IN THE KWAZULU-NATAL HIGH COURT, DURBAN
REPUBLIC OF SOUTH AFRICA

CASE NO. 9105/2011

In the matter between:

LIBERTY GROUP LIMITED PLAINTIFF

and

ROYCHAND SINGH
(I. D. No.) FIRST DEFENDANT

REETHA DEVI SINGH
(I. D.) SECOND DEFENDANT

JUDGMENT Delivered 07 June 2012

SWAIN J

[1] The defendants resist an application for summary judgment which is sought against them jointly and severally for payment of the sum of R466,780.77, interest on this sum, together with costs of suit on the attorney and client scale, on the following grounds:

[1.1] The plaintiff's particulars of claim, forming part of the combined summons, was signed by an attorney who was not qualified to do so, in terms of the Right of Appearance in Courts Act

No. 62 of 1995 (the Right of Appearance Act) as he had not been issued with the requisite certificate, by the Registrar of this Court in terms of Section 4 (2) of the Act, "to the effect that the applicant has the right of appearance in the Supreme Court".

[1.2] The combined summons was signed by an attorney, who was not qualified to do so, by virtue of the fact that he had not been enrolled by the Registrar of this Court, in terms of Section 20 (3) of the Attorneys Act No. 53 of 1979 (the Attorneys Act) as an attorney entitled in terms of Section 20 (4) of the Attorneys Act

"to practise ....and have all the rights and privileges and be subject to all the obligations which he would have had and to which he would have been subject if he had been admitted and enrolled by (this) Court"

[1.3] The plaintiff had failed to comply with Rule of Practice No. 28 of this Court, which provides that in any action brought in terms of the National Credit Act No. 34 of 2005, the summons must allege that there has been compliance with Section 129 of the Act and a certificate must be attached to the summons indicating compliance therewith.

[1.4] The plaintiff was not entitled to claim the amounts in question, in terms of the broking agreement concluded between the plaintiff and the first defendant, because the lapses that occurred in respect of policies that the first defendant "had written up" had been caused by the conduct of the plaintiff.

[2] Dealing firstly with the validity of the combined summons,

incorporating as they do, the particulars of claim. It is common cause, that the attorney who signed the summons, as well as the particulars of claim, is admitted and enrolled as such in the Gauteng division of the High Court in terms of the Attorneys Act, but has not been enrolled by the Registrar of this Court in terms of Section 20 (3) of the Attorneys Act, as an attorney thereby entitled, in terms of Section 20 (4) of that Act, to practice within this division. It is also common cause that the attorney was issued with a certificate, by the Registrar of the Gauteng High Court, in terms of Section 4 (2) of the Right of Appearance Act, to the effect that he has the right of appearance in the High Court.

[3] It is clear that in terms of the Attorneys Act, an attorney is only entitled to practice within the territorial jurisdiction of the division of the High Court in which he/she was initially admitted and enrolled. The right to practice in another division of the High Court, is dependent upon enrolment of the attorney by the Registrar of the other division in terms of Section 20 (3) of the Attorneys Act.

Caietta & another v Gess1988 (2) SA 395 (SWA)
S v Sewnandan 1999 (2) SA 1087 (O)

[4] The extent to which the provisions of the Right of Appearance Act, have extended the territorial rights of practise of attorneys in the High Court, has been the subject of a number of decisions. The provisions of the Right of Appearance Act relevant to this enquiry are the following:

“Section 3 (4) An attorney who has been granted the right of appearance in the Supreme Court shall also be entitled to discharge the other functions of an advocate in any proceedings in the Supreme Court “

and

“Section 4 (4) An attorney who has been granted the right of appearance in terms of this section shall be entitled to appear in any court throughout the Republic”

[5] In Sewnandan, which was decided before the amendment of the Right of Appearance Act by the insertion of Section 4 (4), it was held that the issue of a certificate by the Registrar of a division of the High Court, in terms of Section (4) (2) of the Right of Appearance Act, did not entitle the attorney to appear before other divisions of the High Court. The case was concerned only with the right of appearance of an attorney and not with any of the other functions of an attorney, or “other functions of an advocate” which could be exercised by an attorney, in terms of Section 3 (4) of the Right of Appearance Act.

[6] Subsequent to the amendment of the Right of Appearance Act, by the insertion of Section 4 (4) (presumably to deal with the effect of the decision in Sewnandan) Tshabalala J P, had occasion to consider the effect of this amendment, upon the rights of attorneys to appear before, and carry out the functions of an advocate in, divisions of the High Court, other than the division of

the High Court in which they were admitted and enrolled in terms of the Attorneys Act and other than the division in which the certificate of right of appearance was issued.

Zeda Car Leasing (Pty) Ltd. t/a Avis Fleet Services v Pillay 2007 (3) SA 89 (DCLD)

[7] At issue in Zeda was whether an attorney who was not admitted and enrolled in the KwaZulu-Natal Division of the High Court and whose certificate of right of appearance in terms of Section 4 (2) of that Act, was not issued by the Registrar of that court, was entitled to sign the particulars of claim, forming part of a combined summons issued in that division, qua attorney and qua advocate, as required by the Rules.

[8] Tshabalala J P concluded that the amendment "affects right of appearance only and does not cover rights and obligations imposed by the Attorneys Act".

Zeda at at 94 G

[9] The reasoning of Tshabalala J P was as follows:

"To my mind, the 2005 amendment is couched in broad terms which make it unclear whether its ambit goes further than to extend the right to appear by also extending the area of jurisdiction. The section does not say that an attorney may issue pleadings in any Court other than where he was enrolled. Furthermore, there is no indication of an intention to do away with the control purported in the Right of Appearance Act".

Zeda at 94 B - C

Leaving aside for the moment, the correctness of the decision reached by Tshabalala J P, as to the effect of the provisions of Section 4 (4) of the Right of Appearance Act, it is necessary to examine the correctness of the decision in Sewnandan, forming as it did the basis for the decision of Tshabalala J P .

[10] The issue of control over attorneys with right of appearance in divisions of the High Court, other than the division in which they were admitted or enrolled, was central to the decision in Sewnandan. This arose from Section 4 (3) of the Right of Appearance Act which provides as follows:

"Section 21 of the Attorneys Act 1979 (Act 53 of 1979) which requires rolls of attorneys to be kept, shall apply mutatis mutandis in respect of attorneys who have been granted the right of appearance in the Supreme Court".

[11] In Sewnandan Lombard J, in whose Judgment Pretorius A J concurred, decided as a consequence of the provisions of Section 4 (3), the Registrar of every division of the High Court, was obliged to maintain four registers containing details of attorneys admitted in that division, attorneys enrolled in that division, details of attorneys to whom certificates of rights of appearance had been issued by the Registrar of that division and details of attorneys enrolled, who had applied for certificates of right of appearance, but to whom such

certificates had not been issued.

[12] In Sewnandan it was held that this interpretation also satisfied the second main object of the Right of Appearance Act (the first main object being the extension of the existing right of attorneys to appear in the courts) which was

"to ensure that by extension of the right to appear in the Supreme Court, the control over the professional conduct of attorneys by their governing body, the respective Law Societies, remains untouched, i.e. the same control is maintained over these members who are entitled to appear in the Supreme Court as over those who are not. If there were to be any difference in the control of the two 'types of attorneys' this would frustrate one of the main purposes of the new Act, i.e. to regulate and control the right of attorneys to appear in the Supreme Court by Statute. What the new Act has in essence brought about is that, although an attorney's right to appear has been extended, his or her 'area of jurisdiction' remained the same and can only be extended as set out in Section 20 of the Act".

Sewnandan pg 1093 J – 1094 C

[13] The issue of control over attorneys with right of appearance in the High Court, is central to the conclusion which Tshabalala J P reached in Zeda, agreeing as he did with the conclusion reached in Sewnandan, that this was the second main object of the Right of Appearance Act.

Zeda at pg 93 B – F

[14] In Sewnandan the learned Judges accordingly concluded that

an attorney's right of appearance in the High Court was not unqualified and had to be read with the provisions of Section 21 of the Attorneys Act (Section 4 (3) of the Right of Appearance Act)

Sewnandan pg 1093 F

[15] With great respect to the Judges in Sewnandan, I fail to see why the requirement in Section 4 (3) of the Right of Appearance Act, that a register be kept of attorneys to whom right of appearance have been granted in that division, with the object of maintaining control over these attorneys, leads to the conclusion that such an attorney's right to appear in the High Court, is limited to the division in which the attorney is admitted or enrolled in terms of Section 20 of the Attorneys Act. The requirements in terms of Section 4 (b) and (c) of the Right of Appearance Act, that a certificate be provided by the Secretary of the Law Society, of which the attorney concerned is a member, that he/she has practised for a period of not less than three years and that there are no proceedings to strike the attorney's name off the roll, or to suspend him/her from practise, ensures the same level of control for the issue of a certificate, as where the attorney applies in a division , where he/she is admitted or enrolled. As regards the control of the conduct of attorneys, after the issue of a certificate of appearance in terms of the Attorneys Act, if an attorney is struck off the roll, or suspended from practise, the Registrar of the court concerned is obliged to forward a copy of the order to the Registrars of the other courts. On receipt of such an order, the Registrar is obliged to enter a reference to that order opposite the name of the attorney concerned in the register and the

effect of such entry is that in the area of jurisdiction of that court, the attorney concerned is removed from the roll, or suspended from practise, as the case may be. Obviously, this would have the effect of terminating the attorney's right of appearance, before any division of the High Court. In addition, if the conduct of an attorney appearing before a division of the High Court, in which a certificate of appearance was issued, is the subject of a complaint, a reference to the register kept by the Registrar, will ensure that the complaint is directed to the Law Society, of which the attorney is a member. The requirement that a register be kept by the Registrar of all attorneys to whom certificates of appearance have been issued in that division, has as its object control over those appearing in a division, other than a division in which they are either admitted, or enrolled. The object was not to limit the right of appearance, to a division where the attorney concerned was either admitted, or enrolled.

[16] In so far as attorneys are concerned, the purpose of the Right of Appearance Act, was not only to regulate the right of attorneys to appear in courts, but "the object is stated in express terms to be to extend an existing right".

Society of Advocates of Natal v de Frietas & another
(Natal Law Society intervening)
1997 (4) SA 1134 (N) at 1172 E

In ascertaining the meaning and effect of Section 4 (3) of the Right of Appearance Act,

"consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible, each possibility must be weighed in the light of all these factors. The process is objective not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document".

Natal Joint Municipal Pension Fund v Endumeni Municipality [2012] 2 All SA 262 (SCA) at 273 B – E

[17] The interpretation of the Right of Appearance Act and specifically the control to be exercised over attorneys to whom certificates of appearance are issued, adopted in Sewnandan, in my view, with respect, defeats the purpose of the Act by over emphasising the regulation of the appearance of attorneys in the High Court, without according sufficient weight to the object of extending such right of appearance. To limit the right of appearance, to a division where the attorney was admitted or enrolled, unreasonably limits the right of appearance which was extended by the Right of Appearance Act. In addition, as pointed out by Binns-Ward J in

Absa Bank v Barinor New Business Venture 2011 (6) SA 225 at 229 A - B

such a construction also gives rise to an absurdity, in that an attorney to whom a certificate of right of appearance was issued by the Registrar of a particular division of the High Court, in which the attorney was enrolled, would without further formality, be entitled to appear before the Supreme Court of Appeal and the Constitutional Court, but could not do so before another division of the High Court, without being enrolled in that division.

[18] The decision in Sewnandan, albeit that it is the decision of two Judges, is of another division, and consequently not binding upon me. I, with respect, regard the decision as wrong.

[19] In Zeda, Tshabalala J P, having accepted the correctness of the conclusion reached in Sewnandan, concluded as follows

"I therefore accept the respondents' assertion that the proper construction to be placed upon the legal provisions is that an attorney who holds a certificate under s 4 (2) of the Right of Appearance Act may carry out the functions of an advocate only within the jurisdiction of the Registrar by whom such attorney's certificate was issued. Furthermore that, if such attorney wishes to exercise the functions of an attorney or advocate in any other jurisdiction, that attorney must apply under s 20 of the Attorneys Act to be enrolled in that other jurisdiction. Therefore, in the absence of being so enrolled, it does not seem proper that such attorney would be entitled to sign pleadings as an advocate or attorney in a different Division from where he/she was enrolled".

Zeda at pg 94 E - G

[20] It should be noted that although Sewnandan was only concerned with an attorney's right of appearance, Tshabalala J P applied the conclusion reached in that case to "the functions of an advocate" to be exercised by an attorney in terms of Section 3 (4) of

the Right of Appearance Act. This conclusion must necessarily follow because the right of an attorney to exercise the functions of an advocate, is dependent upon the attorney possessing the requisite right of appearance. Tshabalala J P at no stage examined what the functions of an advocate were in relation to the signature of particulars of claim, forming part of a combined summons and whether an attorney with right of appearance, was entitled to exercise such a function, qua advocate.

[21] I, however, for the reasons set out above, respectfully disagree with the conclusion of Tshabalala J P that the right of appearance of an attorney in terms of Section 4 (2) of the Right of Appearance Act, is limited to the division where the attorney is admitted or enrolled, based as it is upon the decision in Sewnandan. I respectfully regard the decision of Tshabalala J P in this regard as wrong. It also follows that I, with respect, regard as wrong, the decision by Tshabalala J P, that the ability of an attorney to exercise the functions of an advocate, is similarly restricted to the division where the certificate of the right of appearance was issued. Consequently, in my view, the attorney in Zeda was entitled to exercise the functions of an advocate in this division. However, for reasons which I will set out below, I respectfully agree with the conclusion of Tshabalala J P that the attorney in Zeda was not entitled to exercise the functions of an attorney, in this division.

[22] In any event, I regard the provisions of Section 4 (4) of the Right of Appearance Act, as decisive. I, with respect, regard as

wrong the view of Tshabalala J P that the provisions of this Section are not "sufficiently cogent" to conclude that an attorney's right to practise is "without any territorial restriction".

Zeda at 94 C – D

[23] I agree with the views of Binns-Ward J in

Barinor *supra* at 228 G – H

that Section 4 (4) was merely expositionary legislation, the purpose of which was "not to alter the effect of an existing statutory provision, but merely to express it more clearly, and to put its meaning and effect beyond debate".

[24] Section 4 (4) is quite clear in its terms that the attorney concerned is "entitled to appear in any court throughout the Republic". The decision by Tshabalala J P in regard to the effect of Section 4 (4) in any event, may be regarded as *obiter*, because he states the following:

"In any event the pleadings herein were issued on 03 June 2005, before the said 2005 amendment"

Zeda at 94 G

[25] I am therefore satisfied that the attorney in the present case, by virtue of the issue of a certificate, by the Registrar of the Gauteng High Court, in terms of Section 4 (2) of the Right of Appearance Act,

to the attorney, acquired the right of appearance before this Court.

[26] The next issue for determination is whether the acquisition of a right of appearance before this Court, afforded to the attorney the right to sign the particulars of claim in question, in terms of Section 3 (4) of the Right of Appearance Act.

[27] The issue is whether the signature of pleadings constitutes a "function of an advocate". In de Freitas at 1159 G Thirion J, in whose Judgment Hugo J and P C Combrinck J concurred, referred to

"the rule of the common law that it is the function of the advocate to draw the pleadings and the function of the attorney to file the pleadings of record as the representative of the party".

[28] In the case of

Fortune v Fortune 1996 (2) SA 550 (C) at 551 D – E

Selikowitz J concluded that

"Amongst the duties of an advocate which an attorney duly certified in terms of Section 4 (2) of the Act, is entitled to discharge is the signing of pleadings. There can, in my view, be no doubt that pleadings, although initially prepared and delivered prior to any appearance before the Court, nonetheless form an integral part of the 'proceedings in the Supreme Court' "

[29] In Barinor, Binns-Ward J, sitting in the Western Cape High Court, had to decide whether an attorney with right of appearance by virtue of a certificate issued by a Registrar in another division, in terms of the Right of Appearance Act, but who had not been enrolled by the Registrar of the Western Cape High Court, in terms of Section 20 (3) of the Attorneys Act, was entitled to sign a combined summons qua attorney and qua advocate, issued in the Western Cape High Court. The issue raised was consequently the same as in Zeda and the present case.

[30] Binns-Ward J after referring to Section 3 (4) of the Right of Appearance Act, at 230 B stated the following:

"In respect of the signature of pleadings, an attorney with right of appearance could therefore sign the pleadings qua advocate and qua attorney"

Binns-Ward J then referred to the fact that prior to the substitution of Rule 18 (1) of the Rules, this gave rise to the oddity that attorneys exercising the rights conferred by Section 3 (4) of the Right of Appearance Act, had to sign the pleading twice, once in discharge of the prescribed function of the advocate and again in discharge of the prescribed function of the attorney. Reference was then made to the decision in Fortune, where it was held that where a duly certified attorney signs a pleading, in place of an advocate, he or she should indicate that fact by indicating that the attorney is certified in terms of Section 4 (2) of the Right of Appearance Act.

Fortune at pg 551 H – I

[31] Binns-Ward J then set out a number of examples of other functions of an advocate, which an attorney with right of appearance under the Act might discharge and concluded as follows:

"[14] The signature of pleadings by a legal practitioner is a function quite discrete from the appearance in court. It precedes the appearance and it is ordinarily not done in court, but in an advocate's chambers or an attorney's office. It was a function undertaken by attorneys, qua attorney – as distinct from qua advocate – long before that branch of the profession obtained a statutory basis to exercise right of appearance in the superior courts. It is a function which attorneys who do not possess a certificate of right of appearance can, and do, competently discharge".

[32] Binns-Ward J then referred to the amended provisions of Rule 18 (1) which provides for the signature of a combined summons by an advocate and an attorney, alternatively in the case of an attorney with the right of appearance in the High Court only by such attorney and stated the following:

"[15].......At first blush that might be read as affording any attorney holding a certificate issued in terms of s 4 (2) of the Act the authority to sign pleadings in any court in which he or she has the right of appearance. That is not so. Apart from the fact that the rules could not in law override the effect of the relevant Acts, the term 'attorney' is in any event specially defined in rule 1 to mean 'an attorney admitted, enrolled and entitled to practise a such in the division concerned'. An attorney admitted, enrolled and entitled to practise as such in the Gauteng High Courts, for example, has the right to appear in the Western Cape High Court and discharge the other functions of an advocate here if he or she has been issued with a certificate of right of appearance by a registrar of the Gauteng High Courts, but he or she may not otherwise practise as an attorney within the jurisdiction of the Western Cape High Court if he or she is not enrolled by the registrar of the Cape Court in terms of s 20 of the Attorneys Act".

[33] Binns-Ward J then stated that the conclusion reached by Tshabalala J P in Zeda was correct.

Barinor at 231 A

However, in Zeda, Tshabalala J P, concluded that an attorney

"may carry out the functions of an advocate only within the jurisdiction of the Registrar, by whom such attorney's certificate was issued".

Zeda at 94 E – F

In the light of the conclusion of Binns-Ward J, that Tshabalala J P was wrong, in territorially limiting an attorney's right of appearance (with the concomitant right to exercise the functions of an advocate) to the division in which the attorney's certificate of appearance was issued, I understand his approval of the decision of Tshabalala J P to be restricted to that of the inability of an attorney to sign the combined summons qua attorney, but not qua advocate. In other words, an attorney's right to sign a combined summons qua attorney is limited to the division in which the attorney is admitted or enrolled, but an attorney with the right of appearance has the right to sign a combined summons qua advocate, without such limitation.

[34] If I have misconstrued the judgment of Binns-Ward J and he

intended not only to limit the right of an attorney (with right of appearance in the High Court) to sign a combined summons qua attorney, but also qua advocate, to the division where the attorney was admitted and enrolled, I respectfully disagree with it. If the reason for such a conclusion by Binns-Ward J was that the signature of pleadings is a function ”which is quite discreet from the appearance in court” and consequently not a function of an advocate, which an attorney with a right of appearance can exercise, I respectfully disagree with it for the reasons set out below.

[35] As pointed out by Selikowitz J in Fortune, the signature of pleadings is a function of an advocate, forming an integral part of “any proceedings in the Supreme Court” that an attorney who has been issued with the requisite certificate in terms of Section 4 (2) of the Right of Appearance Act, is entitled to exercise in terms of Section 3 (4) of that Act.

[36] A combined summons is a pleading

Dowson and Dobson Industrial Ltd. v van der Werf & others 1981 (4) SA 417 (C) at 422 C – E

and in terms of de Freitas it was a rule of the common law that it was the function of an advocate to draw the pleadings. Consequently the attorney in the present case was entitled to sign the combined summons issued out of this division, qua advocate.

[37] The definition of "attorney" in Rule 1 means "an attorney admitted and enrolled and entitled to practise as such in the division concerned". In the context of Rule 18 this means that an attorney with the requisite right of appearance, can only sign a combined summons, qua advocate and qua attorney, if he or she has been admitted in that particular division. Although the Rules of Court are delegated legislation, have statutory force and are binding on the Court

Western Bank Ltd. v Packery
1977 (3) SA 137 (T) at 141 B – C

the provisions of Rule 18, read together with the definition of "attorney" in Rule 1 cannot take precedence over the provisions of the Right of Appearance Act, which confers upon an attorney certified in terms of the Act, the right to sign a combined summons qua advocate, issued out of a division, other than the division in which the Registrar issued such certificate.

[38] Whether such certification, entitles the attorney to sign a combined summons qua attorney, issued out of a division other than the division in which the Registrar issued the certificate is a different enquiry, to which I now turn.

[39] When the matter was argued I understood the challenge raised in the defendant's affidavit opposing summary judgment, to be directed at the authority of the plaintiff's attorney to sign the combined summons qua attorney, but not qua advocate. Mr. Boulle, who appeared for the plaintiff, submitted that the challenge

was directed solely at the authority of the plaintiff's attorney, to sign the combined summons qua advocate. When I asked Mr. Tobias, who appeared for the defendants, I understood him to indicate that the challenge was raised in respect of the ability of the attorney to sign the combined summons qua attorney and qua advocate. On examining the affidavit more closely, it appears that the challenge was raised only in respect of the ability of the attorney to sign qua advocate. Be that as it may, it is clear that a defendant in summary judgment proceedings "is not precluded from raising issues relating to the validity of the plaintiff's application merely because he has not referred to these matters in his opposing affidavit".

Arend & another v Astra Furnishers (Pty) Ltd.
1974 (1) SA 298 (C) at 314 B - C

cf H.K. Gopal (Pty) Ltd. v Muthambi
1967 (3) SA 89 (T) at 90 G - H

[40] The signature of the combined summons by an attorney as required by Rule 18, as distinct from the signature of the combined summons by an advocate, has never been the function of an advocate. A signature of the combined summons, qua attorney, cannot accordingly be justified in terms of Section 3 (4) of the Right of Appearance Act, where the summons is issued in a division, other than where the attorney was admitted or enrolled. The authority of an attorney to sign a combined summons must accordingly be found within the provisions of the Attorneys Act. An attorney would be entitled to sign a combined summons, qua attorney, issued in the division in which he/she was admitted and

enrolled, or in a division in which he/she has been enrolled by the Registrar of that division in terms of Section 20 (3) of the Attorneys Act, as an attorney thereby entitled in terms of Section 20 (4) of that Act, to practise within that division. On the facts of the present case, the plaintiff's attorney was admitted and enrolled in the Gauteng High Court, and was accordingly not entitled to sign the combined summons, qua attorney, which was issued in this division, despite the fact that the attorney possessed the right to appear in this division.

[41] In this respect the provisions of Rule 18, read with the definition of attorney in Rule 1, are in accordance with the provisions of the Attorneys Act.

[42] Mr. Boulle sought to argue that the provisions of Rule 17 were applicable on the present facts and accordingly all that was required was that the summons be signed "by the attorney acting for the plaintiff", which did not require that the attorney be admitted in that division. It is clear however, that the summons in this matter is a combined summons and accordingly the provisions of Rule 18 and not Rule 17, are applicable. In any event "attorney" is defined in Rule 1 in the manner set out above.

[43] In the alternative Mr. Boulle submitted that this deficiency could and should be condoned. In support of this proposition, he referred me to an unreported decision of Lopes A J (as he then was) in

B M W Financial Services (SA) (Pty) Ltd. v Singh
KZN Case Nos. 2694/2009, 2695/2009

where in a summary judgment application, the defendant as in the present case raised as a defence a failure by the plaintiff to comply with Rule of Practice No. 28. Lopes A J held that the annexures to the summons constituted more than substantial compliance with the Practice Directive. He then added that in any event, he condoned any perceived non-compliance with the Practice Directive. However in

Western Bank Bpk v de Beer en 'n ander
1975 (3) SA 772 (T) at 775 D – E

Myburgh J in dealing with an application by a plaintiff for condonation in summary judgment proceedings, where the combined summons had not been signed by an advocate, had the following to say

"Dit was ook namens die eiser betoog dat die verweerder nie enigsinsbenadeel is nie en dat ek die onreelmatige dagvaarding moet kondoneer. Die harwar wat deur die baster dagvaarding geskep is, is sulks dat ek nie geneig is om daarop summiere vonnis te gee nie. Die verweer dat dit 'n onreelmatige document is, is na my oordeel 'n *bona fide* verweer. Benadeling is nie noodwendigerwyse uitgesluit nie. Inteendeel het mnr *Pickard*, na my mening, met reg betoog dat die verweerder wel in sy verweer in dié omstandighede benadeel is".

The approach to be adopted to procedural or technical irregularities, in a plaintiff's cause of action in summary judgment proceedings, has been dealt with in a number of cases. The high water mark in an insistence upon procedural or technical regularity, on the part of a plaintiff in summary judgment proceedings is found in the remarks of Marais J in the case of

Mowschenson & Mowschenson
v
Mercantile Acceptance Corporation of South Africa Ltd.
1959 (3) SA 362 (W) at 366 F

where after pointing out that summary judgment is a stringent remedy and that it can only be granted if there is no doubt that the plaintiff has an unanswerable case, said the following:

”If it is reasonably possible that the plaintiff’s application is defective or that the defendant has a good defence, the issue must, in my view, be decided in favour of the defendant”.

However in

van den Bergh v Weiner
1976 (2) SA 297 (T) at 300 B – C

the Full Bench endorsed the view of Boshoff J in

W. M. Mentz & Seuns (Bpk) v Katzoke
1969 (3) SA 306 at 311 A

that the passage in Mowschenson was never intended to allow a defendant to raise any technical point, no matter how insignificant, and thereby defeat the grant of summary judgment. It was never the intention to give weight to purely technical defences because that would defeat the object of summary judgment proceedings.

[44] The remarks of Myburgh J in Western Bank must however be seen in the context that the irregularity in question was one of a number of defects raised by the defendant in that case. In addition, in the present case, Mr. Tobias has not pointed to any prejudice suffered by the defendants as a consequence of the irregularity. When regard is had to the fact that the point was only seized upon by the defendant, when I raised it at the hearing, I have no doubt that the irregularity should be condoned. I accordingly condone the irregularity.

[45] Turning to the issue of whether the plaintiff has failed to comply with Rule of Practice No. 28, which obliges the plaintiff to allege in the summons that there has been compliance with Section 129 of the National Credit Act No. 34 of 2005, and a certificate must be attached to the summons indicating compliance therewith. Mr. Boulle's answer to this defence was to submit that the agreement in question was not a credit agreement in terms of the National Credit Act No. 34 of 2005. Mr. Tobias however submitted that the agreement fell squarely within the provisions of Section 8 (4) (d) of the Act as it was a "secured loan" within the definition of that term in Section 1 of the Act.

[46] The agreement between the parties is a broking agreement, in terms of which the first defendant t/a KwaZulu-Natal Financial

Services, would submit proposals from clients for various contracts to be issued by the plaintiff. The first defendant would be paid commissions on premiums received by the plaintiff during the currency of such contracts. The first defendant acted as an independent contractor, was not entitled to contract on behalf of the plaintiff, or to incur any liability on behalf of the plaintiff. The first defendant was also not authorised to collect any monies on behalf of, or issue any receipts in the name of the plaintiff.

[47] The clause which forms the basis for the argument of Mr. Tobias that the agreement is a "secured loan" reads as follows:

"10.1 Any advances made to the Brokerage at any time against commission to be earned or amounts advanced to it for any other purpose whatsoever, shall constitute debts owed by the Brokerage to Liberty, which Liberty may call upon to be paid at any time.....

10.2 As security for any present or future indebtedness to Liberty the Brokerage hereby cedes to Liberty its claim to all amounts to which it may from time to time become entitled hereunder. Liberty shall in its discretion and without notice to the Brokerage be entitled to set off any amounts owing to it by the Brokerage from any cause whatsoever, against any indebtedness of Liberty to the Brokerage".

[48] "Secured loan" is defined in the National Credit Act as follows:

"means an agreement, irrespective of its form but not including an instalment agreement, in terms of which a person –

a) advances money or grants credit to another, and

b) retains, or receives a pledge or cession of the title to any movable

> property or other thing of value as security for all amounts due under that agreement".

[49] It is clear that what is ceded by the first defendant to the plaintiff, are the commissions which the plaintiff is liable to pay to the first defendant. The debts, the payment of which the parties seek to secure by the cession, are advances made by the plaintiff to the first defendant in respect of these commissions, or amounts advanced by the plaintiff for any other purpose.

[50] In the present case the cause of action advanced by the plaintiff is pleaded as follows:

> "Pursuant to the agreement and subsequent thereto the plaintiff advanced unearned commission to the first defendant in respect of contracts issued by the plaintiff on proposals submitted by first defendant to plaintiff prior to the plaintiff receiving any premiums in respect thereof".

It is then alleged that contracts in respect of which unearned commission was advanced to the first defendant lapsed or went out of force, with the result that unearned commission, that was paid in advance to the first defendant has become repayable. It is therefore clear that the amounts advanced were solely in respect of unearned commission and not for any other purpose.

[51] Consequently, in terms of the cession, the cedent (first defendant) ceded his claim for payment of commission against the debtor (plaintiff) to the cessionary (plaintiff) as security for the loan

that the plaintiff made to the cedent (first defendant). The cession is one in *securitatem debiti* and the respective capacities of the plaintiff and the first defendant were not "too incompatible to co-exist" such that *confusio* resulted with the destruction of the parties' mutual obligations.

Trust Bank of Africa Limited. v Standard Bank of South Africa 1968 (3) SA 166 (A) at 183 H – 184 F

Put differently, the plaintiff did not as a result of the cession become its own creditor, with a consequent merger of rights.

Roman Catholic Church (Klerksdorp Diocese)
v
Southern Life Association Limited
1992 (2) SA 807 (A) at 815 H – 816 A

This is because the advances were made against unearned commission, in respect of which there was no obligation on the plaintiff to make payment to the first defendant, and the first defendant was not entitled to claim payment, as commission was not yet due and payable.

[52] The significance of this is that for the purpose of determining whether this agreement constitutes a "secured loan" in terms of the National Credit Act, there was a valid cession by the first defendant of his right to claim payment of commission. The crucial issue however, is whether this particular type of cession is one which is comprehended by the definition of a "secured loan". What is required

is a cession of an “other thing of value as security for all amounts due under that agreement”. It is clear that the “thing of value” has to be something other than the “amounts due under that agreement”, and not simply a “thing of value”, other than “any movable property”. What is due by the first defendant under the agreement is advances of unearned commission by the plaintiff and the “thing of value” which has been ceded, is the first defendant’s claim to payment of that very commission, when it becomes due and payable.

[53] The cession in question is accordingly not one which falls within the definition of a “secured loan” in terms of the National Credit Act. There is accordingly no obligation upon the plaintiff to comply with Rule of Practice 28, nor the procedure specified in the National Credit Act.

[54] The final defence raised by the defendants relates to the merits of the plaintiff’s claim. As pointed out above, the defendants allege that lapses in policies were caused by the conduct of the plaintiff in the following respects:

[54.1] The plaintiff incorrectly captured stop orders as debit orders on a number of policies.

[54.2] Only one stop order could go through on the accounts of certain customers, but the plaintiff attempted to pass double debit orders on these accounts, with the result that premiums were not paid.

[54.3] The plaintiff's systems failed, causing a number of lapses in policies, which ought not to have occurred.

[55] What is clear is that the allegations of the defendants are entirely lacking in any particularity. If the allegations of the defendants were *bona fide,* I would have expected the defendants to set out the material facts upon which they are based. The defendants rely upon three different causes for the lapsing of policies, and in order to draw such a distinction, if *bona fide,* I would expect details of the policies concerned, as well as the amounts advanced by the plaintiff in respect of these policies. This is because the defendants do not deny that the plaintiff advanced unearned commissions to the first defendant, or that policies in respect of which advances were made, lapsed. The first defendant should accordingly be able to furnish these details, particularly as the first defendant was the broker who submitted proposals in respect of each of these lapsed policies. In addition, the defendants allege that a number of the plaintiff's claims have prescribed, again without furnishing any material facts upon which this allegation is based. I am accordingly satisfied that the defendants have failed to establish that they have a valid and *bona fide* defence to the plaintiff's claim.

[56] The plaintiff seeks costs on the attorney and own client scale against both defendants. However, only the Deed of Suretyship contains a consent to pay costs on this scale. Although the Deed of

Suretyship purports to be one in which both defendants stand surety for the debts of KwaZulu-Natal Financial Services, it is clear from the plaintiff's particulars of claim and the agreement, that this is a firm of which the first defendant is the sole proprietor. The suretyship agreement in so far as it relates to the first defendant is consequently unenforceable. A costs order on the attorney and own client scale can accordingly only be advanced against the second defendant.

I make the following order:

> Summary judgment is granted against the first and second defendants, jointly and severally, the one paying the other to be absolved for:
>
> a) Payment of the amount of R466,780.77
>
> b) Interest at the rate of 15.5% per annum *a tempore mora* from 20 November 2009 to date of payment.
> c) Costs of suit against the first and second defendants jointly and severally, including costs on the attorney and own client scale as against the second defendant

K. SWAIN J

Appearances: /

Appearances:

For the Plaintiff : Mr. A. Boulle

Instructed by	**:**	Gerings Attorneys C/o Hassen, Parsee & Poovalingham Attorneys Durban
For 1st & 2nd Defendants	**:**	Mr. D. G. Tobias
Instructed by	**:**	J. Surju Durban
Date of Hearing	**:**	11 May 2012
Date of Filing of Judgment	**:**	07 June 2012