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**REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA,
GAUTENG DIVISION, JOHANNESBURG**

Case Number: 2023/055133

(1) REPORTABLE: Yes

(2) OF INTEREST TO OTHER JUDGES: Yes

(3) REVISED: Yes

DATE 10 September 2024

SIGNATURE

In the matter between:

SS GLEN HIGH

Applicant

and

MADELEYN KRUGER NO

Respondent

JUDGMENT

DE BEER AJ

This matter has been heard in open court and is otherwise disposed of in terms of the Directives of the Judge President of this Division. The judgment and order are accordingly published and distributed electronically and handing it down.

1. The application before me is for summary judgment as embodied in rule 32 of the Uniform Rules of Court. The Applicant in the supporting affidavit relies on a

deponent who acts as the manager, employed by its managing agent, and who has all the documentation under his control. The deponent claims to have access to and personal knowledge of the same. The Applicant relies on the fact that the monetary value of its claim is capable of prompt and easy ascertainment or calculation. The statements presented for prompt calculation are annexed to the supporting affidavit.

2. The Applicant is a body corporate duly established by virtue of its registration in terms of the Sectional Titles Act.¹ The Respondent acts *ex officio* as the duly appointed executor of the Estate Late Takesure Tembo (“Tembo”) who was the registered owner of Unit 1[...] G[...] H[...] Body Corporate, CNR High Road & Central Edenglen. In terms of section 2(1) of the Sectional Titles Schemes Management Act² any person who becomes an owner of a unit in a sectional title scheme becomes a member of that particular body, *ex lege* and as such the Tembo became a member of the Body Corporate by virtue of his ownership.
3. The functions of a Body Corporate are specifically set out in section 3 of Sectional Titles Schemes Management Act, which *inter alia*, stipulates that the Body Corporate must:
 - 3.1. establish and maintain both an administrative and reserve fund; ³
 - 3.2. require owners, whenever necessary, to make contributions to such funds, which includes the provisions of electricity, water, and sewage, where the owners concerned are responsible for such funds; ⁴
 - 3.3. determine amounts to be raised for the purpose of such administrative and reserve funds, as well as contributions towards electricity, water,

¹ Act 95 of 1986.

² Act 8 of 2011.

³ Section 3(1)(a).

⁴ Section 3(1)(c).

and sewage, where the owners concerned are responsible for such funds;⁵ and

3.4. determine such administrative and reserve fund contributions in proportion to an owner's participation quota.⁶

4. In terms of section 3(2), Tembo, by virtue of his membership to the body corporate, is liable to make payment to the body corporate for all contributions levied by the Body Corporate, together with all charges relating to utilities and consumption charges on a monthly basis.
5. In terms of section 4(i) of the Sectional Titles Schemes Management Act, a body corporate is entitled to do all things reasonably necessary for the enforcement of the rules and for the management and administration of the common property. The Sectional Titles Schemes Management Act, and particularly sections 3 and 4 thereof remain binding on the owner, and any failure on the part of any owners of any section to ensure that payment of the levies or any other amounts due to the body corporate is paid as such, the body corporate shall be entitled to claim same from the owner.
6. The Applicant has the authority, as set out in section 3(2) to appoint its managing agent. In terms of section 4(a) of the Sectional Titles Schemes Management Act, a body corporate shall have the powers conferred upon it by the Sectional Titles Schemes Management Act and/or its regulations and/or Management and/or Conduct Rules, and such powers include appointing such managing agents and employees as the Applicant deems fit.
7. Accordingly, the Applicant through its managing agents, imposed levies, community scheme ombud service levies, special levies and legal costs recovering arrear contributions in an amount of R 322 966.82.

⁵ Section 3(1)(e).

⁶ Section 3(1)(f).

8. In reiteration, the Applicant in its supporting affidavit relies on the manager employed by the managing agent that stated that: *"All the documentation pertaining to this application is under my control. I have access thereto, and indeed possess personal knowledge thereof. I am able to depose to all aspects pertaining to this matter under oath and hereby duly do so. Where I rely on information conveyed to me by others, I believe such information to be correct and have no reason to believe otherwise"*. He continues and confirms the cause of action and the indebtedness in the amount of R 322 966.82 by attaching statements detailing the amounts and/or charges levied, being the total amount which consists of outstanding levies, community schemes ombud services levies, special levies, interest related charges, and legal costs in terms of the mandate entrusted upon him.
9. The Respondent opposed the summary judgment application by raising three defences to prevent the granting thereof: lack of personal knowledge of the deponent, a premature institution of the action because of a section 34(1) notice served in terms of the Administration of Estates Act⁷ and that the amount relied upon is not liquidated. The Respondent, during argument, similarly focused on these aforesaid grounds of opposition.

LACK OF PERSONAL KNOWLEDGE

10. The Respondent incorrectly contends that the deponent refers to himself as the appointed portfolio manager of the Plaintiff. After careful reading of the supporting affidavit, it is quite evident that the deponent refers to himself as the duly appointed portfolio manager of the Applicant, employed with the Managing agent of the Applicant.
11. Relying on the alleged lack of personal knowledge, the Respondent contends further that a portion of the amount claimed emanates from outstanding charges, levies and special levies imposed through a previous managing agent, Norma Wallace Property Management. The duties have subsequently been

⁷ Act 66 of 1956.

taken over by the current managing agent, Earle Blue. On the aforesaid premise, Respondent argued that the deponent has insufficient knowledge and is unable to state he has personal knowledge and is unable to verify the correctness of total amount of R 322 966.82. The Respondent submitted that the confirmation aforesaid amounts to inadmissible hearsay evidence and no reliance can be placed thereon.

12. In *Maharaj v Barclays National Bank Ltd*⁸ Corbett JA, in considering the requirement that the affidavit should be made by the plaintiff himself 'or by any other person who can swear positively to the facts', stated:

“Concentrating more particularly on requirement (a) above, I would point out that it contemplates the affidavit being made by the plaintiff himself or some other person who can swear positively to the facts. In the latter event, such other person's ability to swear positively to the facts is essential to the effectiveness of the affidavit as a basis for summary judgment; and the Court entertaining the application therefor must be satisfied, *prima facie*, that the deponent is such a person. Generally speaking, before a person can swear positively to facts in legal proceedings they must be within his personal knowledge. For this reason the practice has been adopted, both in regard to the present Rule 32 and in regard to some of its provincial predecessors (and the similar rule in the magistrates' courts), of requiring that a deponent to an affidavit in support of summary judgment, other than the plaintiff himself, should state, at least, that the facts are within his personal knowledge (or make some averment to that effect), unless such direct knowledge appears from other facts stated The mere assertion by a deponent that he can swear positively to the facts (an assertion which merely reproduces the wording of the Rule) is not regarded as being sufficient, unless there are good grounds for believing that the deponent fully appreciated the meaning of these words In my view, this is a salutary practice. While undue formalism in procedural matters is always to be eschewed, it is important in summary judgment applications under Rule 32 that, in substance, the plaintiff should

⁸ 1976 (1) SA 418 (A) at 434 A-H, *Rees and Another v Investec Bank Ltd* 2014 (4) SA 220 (SCA) at par 10.

do what is required of him by the Rule. The extraordinary and drastic nature of the remedy of summary judgment in its present form has often been judicially emphasised The grant of the remedy is based upon the supposition that the plaintiff's claim is unimpeachable and that the defendant's defence is bogus or bad in law. One of the aids to ensuring that this is the position is the affidavit filed in support of the application; and to achieve this end it is important that the affidavit should be deposed to either by the plaintiff himself or by someone who has personal knowledge of the facts.

Where the affidavit fails to measure up to these requirements, the defect may, nevertheless, be cured by reference to other documents relating to the proceedings which are properly before the Court The principle is that, in deciding whether or not to grant summary judgment, the Court looks at the matter at the end of the day on all the documents that are properly before it” [Own emphasis.]

13. In *Rees and Another v Investec Bank* ⁹ relying on *Barclays National Bank Ltd v Love* (quoted with approval in *Maharaj* at 424B – D) the following is said:

“We are concerned here with an affidavit made by the manager of the very branch of the bank at which overdraft facilities were enjoyed by the defendant. The nature of the deponent's office in itself suggests very strongly that he would in the ordinary course of his duties acquire personal knowledge of the defendant's financial standing with the bank. This is not to suggest that he would have personal knowledge of every withdrawal of money made by the defendant or that he personally would have made every entry in the bank's ledgers or statements of account; indeed, if that were the degree of personal knowledge required it is difficult to conceive of circumstances in which a bank could ever obtain summary judgment.” [Own emphasis.]

⁹ Supra at par 11.

14. Since *Maharaj*, the requirements of rule 32(2) have from time to time received the attention of our courts.¹⁰ In *Shackleton Credit Management v Microzone Trading* it was held in para 13 that:

“(F)irst-hand knowledge of every fact which goes to make up the applicant's cause of action is not required, and . . . where the applicant is a corporate entity, the deponent may well legitimately rely on records in the company's possession for their personal knowledge of at least certain of the relevant facts and the ability to swear positively to such facts.” [Own Emphasis]

15. Taking the nature of the deponent's office into consideration it suggests very strongly that he would in the ordinary course of his duties acquire personal knowledge of the outstanding levies, community schemes ombud services levies, special levies, interest related charges. The knowledge also further appears from other stated facts and documents that are properly before me. As per *Shackleton Credit Management v Microzone Trading supra*, First-hand knowledge of each and every fact is not required. It is prudent to mention that the Respondent does not dispute the authenticity of any documents transferred from the erstwhile managing agent to the current one, nor did she raise or reflected incorrect computed amounts/levies charged. Counsel for the Respondent confirmed that the authenticity of the documents is not in dispute. Seemingly, the Respondent solely relies on the ‘verification’ of the correctness thereof. The reliance on the ‘verification’ is without disputing the authenticity and correctness of the amounts. The total outstanding amount is in my view clear and capable of prompt ascertainment.
16. The managing agent, Earle Blue is a corporate entity responsible for managing the accounts of the Applicant and the deponent may well legitimately rely on the records in its possession, also those taken over by it. It often occurs that

¹⁰ Rees and Another Supra at par 12. Also see *Shackleton Credit Management (Pty) Ltd v Microzone Trading* 88 CC and Another 2010 (5) SA 112 (KZP); *FirstRand Bank Ltd v Beyer* 2011 (1) SA 196 (GNP); *Mowschenson and Mowschenson v Mercantile Acceptance Corporation of SA Ltd* 1959 (3) SA 362 (W); *Jeffrey v Andries Zietsman (Edms) Bpk* 1976 (2) SA 870 (T); *Standard Bank of South Africa Ltd v Han-Rit Boerdery CC* [2011] ZAGPPHC 120; *Standard Bank of South Africa Ltd v Kroonhoek Boerdery CC* [2011] ZAGPPHC 132; *Absa Bank Ltd v Le Roux and Others* 2014 (1) SA 475 (WCC).

managers and/or personnel attending to the accounts change or are replaced. Does that mean a new manager cannot verify the correctness of the amount. No, I am of the view that he/she can. It is not to suggest that he /she would have personal knowledge of every amount levied or that he is responsible for every entry but the thrust of it is that he/she has it under his/her control. On the conspectus of evidence, the levies, special levies and charges imposed are not disputed.

17. In this matter, there is sufficient probability in favour of the deponent having the requisite knowledge for the purposes of summary judgment.

A PREMATURE INSTITUTION OF ACTION BECAUSE OF A SECTION 34(1) NOTICE SERVED IN TERMS OF THE ADMINISTRATION OF ESTATES ACT.

18. The question up for determination here is whether the delivering of a section 34(1) notice in terms of the Administration of Estates Act precludes a creditor from enforcing its claim against a deceased estate. Counsel for the Applicant relied on *Nedbank Ltd v Samsodien NO*¹¹ “.... The weight of the authority is in favour of allowing a creditor to avail himself of the common-law enforcement procedures (see *Estate Stanford v Kruger* 1942 TPD 243; *Dauids v Estate Hall* 1956 (1) SA 774 (C), *Benade v Boedel Alexander* 1967 (1) SA 648 (O)... I have referred to. Professor FJ van Zyl, who was a renowned authority on the law of succession, in an article 'Boedelskuldeiser Versus Eksekuteur' (1987) 53 De Jure 308, convincingly comes to the conclusion that the creditor's common-law competence to enforce his claim against a deceased estate has not been abolished by the provisions in the Act (see also W Abrie et al *Deceased Estates* 5 ed 138). Finally, some support for this view is to be found in the recent judgment of the Supreme Court of Appeal, in *Scoin Trading (Pty) Ltd v Bernstein NO* 2011 (2) SA 118 (SCA), para 23, where K Pillay AJA remarked: 'Except for the risk of personal liability if he overpays, it is not unlawful for an

¹¹ 2012 (5) SA 642 (GSJ) par 3.

executor to pay a creditor's claim before the confirmation of such account.” for its contention that it does not.

19. Counsel for the Respondent, despite invitation, failed to provide case law that militates against the above finding.
20. In *Nedbank Ltd v Steyn*¹² it was held by Brand JA that the claims procedure provided for by the Administration of Estates Act does not prevent a creditor from instituting action.¹³
21. The delivering of a section 34(1) notice in terms of the Administration of Estates Act therefore does not deprive a creditor of his right to institute action. The Applicant may avail itself of the common-law remedies to claim an outstanding debt. Concomitantly the failure to deliver a notice cannot serve as a defence in summary judgment proceedings.

CLAIM THAT THE AMOUNT IS NOT LIQUIDATED

22. The Respondent disputes the liquidity of the amount with specific reference to the legal costs incurred in recovering outstanding levies and charges. Counsel for the Respondent referred to the management rule 25(5)¹⁴ “The body corporate must not debit a member’s account with any amount that is not a contribution, or a charge levied in terms of the Act or these rules without a member’s consent or the authority of a judgment or order by a judge, adjudicator or arbitrator.” [Own emphasis] and submitted that the legal costs in the amount of R 17 316.45 have not been taxed or agreed to as provided for in management rule 25(5) and therefore the amount cannot be construed as liquidated. Counsel for the Respondent incorrectly referred me to management rule 25(5), in fact rule 25(4) deals with reasonable legal costs and

¹² (20085/2014) [2015] ZASCA 30 (25 March 2015).

¹³ Paras 7-15.

¹⁴ Rules and Regulation to the Sectional Titles Schemes Management Act 8 of 2011. GNR 1231 of 7 October 2016 Sectional Title Management Regulations (Government Gazette No. 40335) Schedule of the Sectional Titles Schemes Management Regulations, Annexure 1, Management Rules.

disbursements as taxed or agreed. Management rule 25(5), *inter alia*, deals with levying charges where a member consents to it.

23. The question of legal costs incurred by a body corporate in the collection of arrear levies and the recovery thereof came up for adjudication in previous judgments and was pronounced upon. The question of untaxed legal costs and whether it can be added to a member's account together with other arrear levies and interest was raised in *The Body Corporate Marsh Rose v Steinmuller and Others*¹⁵ ("*Marsh Rose*") Although the court was primarily concerned with this question to determine the issuing a levy clearance certificate for the purposes of section 15B(3)(a)(i)(aa), the principles enunciated nevertheless will apply to summary judgment matters.
24. In *Marsh Rose*, the majority judgment, with reference to the management subrules 25(4) and 25(5), per Motojane J, held:¹⁶ "The amount of collection and legal costs claimed before a clearance certificate could be issued is R 57 395.80. These costs have not been taxed or agreed to as provided for in section 25(5) of the STSMA and are accordingly unlawfully levied as the amount is not due." The minority judgement as per Adams J, however held:¹⁷ "Maybe it is apposite at this juncture to deal with the issue of the legal charges, which, according to the first respondent, should not be included in the payments due under s 15B(3)(a)(i)(aa). The trial court agreed with the first respondent on this issue. I don't. I find support for my view in *Barnard NO v Regpersoon van Aminie en 'n Ander*, in which the SCA held that, in giving expression to the intention of the provision [s 15B(3)(a)(i)(aa)] to give effective protection to the body corporate, it was clear that the contributions were covered by the provision and therefore the relevant legal costs also fell within the ambit of the provision. I am therefore of the view that the Body Corporate was entitled to insist on the legal costs being paid before issuing the clearance certificate. To say that these costs should have been taxed, as did the first respondent, is, in my view, not sustainable..." [Own Emphasis]

¹⁵ Case Number A5002 23 September 2021.

¹⁶ Par 28.

¹⁷ Par 46.

25. The aforesaid matter then served before the supreme court of appeal, *Body Corporate, Marsh Rose v Steinmuller and Others*¹⁸ and with reliance on *Barnard NO v Regspersoon van Aminie en 'n Ander*¹⁹ it was held that:

“ ... the question arose whether the embargo covered not only arrear levies and interest, but also legal costs incurred by a body corporate in seeking to recover amounts due to it by the owner of a unit. This court held that the legislature intended to give to a body corporate effective protection. It reasoned that a body corporate was merely a collective of owners of units who shared expenses. If one owner fails to meet their obligations, the burden fell on others, hence the need for an effective remedy. This court concluded that legal costs incurred in recovery of amounts due to body corporate fell within the ambit of the protection afforded by s 15B(3)(a) of the Act.”²⁰ [Own Emphasis]. Notwithstanding the costs being untaxed, it was held that it does form part and ought to be included and paid before a clearance certificate stands to be issued. The Supreme Court of Appeal did not directly labour upon the question of untaxed legal costs, but it would appear, followed and sustained the minority finding by Adams J, thereby implying that it is not necessary for the legal costs to be taxed. But it is prudent to note that the Supreme Court of Appeal in its judgment referred to ‘legal costs incurred’. Therefore, in my view where ‘legal costs are incurred’ by a Body Corporate it need not be taxed. Management rule 25(4) is qualified by the Supreme Court of Appeal where it refers to ‘as taxed’. It is clear from the Supreme Court of Appeal’s judgment that untaxed legal costs formed part of the monies due by a member. Thus, the legal costs incurred in recovering arrear amounts *in casu* need not be taxed for its inclusion to the levies and other charges for the purposes of summary judgment.

26. Section 15B(3)(a)(i)(aa) of the Sectional Titles Act²¹ confers upon a body corporate a statutory right to resist transfer of a unit in the scheme until all moneys due to it have been paid or it is satisfied that the arrangements for their

¹⁸ 2024 (2) SA 270 (SCA) at para 27.

¹⁹ 2001 (3) SA 973 (SCA).

²⁰ Ibid paras 15-18.

²¹ See vn 1 above.

payment have been made.²² The monies due are inclusive of legal costs. Therefore, the entitlement to add such costs to a members account is manifest.

27. I deem it prudent to have further regard to the wording rule 25(4) of the rules and regulations to the Sectional Title Scheme Management Act that stipulate that: “A member is liable for and must pay the body corporate all reasonable legal costs and disbursements, as taxed or agreed by a member, incurred by the body corporate in the collection of arrear contributions or any other arrear amounts due and owing by such member to the body corporate, or in enforcing compliance with these rules, the conduct rules of the Act.” [Own Emphasis] The subrules 25(4) and 25(5) refer to either consent to or agreed by a member. The question that begs answering is what the ‘consent’ or ‘agreed to’ entails?
28. In this matter the conduct rules of the Body Corporate determine: “If the Body Corporate or the Trustees instruct a firm of Attorneys in connection with or arising out of any infringement by an occupant of any provision of these rules, such occupant shall be liable to reimburse the Body Corporate on demand for all its legal costs incurred in respect thereof on an Attorney Client basis.” [Own Emphasis]. The emphasis placed on reimbursement of costs incurred on an attorney client scale. The conduct rules are rules that the Respondent consented to upon becoming a member. There is an underlying agreement to be bound by it.
29. The Respondent upon becoming a member ‘consented’ and/or ‘agreed’ to reimburse the body corporate on demand, for all its ‘legal costs incurred’, thereby, in my view, also further satisfying the requirements in subrules 25(4) and 25(5).
30. Accordingly, the legal costs incurred in this matter need not be taxed to be included in the claim. Subrules 25(4) and 25(5) are further satisfied in that the Respondent consented and or agreed that such legal costs so incurred be

²² Body Corporate, Marsh Rose v Steinmuller and Others supra at par 26.

reimbursed which constitutes a liquidated amount for the purposes of summary judgment.

31. As already indicated, the *Body Corporate, Marsh Rose v Steinmuller and Others*²³ referred to 'legal costs incurred' which brings me to the following aspect that requires me to draw a distinction between "legal costs incurred" and legal costs that are claimed by its primary source or provider, the legal representative. In the latter case it is trite law that attorney's fees (legals costs) do not constitute a liquidated debt until ascertained and determined by taxation. See *Blakes Maphanga Inc v OUTsurance Insurance Co Ltd* ²⁴ In the matter before me, the amount of legal costs was already incurred by the Body Corporate and stands to be reimbursed by the Respondent. By reason of it already having been incurred by the Body Corporate, it forms a liquidated amount that has been determined which needs not be taxed. It constitutes a liquidated amount that can be included in the determination of the liquidated amount owed for summary judgment purposes.
32. For the reasons set out above, I see no reason why the untaxed legal costs cannot be included to form part of the monies due to the Applicant. The total outstanding amount is capable of being promptly computed and established.

RESPONDENT'S DEFENCE

33. The Applicant relies on several grounds in its supporting affidavit to demonstrate that the Respondent's opposition is not *bona fide* and purely to delay the inevitable.
34. On the conspectus of evidence, it is evident that the Respondent concedes that the amount is due and payable. The Respondent in her plea relies on the provisions of section 34 of the Administration of Estates Act as defence. She pleads that in the circumstances the claim is premature, and that Applicant ought to wait until the property is sold, thereby entitling the Applicant to place

²³ Supra at par 27.

²⁴ 2010 (4) SA 232 (SCA).

reliance on section 15B(3)(a)(i)(aa) of the Sectional Titles Act by refusing a clearance certificate until all outstanding monies are paid. Differently put the Respondent admits that the amount is due and payable, although not immediately. Accordingly, it is evident to me that Respondent is only causing a delay by filing a plea and opposing the summary judgment application.

35. The Respondent also does not dispute the authenticity of the documents utilised to determine the liquidated amount.
36. The Respondent's plea and opposing affidavit do not disclose any plausible triable issues or put differently, her affidavit fails to show that there is a reasonable possibility that the defences which she advances may succeed at trial.²⁵
37. There is 'some onus of proof' on a Respondent resisting summary judgment.²⁶ The test is whether the opposing affidavit sets out facts which, if proved at the trial, will constitute a defence.²⁷ The Respondent's opposing affidavit fails to set facts which constitutes a defence. No sustainable defence has been put forward.
38. In the exercise of a discretion on liquidity a court must not only look at the summons in order to decide whether a claim is for a liquidated amount of money; the defence disclosed in the defendant's opposing affidavit must also be taken into account.²⁸ The Respondent's defence does not bring about any doubt as to the amount claimed which in any event can be easily determined by way of a calculation.

²⁵ See, inter alia, *Wright v Van Zyl* 1951 (3) SA 488 (C); *Lombard v Van der Westhuizen* 1953 (4) SA 84 (C); *Soorju v Pillay* 1962 (3) SA 906 (N); *Shepstone v Shepstone* 1974 (2) SA 462 (N) at 467; *Citibank NA, South Africa Branch v Paul* NO 2003 (4) SA 180 (T) at 200J–201A; *He & She Investments (Pty) Ltd v Brand* NO 2019 (5) SA 492 (WCC) at 497B–C; *South African Securitisation Programme (RF) Ltd v Cellsecure Monitoring and Response (Pty) Ltd* (unreported, GP case no 21647/2021 dated 25 November 2022) at paragraph [33].

²⁶ See *Kassim Bros (Pvt) Ltd v Kassim and Another* 1964 (1) SA 651 (SR) per Hathorn ACJ at 652, 653A.

²⁷ In *Shepstone v Shepstone* 1974 (2) SA 462 (N) at A 467H it was held that 'a defendant may successfully resist summary judgment where his affidavit shows that there is a reasonable possibility that the defence he advances may succeed on trial'.

²⁸ *Tredoux v Kellerman* 2010 (1) SA 160 (c) at 166G

39. A liquidated amount of money is an amount which is either agreed or which is capable of speedy and prompt ascertainment. Whether an amount is capable of speedy ascertainment is a matter left to the individual discretion of a judge.²⁹ I am satisfied that the amount for summary judgment purposes can be determined and is capable of being the subject of summary judgment.
40. In this matter, the Applicant has complied with the requirements of rule 32, the Respondent has no *bona fide*, triable defence and summary judgment stands to be awarded.

COSTS

41. I was reminded by counsel for the Respondent that although consent to costs is not prohibited by the common law, the court retains a residual discretion to enforce such an agreement, and parties cannot by agreement deprive a court of the discretion it has to costs. Reference was made to *Intercontinental Exports (Pty) Ltd v Fowles* 1999 2 All SA 304 (A)³⁰ "Because a court exercises its discretion judicially, not capriciously, it would normally be bound to recognise the parties' freedom to contract and to give effect to any agreement reached in relation to costs. But good grounds may exist, depending upon the particular circumstances, for following a different course. This might result, on a proper exercise of discretion, in a party being deprived of agreed costs, or being awarded something less in the way of costs than that agreed upon." I can find no reason, in the exercising of my discretion in this matter, to deviate from the agreement between the parties.
42. The Applicant's counsel correctly submitted that the matter deserves only costs on the magistrate's court scale. He qualified it further by relying on the body corporate rules that provides for cost on an attorney client basis.

²⁹ Botha v Themistocleous 1966 (1) SA 107 (T) at 110C-D, Maasdorp and Smith v Sullivan 1964 (4) SA 2 (E) at 3B-D.

³⁰ At par 26.

43. In the premises I make the following order:

1. Summary judgment is awarded in the amount of R 322 966.82 (Three Hundred and Twenty-Two Thousand Nine Hundred and Sixty-Six Rand and Eighty-Two Cents).
2. Interest on the aforesaid amount at the rate of 11.25 % interest rate per annum from 08 June 2023 to date of payment.
3. Costs of the suit on the magistrate's court scale as between attorney and client which include VAT.

DE BEER AJ
ACTING JUDGE OF THE GAUTENG
DIVISION, JOHANNESBURG

APPEARANCES:

For the Applicant: Adv. R. Smith

Instructed by: Schüler Heerschop Pienaar Attorneys

For the Respondent: Adv. J. Eastes

Instructed by: Velilo Tinto & Associates Inc.

Date of Hearing: 28 August 2024 – Open Court

Date of Judgment: 10 September 2024 – Electronically