IN THE HIGH COURT OF SOUTH AFRICA
(WITWATERSRAND LOCAL DIVISION)

CASE NO: 00007/07

In the matter between:

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES / (NO)
(2) OF INTEREST TO OTHER JUDGES: YES / (NO)
(3) REVISED: (YES) / NO

17/3/08
DATE

SIGNATURE

LYNN AND MAIN INCORPORATED **Plaintiff**

and

BLUMENTHAL LEANNE **Defendant**

JUDGMENT

Gildenhuys J

[1] This is an opposed application for summary judgment. In this judgment, I will refer to the applicant as the plaintiff and the respondent as the defendant.

[2] The action was commenced by a combined summons, in which the plaintiff claimed:

"9.1 Payment of the sum of R21 016.49.

9.2 Interest on R21 016.49 at the rate of 21.5 from the 11 June 2001 to date of final payment..

9.3 Costs in the amount of R504.50

9.4 Further and alternative relief."

[3] In par 3.2 of its particulars of claim, the plaintiff states:

"3.2 Plaintiff institutes this action as cessionary in terms of a written cession concluded at Sandton, on 25 March 2003, a copy is annexed hereto marked "A", in terms whereof the Cedent, with effect from 2 January 2003, ceded all its right, title, and interest in and to certain claims which it may have against the Defendants from any cause of indebtedness whatsoever arising, to Plaintiff."

[4] Annexed to the application for summary judgment is a copy of the deed of cession. The cedent is Nedbank [formerly Nedcor Bank Limited]. The cessionary is the plaintiff. The cession is given in respect of book debts owned to Nedbank by various debtors. A list of them is annexed to the deed of cession. Included in the list is a close corporation named Secure Yourself CC. The defendant was the sole member of Secure Yourself CC.

[5] On 11 June 2001, default judgment for R21 016.49 plus interest and costs was given in the Pretoria Magistrate's Court against Secure Yourself CC, in favour of Nedbank Limited. Secure Yourself CC was deregistered on 12 April 2005 by the Registrar of Close Corporations. At that time, its liability to the cessionary was outstanding.

[6] The plaintiff alleges, in par 8 of its particulars of claim:

> "As the member of the close corporation and pursuant to the cession of its claim by the Cedent to the Plaintiff, and the Defendants are liable to the Plaintiff in terms of the provisions of Section 26(5) of the Close Corporation Act."

Section 26(5) of the Close Corporations Act No 69 of 1984 reads as follows:

> "If a corporation is deregistered while having outstanding liabilities, the persons who are members of such corporation at the time of deregistration shall be jointly and severally liable for such liabilities."

[7] The defendant has not delivered any affidavit setting out her defence to the claim. Instead, she opposes the summary judgment application by taking advantage of shortcomings in the plaintiff's particulars of claim.

[8] Mr Lavine, who appeared for the defendant, pointed out that it is alleged in par 3.2 of the particulars of claim that Nedbank ceded its claim against the defendants to the

plaintiff. There is, despite the use of the plural, only one defendant. Furthermore, at the time of cession, Nedbank had no claim against the only defendant. Nedbank cannot cede a non-existing claim.

[9] Mr. K Lavine also submitted that par. 8 does not set out, clearly and unambiguously, what cession the plaintiff is referring to. He submitted that if it was Annexure A, the plaintiff would have said so. In my view, this is ultra-critical. Annexure A is the only deed of cession annexed to the particulars of claim. It must follow that the cession referred to in par. 8 is that cession

[10] Reading the deed of cession and the particulars of claim as a whole, it is abundantly clear that the plaintiff's case is as follows:

- On 11 June 2001 Nedbank obtained judgment against Secure Yourself CC;
- On 25 March 2005 Nedbank ceded its judgment against Secure Yourself CC to the plaintiff;
- On 12 April 2005 Secure Yourself CC was deregistered;
- Upon deregistration of Secure Yourself CC the defendant became personally liable for the judgment debt.

[11] The particulars of claim is muddled. Although it is apparent what the draftsperson had in mind, its many shortcomings make it technically vague and

embarrassing. For this reason, I requested Counsel to submit written argument on whether I can grant summary judgment on vague and embarrassing particulars of claim. Both Ms Stevenson and Mr Lavine submitted extensive and very helpful heads of argument to me.

[12] Ms R.J Stevenson submitted that although the particulars of claim might be vague and embarrassing, they are not fatally defective and are easily cured by appropriate amendments. She went on to say that typographical errors, grammatical errors, unwise choice of words, misunderstanding of language and a lack of vocabulary often make pleadings vague and embarrassing. She submitted that, in such cases, the court should overlook the patent errors and find that summary judgment should be granted where the defendant does not put forward a bona fide defence. She based her submissions on *inter alia* the following cases: *Trans-African Insurance Co Ltd v Maluleka* 1956 (2) SA 273 (A) at 278 and *Teale & Son (Pty) v Vrystaatse Plantediens* 1968 (4) SA 371 (O) at 375A.

[13] Mr. Lavine countered this submission by saying that a plaintiff who invokes the extraordinary remedy of summary judgment should, at the very least, place before the Court an unexcipiable summons and a verifying affidavit that confirms a properly pleaded cause of action.

[14] In the present case the defendant did not deliver an affidavit resisting summary judgment. Instead, she elected to put its defence that the plaintiff's summons is

defective, to the court from the bar. In *Standard Bank of South Africa v Roestof* 2004 (2) SA 492 (W) at 497H-I, Blieden J said,

> "If a defendant has difficulty in dealing with pleadings because they are not technically correct for one or other reason, this should be stated in his affidavit filed in terms of R32(3) as a justification for his inability to present an affidavit disclosing 'fully the nature and grounds of the defence and the material facts relied upon therefor'.

[15] *In TransAfrica v Maluleke* 1956 (2) SA 273 (A) 278 F, Schreiner JA held;

> "No doubt parties and their legal representatives should not be encouraged to be slack in the observance of the rules which are an important element in the machinery for the administration of justice. But, on the other hand, technical objections to less than perfect procedural steps should not be permitted, in the absence of prejudice, to interfere with the expeditious and, if possible inexpensive decisions of cases on their merits."

[16] In *Caxton Ltd v Barrigo* 1960 (4) SA 1 (W) 311 - 4A, Roberts AJ said:

> "It is true that when no valid claim appears *ex facie* the summons and affidavit of the plaintiff, the defendant is not called upon to file a replying affidavit, but in the instant case the third defendant has confined himself to what one might describe as textual criticism of the summons and affidavit, which, though certainly not above such criticism, does, as I have already indicated, convey beyond reasonable doubt to the defendant what the plaintiff's case is. And to that case the defendant has

made no reply. It would have been the easiest thing for him to file an affidavit under sub-rule (3)(c) making summary judgment impossible, if he actually had a defence."

[17] Nowhere in the submissions made on behalf of the defendant has she claimed to have suffered any prejudice as a result of the plaintiff's manifest blunders. *In Standard Bank of South Africa v Roestof, supra* at page 496G-H, Blieden J said-:

"If the papers are not technically correct due to some obvious and manifest error which causes no prejudice to the defendant, it is difficult to justify an approach that refuses the application, especially in a case such as the present one where a reading of the defendant's affidavit opposing summary judgment makes it clear beyond doubt that he knows and appreciates the plaintiff's case against him."

[18] In my view, to dismiss the application for summary judgment purely on technical flaws in the particulars of claim which, I might add, can be cured by uncomplicated amendments, would not be serving the ends of justice. The defendant chose not to reveal her defence, if any, and she must live with the consequences thereof.

[19] The amounts claimed in these proceedings fall well within the jurisdiction of the Magistrate's Court. This must impact on costs. Furthermore, there is no justification on the papers before me for an award of interest at the rate of 21,5% *per annum*. The plaintiff did not even attempt to justify that rate. In its particulars of claim, the plaintiff asks for costs in an amount of R 504, 50. I will award that amount, and nothing more.

The slovenly manner in which the particulars of claim were prepared, retrains me from awarding a larger amount under the prayer for alternative relief, as I was requested to do.

[20] For these reasons I give summary judgment for:

a) R 21 061.49;

b) Interest thereon at the rate of 15,5% *per annum* calculated from 11 June 2001 to date of payment; and

c) Costs of suit in an amount of R504.50.

A GILDENHUYS J
Judge of the High Court

Appearances:
For the plaintiff
Ms R J Stevenson
instructed by
Lynn & Main Inc

For the defendant
Mr K Lavine
instructed by
H Miller Ackermann & Bronstein