1911. March 7.

Cooper *vs.* Van Ryn G.M. Estates, Ltd.

Applicant in person submitted that the above charges for translation should have been disallowed; no such charges could be made in view of Article 137 of the South Africa Act, which made both languages official.

The Court disallowed the items challenged, with costs.

[Reported by GUY VAN PITTIUS, Esq, Advocate.]

DE VILLIERS, J.P. and WESSELS, J. March 8th, 1911.

OBERMEYER *vs.* BAUMANN.

Magistrate's Court.—Summons.—Pleading Cause of Action.—Action on Written Document.

Appellant sued respondent in a Magistrate's Court on a certain written document, alleged to be a promissory note, for breach of a promise by the respondent to pay a certain sum to the appellant. The document was attached to the summons, and contained no provision to pay the said sum to the appellant, but only to pay it into a certain bank:—Held, *that an exception to the summons, on the ground that it disclosed no cause of action, was good.*

1911. March 8.

Obermeyer *vs.* Baumann.

Appeal from a decision of the Resident Magistrate, Middelburg.

Obermeyer sued Baumann for the sum of £29, which amount he alleged in his summons "that the defendant owes him upon and by virtue of a certain promissory note, dated Witpoort, 5th May, 1910, made and signed by the defendant, and payable at the National Bank, Belfast, which promissory note was given by defendant to plaintiff for value received, and is originally for the sum of £29, and whereof plaintiff was at the time of signing, and still is, the legal holder." Plaintiff further alleged that the note had been duly presented, and was dishonoured. The document sued upon read: "Witpoort, 5/5/1910. Drie maanden na datum belove ik ondergeteekende te betalen in de Nationale Bank, Belfast, de somma van negen-en-twintig pond stg. £29 voor

1911. March 8. — Obermeyer *vs.* Baumann.

waarde genoten, zonder renten. (Sgd.) C. J. Baumann." To this summons the defendant excepted that it was bad in law, and did not disclose a cause of action, inasmuch as the document sued upon was not a promissory note, and did not contain a promise to pay to, or to the order of, a specified person, or to bearer. Plaintiff in his replication, stated that his name had been omitted in the document by an oversight, and that he would prove at the trial that defendant agreed to pay the amount to him (plaintiff), and that the document was delivered in proof of the fact that the amount was due to him by the defendant.

The Magistrate upheld the exception and dismissed the summons with costs.

T. J. Roos, for the appellant: If the document ment is an acknowledgment of debt, plaintiff can sue upon it. There is an allegation in the summons that the money is owing on the document; the document does not differ from an I.O.U.

[WESSELS, J.: An I.O.U. is a negotiable instrument, and payable to bearer.]

See *Sperryn and Stolp* vs. *Van Oudtshoorn* ([1906], T.S., 88), as to misdescription of the cause of action. The document is an acknowledgment of debt, and the Court will not refuse judgment upon it simply on the ground that it has been described as a promissory note. The exception is only a technical one. See *Reitz* vs. *Kock* (1 M., 56).

[DE VILLIERS, J.P.: Can there be an acknowledgment of debt without mentioning the name of the person to whom it is given?]

Yes. It was sufficient to state that the defendant owed £29 and that he owed it on this document. It seems that, by a clerical error, the name of the payee has been omitted. The Court does not require the same technicality in pleadings of the lower Courts, as in those of superior Courts. The summons, read with the promissory note, does not disclose a cause of action. As to jurisdiction of Magistrates in liquid cases, see Proclam. 21. 1902 sec. 12 (b). It is not clear whether the

name of the payee should be inserted, see section 82 of Proclam. 11. 1902. There is nothing to show that all these facts must be contained in the document itself; the Court will require proof of these facts.

[DE VILLIERS, J.P.: How can you get provisional sentence on the document?]

I do not think I could get provisional sentence on this document without extraneous proof.

[WESSELS, J.: Supposing the defendant did not appear how could the Court give judgment against him?]

The Court can give judgment that £29 is owing on the document.

[WESSELS, J.: You found your action on the promissory note?]

On the promissory note and the allegations in the summons. The fact that the defendant is the right man to be sued, is set out in the summons. If the matter is dealt with simply as a contract, then it is clear that plaintiff has an action. Here there is a contract between the parties, and the misdescription in calling the document a promissory note does not affect the case. Plaintiff is prepared to bring evidence that he is one of the contracting parties.

R. Gregorowski for the respondent: Plaintiff can not sue on the document at all.

[DE VILLIERS, J.P.: What would you say if plaintiff applied for an amendment?]

No amendment of the summons could be granted, as no cause of action has been disclosed,—see *Cook* vs. *Aldred* ([1909] T.S. 150). Plaintiff sues on the document and can not bring proof as to whom it is payable.

[DE VILLIERS, J.P.: Suppose he amended the summons by substituting "document" for "promissory note", would it not be a valid cause of action?]

No. The parties intended to make a negotiable instrument.

T. J. Roos replied.

1911.
March 8.
—
Obermeyer *vs.* Baumann.

DE VILLIERS, J.P.: This appeal must be dismissed. The plaintiff sued the defendant for an amount of £29, upon a document reading as follows: "Drie maanden na datum belove ik, ondergeteekende, te betalen in de Nationale Bank, Belfast, de somma van negen en twintig pond stg., £29, voor waarde genoten zonder renten (sgd) C. J. Baumann." The document is described in the summons as a promissory note, and all the allegations which one would expect in connection with a promissory note are embodied in the summons. To this summons the defendant excepted that the document was not a promissory note within the meaning of Section 82 of the Bills of Exchange Proclamation, because it did not state that the amount was payable to any specific person or to bearer. The magistrate upheld this contention, and the summons was therefore dismissed. Mr. *Roos*, on behalf of the appellant, has argued the appeal ably, and very ingeniously, and, if the summons had supported his contention, I certainly would have been disposed to assist the appellant. The Court naturally is anxious to assist a litigant, when a purely technical objection is raised. On the other hand, we cannot ignore the fact that the cause of action is the alleged promissory note. As Mr. *Gregorowski* points out, if the plaintiff had asked for an amendment of the summons in order to rectify the document, under the decision in *Cook* vs. *Aldred* ([1909] T.S. 150 the Magistrate could not have allowed the amendment. To construe the document even as an acknowledgement of debt would be to do violence to the language of the summons. The plaintiff's whole case is based upon this cause of action—a breach of a promise to pay him. Now there is no promise to pay to him or to anybody else in the document. The document is not even an acknowledgement of debt. That being the case the Magistrate was right, and the appeal must be dismissed with costs.

WESSELS, J.: In his summons the plaintiff complains that the defendant owes him £29 on a certain promissory note, and he attaches the document to the summons.

Thereupon the defendant says, " This is not a promissory note at all; it is not an obligation on anybody to pay, and under these circumstances you cannot sue me upon the document." To this Mr. *Roos* answers " If the summons be read carefully, it will be seen that what the plaintiff really intends is that the defendant has given him the document for value received, and, therefore, the defendant is liable to the plaintiff for the amount mentioned in the document." I would go so far with Mr. *Roos* as to say that I do not attach any great importance to the words " promissory note ", and I would be prepared to alter those words into " attached document " We then have to solve the question whether, if we read " document " for " promissory note ", the plaintiff is in a better position than he was before. If there is one thing certain in the law of pleadings it is that it does not matter in what Court you sue, whether in a superior or an inferior Court, you must set out correctly your cause of action. Without a cause of action, the judge has no jurisdiction whatsoever to deal with the case. If it is a mere technicality which requires to be altered—the name of a person or a place, a date, or some other trivial matter—the Court will readily help the litigant and make the necessary alteration. But when a plaintiff comes into Court with a particular cause of action he cannot ask that the Magistrate shall alter that cause of action. The defendant under such circumstances is entitled to say to the Magistrate, " You have no jurisdiction here, for the cause of action is not correctly set out, and, therefore, you are bound to dismiss the summons." That being the case, the first question we have to ask ourselves is, what is the cause of action set out in the summons? The cause of action—assuming that we alter " promissory note " into " document "—set out in the summons is that, by virtue of a certain document attached, the defendant owes the plaintiff £29. That is what, in effect, is stated in the summons. Next, we must refer to the document to see whether by virtue of it there is any admission on the part of the defendant that money is due by him to the plaintiff. When we

1911. March 8.

Obermeyer *vs.* Baumann.

turn to the document, we find that it is a document signed by the defendant, in which he states that he is prepared to pay £29 into the National Bank. By what stretch of imagination can that be said to be an acknowledgment of debt, in which the defendant admits that he owes the plaintiff anything at all? Directly, therefore, the Magistrate finds, *ex facie* the document, that there is no acknowledgement of debt and no promise to pay the plaintiff any money, he cannot allow the plaintiff to go into the box and testify as to the circumstances under which he obtained the document. He is bound then to say to the plaintiff, "You have not shown me that you have a cause of action and that you have a right to complain against the defendant." Under these circumstances the Magistrate was bound to dismiss the summons. If he was bound to dismiss the summons, *a fortiori* he was bound to uphold the exception.

[Appellant's Attorneys: STEGMANN & ROOS.
Respondent's Attorney: B. J. A. LINGBEEK.]

[Reported by GEY VAN PITTIUS Esq., Advocate.]

DE VILLIERS, J.P., and WESSELS. J. March 8th & 9th, 1911.

VAN DER LINGEN *vs.* MIDDELBURG MUNICIPALITY.

Pounds — Animals liable to be impounded — Regulations Power of Lt.-Governor — Interpretation of Regulations Ordinance 41 *of* 1904, *Sect.* 26—*Costs.*

Under Ordinance 41 *of* 1904, *Sect.* 26, *the Lieutenant-Governor had power to prescribe by regulation what animals should be liable to be impounded.*

A municipal bye-law provided that "no person in charge of any horse, mule, ass, or other cattle, such animals being under saddle, in harness, or yoke, shall allow the same to be or stand in any street, unless it be under the care of some fit and proper person; any such horse, mule, ass or other cattle found loose and be impounded":—Held, *that such bye-laws only applied to animals under saddle, in harness or yoke.*