IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE HIGH COURT, CAPE TOWN)

High Court Case No: A47/2011

In the matter between

LYNN EATWELL Appellant

and

LUCAS DEYSEL CROUS INC Respondent

JUDGMENT

ROGERS AJ

1. This is an appeal from a judgment given by the Cape Town Magistrate's Court. By his order the magistrate set aside a warrant of execution which the appellant ("Eatwell") had taken out against the respondent ("LDC").

2. The circumstances giving rise to the proceedings in the court *a quo* are briefly the following. In April 2009 LDC issued summons against Eatwell in that court for R30 000, being money allegedly lent and advanced. Eatwell opposed the action. Her defence was that she had

borrowed only R10 000 and that the said amount was not due and payable, the agreement having been that she only had to repay the loan when she was in a financial position to do so.

3. In June 2010 LDC withdrew its action and tendered costs, allegedly on the basis that Eatwell had been placed under debt review. Eatwell's costs were taxed on 10 July 2010 in a sum of R5 018,50. When Eatwell sought payment of the taxed costs, LDC claimed that the amount of R5 018,50 had been discharged by set-off against the sum of R10 000 that she admittedly owed LDC.

4. Eatwell disagreed and obtained a warrant of execution. On 11 August 2010 LDC issued an application for the setting aside of the warrant and for its suspension pending the court's decision on whether or not set-off applied. Eatwell filed an opposing affidavit. There was no replying affidavit. The matter was argued in the court *a quo* on 22 September 2010. Immediately on completion of the argument the magistrate said that it was clear from the papers that set-off had occurred and that the application thus succeeded. The order as issued by the court *a quo* stated that the warrant was set aside, that set-off had applied and that the taxed costs of R5 018,50 had been set off against the amount of R10 000 owed by Eatwell. She was also ordered to pay LDC's costs.

5. LDC's application stated, in its heading, that it was an application for suspension of a warrant in terms of s78 of the Magistrates' Court Act 32 of 1944 ("the Act"). One of Eatwell's preliminary objections to LDC's application was that s78 was inapplicable. This is indeed so but it does not follow that LDC's application was fatally defective. The court *a quo* had jurisdiction under s62(3) of the Act to stay or set aside the warrant

"*on good cause shown*". If good cause was shown, LDC's misdescription of the empowering section would not have invalidated its application or deprived the court *a quo* of its power to act. The misdescription was not shown to have caused any prejudice. Ms Reilly, who appeared in the appeal for Eatwell, correctly did not persist with this point.

6. The "*good cause*" which LDC relied upon was that its obligation to pay the taxed costs had been discharged by set-off. Before dealing further with that issue, it is necessary to mention another preliminary objection raised by Eatwell. She alleged in her opposing affidavit that on 9 June 2009 she had concluded a deed of cession with her attorneys, De Abreu & Cohen Inc ("DAC"), in terms whereof she had ceded to DAC all her right, title and interest in and to the proceeds from any claim she might obtain against LDC for costs. She annexed the deed of cession to her affidavit. She alleged that by virtue of this cession the right to the taxed costs vested in DAC and for this reason LDC could not set-off, against such costs, the amount Eatwell personally owed to LDC.

7. This preliminary defence in turn gave rise to an argument by LDC that by virtue of the alleged cession Eatwell had not enjoyed standing to obtain the warrant of execution. This counter-argument was not raised in a replying affidavit but only in argument before the magistrate. In pronouncing judgment the magistrate said that the papers did not support Eatwell's argument that a cession had been concluded. There was no basis for that finding. Eatwell's version was undisputed on the papers, and she had the evidence afforded by the signed deed of cession.

8. Be that as it may, LDC's attack on Eatwell's standing was misconceived. It is clear from *Byron v Duke Inc* 2002 (5) SA 483 (SCA) that our

procedural law permits a cessionary of a judgment claim to obtain a warrant in the name of the cedent in whose name judgment was obtained (see also Jones & Buckle *The Civil Practice of the Magistrates' Courts in South Africa* 9th Ed Vol 1 p260 and fn 7). The cases cited in his heads by Mr Basson for the respondent as to the divesting effect of a cession (for example, *Picardi Hotels Ltd v Thekwini Properties (Pty) Ltd* 2009 (1) SA 493 (SCA)) do not detract from the practice approved in *Byron*. The divesting effect of a cession was firmly established in our law well before *Byron* was decided but was clearly not considered to detract from the practice approved in *Byron*. Mr Basson wisely did not press this argument at the hearing of the appeal.

9. Regarding Eatwell's reliance on the cession to resist set-off (assuming set-off to have been otherwise applicable), it is so that ordinarily a cession of a claim before mutuality exists between the said claim and the other claim against which it might have been set off precludes the operation of set-off (see *LAWSA* 2nd Ed Vol 2(2) §51 and the cases cited in fn 5). Whether this applies where the procedure sanctioned in *Byron* is followed is less obvious. If the cessionary of a judgment claim, instead of having himself substituted as the plaintiff and pursuing the claim in his own name, elects to enforce the claim in the cedent's name, the consequence might arguably be that the debtor is entitled to treat the cedent as the creditor for all purposes. In the present case there is the further consideration, on which Mr Basson placed considerable emphasis, that if the mutuality necessary for set-off existed before LDC became aware of the cession (LDC seems only to have learnt of the cession when Eatwell filed her opposing affidavit), set-off might operate despite the cession. (For a full analysis in support of this view, see *Agricultural & Industrial Mechanisation (Vereeniging) (Edms) Bpk v Lombard & Andere* 1974 (3) SA 485 (O).

The differing views on this question, as reflected in the two lines of authority cited in *LAWSA loc cit* fn 8, have not been finally settled by the Supreme Court of Appeal.) In view of my conclusion on the merits of the set-off issue, it is unnecessary to express a final opinion on these questions.

10. It is trite that in order for set-off to operate, both claims must *inter alia* be due and payable. This is clearly laid down in the leading authorities, of which I need mention only two: *Roman Catholic Church (Klerksdorp Diocese) v Southern Life Association Ltd* 1992 (2) SA 807(A) at 815C-D and *Siltek Holdings (Pty) Ltd (In Liquidation) t/a Workgroup v Business Connexion Solutions (Pty) Ltd* [2009] 1 All SA 571 (SCA) (and see also *Christie The Law of Contract in South Africa* 5th edition at 478; *LAWSA* 2nd Ed Vol 19 §244(c)).

11. In opposing LDC's application to set aside the warrant, Eatwell repeated her version that her admitted indebtedness of R10 000 was, by agreement, only due and payable when she was in a financial position to repay it. She alleged that she was not in a financial position to pay the money. LDC did not allege in its application or argue before the magistrate that a provision of this kind is void is vagueness. Mr Basson, who appeared in this court but not in the court *a quo*, submitted in a single sentence of his written heads of argument that the alleged provision would be void for vagueness. I do not think that this is something which can properly be argued for the first time on appeal. LDC knew, before it launched its application, that Eatwell alleged that the loan was only repayable when she was in a financial position to do so. LDC did not allege in its founding papers that the term was invalid; LDC did not even refer to Eatwell's version. LDC also did not file a replying affidavit. There are in any event a number of

cases in which similar provisions have been upheld as valid on the basis that it is possible to determine by evidence whether the debtor is in a financial position to make payment (see the cases cited in *Christe op cit* page 97 fn 380).

12. On appeal Mr Basson also made submissions to the effect that the alleged term was implausible or could not mean what Eatwell said. Again, none of this was raised in the papers in the court below.

13. In essence, there was a factual dispute on the papers. LDC alleged in its founding papers, as it had done in the withdrawn action, that the loan had been repayable by the end of August 2008. Eatwell alleged in her answering affidavit, as she had done in the withdrawn action, that the loan was repayable when she was in a financial position to do so and that she was not in a financial position to do so. LDC was seeking final relief, namely the setting aside of the warrant on the basis that set-off had operated. That was the relief granted by the magistrate. In accordance with the rule laid down in *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634E-635C, the magistrate could not make the order he did unless Eatwell's version was so untenable or far-fetched as to be capable of being rejected on the papers. That was plainly not the position. Eatwell explained in he affidavit the circumstances in which the loan had been given. Her version to this effect was consistent with what she had maintained in the prior proceedings in the court *a quo* and in even earlier proceedings in the Bellville Magistrate's Court.

14. I should add that this was not a situation of the kind considered in those cases which have held that it is not competent to obtain a writ of execution

if the amount owing under the judgment can only be ascertained after some further legal problem has been resolved (of which *De Crespigny v De Crespigny* 1959 (1) SA 149 (N) is an example). These cases contemplate some uncertainty in the judgment itself. There was no uncertainty about the amount due under the taxed bill of costs in the present case. The issue here was whether the amount due under the taxed bill had been discharged by set-off. A judgment debtor can apply to set aside a warrant if the judgment debt has been discharged by payment, set-off, novation and the like (see *Le Roux v Yskor Landgoed (Edms) Bpk & Andere* 1984 (4) SA 252 (T) at 257 E-F) but in accordance with general principles the onus rests on the judgment debtor to prove the discharge (see *Desai v Inman & Co* 1971 (1) SA 43 (N) at 50H-52A).

15. Mr Basson referred us to cases dealing with the principles of *mora*. I do not think these cases take the matter further. If Eatwell's version as to the agreed term governing repayment could not be rejected on the papers, it would follow that LDC was not entitled to make demand for payment at a time inconsistent with such term.

16. I am thus satisfied that the magistrate's decision cannot stand. In the court *a quo* it might have been open to LDC, in the light of the factual dispute, to ask for a stay of the warrant pending a determination of the factual dispute by oral evidence. However, LDC did not apply in the court *a quo* for a referral to oral evidence. Whether LDC would have been willing to go to oral evidence is unclear, given that LDC had – in the light of Eatwell's financial position – withdrawn an action in which the very issue of the repayment terms would have been determined. In the light of the withdrawal of the action, Eatwell might have had grounds for opposing a

referral to oral evidence. Be that as it may, I do not think it would be appropriate for this court on appeal to fashion any such order.

17. In the result I would uphold the appeal with costs and substitute for the court *a quo*'s order an order dismissing LDC's application in that court with costs.

ROGERS AJ

18. I concur and it is so ordered.

HLOPHE JP

16 August 2011