (3) SA 605 (E), Kannemeyer J, as he then was, referred to *Stuart v Ismail* supra and stated, at 6101 - J that the Court in that case "relied on the Court's inherent power *ex debito justitiae* to prevent a denial of justice because of a procedural difficulty facing the applicant."

[35] The learned Judge referred further at 6108 - D to the matter of *Colonial Government v W .H. Tatham* (1902) 23 NLR 153 and, in particular, to the remarks of Beaumont AJ at 159 where the following was said:

"All we have to do is to satisfy ourselves that the applicant has grounds for a bona fide belief in his right of action - (2) that the action cannot properly be brought unless he obtains information he seeks; and

(3) that it is within the power of the respondent to supply such information."

[36] At 611 C - D Kannemeyer J stated that, in an application of this nature, the applicant must establish that, at least prima facie, he has a right of action against the respondent. He continued, at 611 F - G to state:

"Nor is there any reason why the procedure should be limited to the disclosure of names. In Hart v Stone supra reference is specifically made to the disclosure of facts."

[37] Insofar as it may be assumed that second respondent had a duty of confidentiality towards first respondent that duty, in my view, is, in the circumstances of this case, where applicant seeks information without which he cannot bring an application for an anti-dissipation interdict, clearly overridden by the dictates of justice.

[38] Mr. Paterson submitted further, however, that because first respondent had been cited as a party there was no need for second

applicant, his agent, to be ordered to divulge the confidential information. I disagree. First respondent is domiciled and resident

overseas. Should he fail to comply with an order of this Court an application for his committal for contempt would in all probability

be an exercise in futility. In such circumstances, a denial of justice would result should second respondent not also be ordered to divulge the information.

[40] In my view, the only way to prevent a denial of justice occurring is to order second respondent to furnish the details which are sought. He obviously has those details at his fingertips and I intend to order him to comply with the order within 2 hours of this order being served upon him. Such service may, if necessary, be served upon him and first respondent electronically.

[41] Accordingly the second respondent's application for a variation of the order must fail.

[42] There is no reason why, in respect of first respondent, the costs should not follow the result. As regards second respondent it is important to bear in mind, despite my remarks concerning his disingenuous averments, that he is an officer of the court and that there is nothing to show that his application for a variation of the order was not brought in good faith in the belief that the information sought was indeed privileged. With regard to second respondent, therefore, he and applicant shall bear their own costs.

[41] Accordingly the following order will issue:

1. The Rule Nisi granted by Tshiki J on 20 November 2015 is discharged with no order as to costs.
2. The second respondent's application for a variation of the order of Schoeman J on 24 November 2015 is dismissed.

3. The rule nisi granted by Schoeman J on 24 November 2015 is confirmed save that it is amended as follows:

1.1 That the first and/or second respondent disclose to the applicant the name of the banking institution and bank account number to which the proceeds of the sale between applicant and first respondent, which was held in trust by second respondent, was paid to by second respondent, within 2 hours of service of this order upon it. Should the proceeds of the sale no longer be held in the account to which they were paid the first and/or second respondent shall disclose the name of the banking institution/s and bank account number/s in which they are being held at date of this order;

1.2 That the first and/or second respondent provide to the applicant the proof of payment relating to the proceeds of the sale between applicant and first respondent, which was held in trust by second respondent and allegedly paid to first respondent, within 2 hours of service of this order upon it.

4. Applicant and second respondent shall each bear their own costs in respect of the main application and of the application to vary the order of 24 November 2015.
5. First respondent is ordered to pay applicant's costs of the main application.

J.D. PICKERING

JUDGE OF THE HIGH COURT

Appearing on behalf of Applicant: Adv. v d Merwe

Instructed by: Audie Attorneys, c/o McCallum Attorneys, Mr. McCallum

Appearing on behalf of Respondents: Adv. Paterson S.C.

Instructed by: Woollgar Attorneys , c/o Joubert Galpin & Searle Mr. Huxtable

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