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

CASE NO: AR 226/11

In the matter between:

DEDE PINE AND TIMBER PRODUCTS CC **Appellant**

and

BLICK SOUTH AFRICA (PTY) LTD **Respondent**

JUDGMENT Date: September 2011

PLOOS van AMSTEL J

[1] After the matter was argued before us on 16 September 2011 we made an order dismissing the appeal with costs on the attorney and own client scale. These are the reasons for that order.

[2] The appellant was the defendant in an action instituted by the respondent in

the magistrate's court at Stanger for payment in terms of a written rental agreement relating to a Biometric Unit and the software required for its operation. I will refer to the parties herein as they were referred to in the court below.

[3] The plaintiff's operational manager explained in his evidence that the Biometric Unit is a fingerprint clocking machine which is used to record the time when employees arrive for work and when they leave. It is activated by the employee putting a finger on a part of the equipment, which recognizes his fingerprint and records the relevant information. At the end of the trial the magistrate gave judgment in favour of the plaintiff for the amount claimed, together with interest and costs.

[4] The only basis on which the judgment was attacked before us was the contention that the plaintiff had not proved that the defendant was a party to the contract. The contract refers to Dede Pine and Timber Products, whereas the defendant is Dede Pine and Timber Products CC. If I understood the contention correctly it was that in the absence of rectification of the agreement the plaintiff could not have succeeded against the defendant as the contracting party had a different name.

[5] The best place to start is the pleadings. Rule 17(2) of the Magistrates' Court Rules provides that the defendant shall in its plea either admit or deny or confess and avoid all the material facts alleged in the combined summons or declaration or state which of the said facts are not admitted and to what extent, and shall clearly and concisely state all material facts upon which the defendant relies. Rule 17(3)(a) provides that every allegation of fact in the combined summons or declaration which is not stated in the plea to be denied or to be admitted, shall be

deemed to be admitted. (It would appear that the word 'not' should be read into rule 17(3), so that the deeming provision applies to every fact which is not stated in the plea to be denied or to be not admitted.)

[6] It is the function of the pleadings to define what is in issue and what is not. Fortunately the rule maker seems to have been alive to the evasive habits of some draftsmen and endeavoured to cater for this problem in rule 17(3)(a).

[7] The defendant was described in paragraph two of the particulars of claim as 'Dede Pine and Timber Products CC, a close corporation, incorporated in terms of the *Close Corporations Act 69 of 1984*, with registered physical address at 23b Lindley Street, Stanger, KwaZulu- Natal and with principal place of business and chosen domicilium citandi et executandi at 429 District Road, Richards Bay, KwaZulu- Natal'. The response to this in the defendant's plea was as follows: 'Save to deny that 23B Lindley Street is the registered address of the defendant, defendant notes the rest of the contents of this paragraph'.

[8] The effect of rule 17(3)(a) is that the defendant is deemed to have admitted that it is Dede Pine and Timber Products CC, a close corporation with its principal place of business and chosen domicilium citandi et executandi at 429 District Road, Richards Bay, KwaZulu- Natal.

[9] It will be noted from the rental agreement that the party which contracted with the plaintiff is Dede Pine and Timber Products with its physical site address at District Road 429, Richards Bay. The person who signed the agreement on behalf of the contracting party is described as Aslam Amra, with the title of director.

[10] In paragraph three of the particulars of claim the plaintiff pleaded the

agreement as follows: 'On or about 17 May 2006 the plaintiff duly represented by an authorised representative and the defendant, duly authorised and represented, concluded a written agreement in the name and style of a rental agreement (herein after referred to as "the agreement"), a copy which is attached hereto marked as annexure A. Plaintiff incorporates the contents thereof herein as if it is specifically traverse (sic).' The response to this paragraph in the plea is as follows: 'Defendant notes the contents of this paragraph but denies that this was the agreement between the parties.' In amplification thereof the defendant averred that on or about 17 May 2006 Mr Aslam Amra, a member of the defendant, entered into a written agreement with the plaintiff. It was said Mr Amra duly signed the written agreement on behalf of the defendant. It was alleged however that the words 'In variance to clause 3.1… for 60 months' were added to the agreement after signature, as well as the initial insurance value of R44 100.00 plus vat of R 6174.00 and the total of R 50 274.00. It was further pleaded that the defendant was always under the impression that the total annual rental was R 10 054.80 (vat inclusive) and that had the defendant been aware of the initial insurance value it would not have entered into the agreement with the plaintiff, and that in January 2007 the defendant advised the plaintiff that it disputed the debit charges.

[11] A number of points need to be made with regard to the defendant's plea. The date on which Mr Amra is said to have signed the agreement, namely 17 May 2006, is the date reflected on the first page of the agreement annexed to the particulars of claim. The words which are said to have been added to the agreement after signature appear on the last page of the document. The figures referred to in the plea relating to the initial insurance value, VAT and the total are the figures which appear in the column on the last page of the document.

[12] The allegation in the plea that the words to which I have referred were

added after the agreement had been signed was not pursued at the trial as no evidence was led on behalf of the defendant.

[13] In para 4 of the particulars of claim the plaintiff pleaded the terms of the agreement, including the fact that in terms thereof it undertook to lease to the defendant the equipment described therein, namely a Biometric Unit, the software and the cabling and installation. The response to this in the plea is that the defendant 'notes the contents of this paragraph but avers that plaintiff has breached the terms of the agreement'.

[14] In para 7 of the plea the defendant admitted that it failed to pay the annual rental but averred that 'same was due to the breach of the plaintiff'.

[15] In para 9 of the plea the defendant averred that the equipment never functioned since the date of the installation and that the plaintiff failed to provide the necessary training regarding the operation of the machine, which was faulty and of no use to the defendant due to the lack of training.

[16] How it can be argued in those circumstances that the defendant did not admit the agreement on the pleadings is beyond me (subject of course to its contentions with regard to the content of the document).

[17] Before I refer to the evidence I wish to deal with the application for a rescission of the default judgment which the plaintiff had obtained. The defendant's affidavit in support of the rescission application was deposed to by one Moosa Motala, who described himself as a member of the defendant. In paragraph 5 of his affidavit he says: 'On or about the 17 May 2006, Mr Aslam Amra, a

member of the applicant, entered into an agreement with the respondent. The said Mr Amra duly signed the agreement on behalf of the applicant. However, additions were made to the agreement after signature of same.' Further on in the same paragraph he says: 'The equipment has never functioned since the date of installation. I personally contacted the respondent on numerous occasions regarding same without any success. I annex hereto marked MM4 a copy of letter dated 10 January 2007 addressed to the respondent in this regard.'

[18] Annexed to Mr Motala's affidavit is the last page of the agreement annexed to the particulars of claim, signed on behalf of the defendant by Aslam Amra. Also annexed to his affidavit are two letters which he wrote to the plaintiff and in which he referred to the agreement relating to the "Blick clocking machine'. The last letter attached to the affidavit is a letter from the defendant's attorney to the plaintiff's attorney, dated 15 April 2008, in which he says: 'We act for Dede Pine and Timber Products. Your letter dated 3 March 2008 has been handed to us with instructions to reply. We are instructed that the machine was never utilised by our client as your client failed to provide the necessary training to our client regarding the operation of the machine. Your client is requested to uplift the machine.'

[19] At the hearing before the magistrate counsel for the defendant made an opening statement in which he explained that the defendant's case was that the agreement annexed to the particulars of claim was not in its original format. He told the magistrate that the primary issue in the matter was whether the plaintiff had performed in terms of 'its own agreement'.

[20] Turning to the evidence, Mr Naicker, the plaintiff's operational manager, testified that after the agreement had been signed (which did not involve him) it

was sent to him. He contacted the defendant to make arrangements for the installation of the equipment as it required a computer for the installation of the software. He personally made arrangements with an employee of the defendant and went there to install the equipment. He identified the agreement which is annexed to the particulars of claim as the document which was given to him by the sales department and pursuant to which he contacted the defendant with regard to the installation.

[21] Counsel for the defendant put it to Mr Naicker in cross-examination that the machine was removed on the 3 Sept 2009. He also put it to him that the evidence of the defendant would be that the system was not fully operational and that from time to time it gave problems.

[22] In his address to the magistrate at the end of the trial counsel for the defendant submitted that the written agreement did not show that the subscriber was the defendant. He said there was no dispute that there were discussions between the parties, and it was not in dispute that the plaintiff supplied a Biometric system to the defendant. He submitted that the plaintiff proved the agreement that was annexed to the particulars of claim, but that it was not an agreement with the defendant, as it did not describe the defendant as a close corporation. He also made it clear that it was not the defendant's case that the document that was annexed to the particulars of claim had not been signed by Mr Amra.

[23] There was no need for the agreement to be rectified. The effect of the defendant's plea was that it was admitted, or deemed to be admitted, that the plaintiff and the defendant had concluded the agreement which was referred to in the particulars of claim. The evidence led by the plaintiff established that the

equipment referred to therein had been installed at the defendant's business premises and one of its employees was trained how to operate it. A dispute later developed between the parties, after which the plaintiff removed the machine and uninstalled the software.

[24] The fact that the defendant was not referred to in the agreement as a close corporation is of no consequence. It is obvious from the pleadings and the evidence that the defendant and the entity referred to in the contract are one and the same. It is not unusual for close corporations and companies to refer to themselves in their dealings with others by their registered name, but without the abbreviation CC or (Pty) Ltd which forms part of it. This is recognised in s 63 of the Close Corporations Act, 1984, which provides for the joint and several liability of a member who is responsible for or authorised or permitted the omission of the abbreviation 'CC' in the circumstances set out in that section.

[25] I am not surprised that the magistrate made a comment about playing games. The basis on which the defendant tried to avoid liability by seizing on the omission in the agreement of the abbreviation CC behind its name was deplorable. This appeal was frivolous and misguided. It never had any prospects of success. The agreement between the parties provides for costs on the attorney and own client scale. In the absence of such agreement I would have awarded costs on that scale anyway.

[26] For the aforegoing reasons the appeal was dismissed with costs on the attorney and own client scale.

RADEBE J: I agree: