

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

CASE NO: A2024-034881

(1) REPORTABLE: YES / NO

(2) OF INTEREST TO OTHER JUDGES: YES/NO

(3) REVISED.

DATE: 21 January 2025

SIGNATURE

In the matter between:

SIBONGILE BEATRICE MTSHALI

Appellant

And

HARBOUR TOWN HOMEOWNERS ASSOCIATION

Respondent

J U D G M E N T

LIEBENBERG AJ:

- [1] The appellant is aggrieved by the summary judgment granted against her on 1 March 2024 by the Magistrates' Court for the district of Meyerton held at Midvaal. The judgment was granted at the instance of the respondent which is a Homeowners Association ("*HOA*") initially incorporated as a non-profit company in terms of the Companies Act 1973 ("*the 1973*"), in respect of its claim for payment of arrear levies owed to it by the appellant.
- [2] Summons in the action was issued in November 2022 and served on the appellant on 9 January 2023. She noted her appearance to defend the action

on 24 January 2023 and delivered an exception to the respondent's particulars of claim. Pursuant to the exception, the respondent amended its particulars of claim without objection. It would appear that the appellant delivered a second exception, which she withdrew.¹ The appellant delivered her plea, which incorporated a special plea of prescription, a plea over and a main conditional counterclaim and an alternative thereto.

- [3] The application for summary judgment followed on 31 July 2023, which the appellant opposed. The matter came before the court below which handed down its written judgment and order on 1 March 2024.

The factual matrix

- [4] There is no dispute that the respondent's claim is susceptible to an application for summary judgment. The parties are also agreed on the relevant legal principles applicable to such applications. Where they differ, is whether the appellant raised triable issues. The respondent and the court below contended that she did not do so.
- [5] On the common cause facts, the appellant became the registered owner of an immovable property described as ERF 1[...] V[...] H[...] Township, Ext 6, situated in Midvaal Local Municipality (*"the appellant's property"*) on or about 10 August 2007. The property is within a residential estate of which the appellant is the HOA.
- [6] The title deed in respect of the appellant's property provides that *"every owner of an erf shall become and remain a member of the homeowners association and be subject to its constitution until he ceases to be an owner as aforesaid. No erf ... shall be transferrable to any person who has not bound himself to the satisfaction of the association to become a member of the homeowners association."*

¹ The record does not reflect the reason for the withdrawal of the exception.

- [7] The parties are agreed on the terms of the appellant's Memorandum of Incorporation ("*the MOI*"), amended from time to time. The most recent version of the MOI was approved at a general meeting of members on 12 September 2015 and received by the Companies and Intellectual Property Commission (CPIC) on 12 November 2015. A copy thereof had been annexed to the particulars of claim.
- [8] There is also no dispute that, from time to time, the appellant made payments to the respondent in respect of levies and special levies, as reflected in the schedule annexed as "D" to the particulars of claim. The appellant admitted that the respondent demanded payment from her and she refused to make payment.
- [9] The parties agree that the provisions of the National Credit Act² are not applicable to the matter at hand.

The respondent's claim

- [10] The respondent's case is premised on the following allegations.
- [11] By virtue of her ownership of the property and the terms of the title deed, the appellant became a member of the HOA, and a subscriber to the MOI to which she is bound by virtue of the provisions of the "*Companies Act*."
- [12] In terms of clause 9.2.1 of the most recent MOI, a registered owner of a property in the estate qualifies for membership of the HOA, and all persons who so qualified for membership at the date of adoption of the MOI, shall remain members of the association until they cease to be members in terms of the provisions of the MOI. Additionally, clause 9.2.2 provides that each registered owner, who has bound himself to become a member of the HOA in terms of the title deed, or otherwise, shall become a member of the HOA with effect from the date on which such person becomes the registered owner.

² Act 24 of 2005.

- [13] To enable the HOA to conduct its business and to meet its expenses, all members are liable to pay levies to HOA, the extent of which levies is subject to approval by ordinary resolution of the members at the annual general meeting of members. Members are to make payment of the levies so imposed on or before due date. The MOI also allows for the imposition of special levies.
- [14] At the annual general meetings of members held on 12 September 2015, 19 November 2016, 18 November 2017, 13 October 2018, 20 November 2019, the extent of levies payable, as well as an interest rate of 15.5% per annum to be levied on arrears, were approved by ordinary resolution.
- [15] Until 24 June 2019, the appellant made regular monthly payments of the levies due. Subsequently, she failed to do so but for a payment of R 10 000.00 made on 16 February 2021. As at 1 November 2022, the appellant was indebted to the HOA in the amount of R 151 300.00, as set out in the annexure to the summons.

The appellant's defences and counterclaim

- [16] The appellant raised, in the main, three defences:

[16.1] A special plea of prescription, contending that a least a portion of the respondent's claim had been extinguished by the effluxion of time (*"the prescription issue"*).

[16.2] Although she admits the terms of the title deed, the appellant pleaded that these terms do not result in her automatically becoming a member of the HOA or a subscriber to the MOI, or that she is bound by decision taken at annual general meetings of the HOA. As such, she denied being a member of the HOA, and therefore liable to make payment of levies to the respondent (*"the membership issue"*).

[16.3] The appellant also pleaded that the respondent *"has not pleaded any cognisable basis for the [appellant] being bound by the [respondent's] Memorandum of Incorporation."* (*"the exception issue"*)

- [17] Additionally, the appellant filed a counterclaim, couched in two alternatives.

[18] The main counterclaim is conditional on a finding of her having become and remained a member of the association and is premised on the terms of the MOI. It was alleged, it contains a tacit term that the HOA would:

“3.2.1 at all times act in the best interests of members of the Plaintiff, including the Defendant;

3.2.2 would not act to the prejudice of any members of the Plaintiff, including the Defendant;

3.2.3 collect from members of the association levies due by such members; ...”

[19] She alleged that the HOA had breached the terms of the MOI, including the tacit term, by failing to collect levies and thus being unable to maintain the infrastructure of the residential estate. As a result of this breach, the appellant suffered damages in the amount of R 1 800 000.00 “being the difference between the market value of the Defendant’s immovable property in the amount of R 3 800 000.00 [when she became a member of the association] and the current market value of the Defendant’s immovable property in the amount of R 2 000 000.00.”

[20] In the alternative, and in so far as it is found she was not a member of the HOA, the appellant counterclaimed for the same amount of R 1 800 000.00 premised on the respondent having (a) breached an alleged legal duty to act in the best interests of property owners;(b) not to prejudice any such owners; (c) to collect levies from members of the association; and (d) to maintain and promote the infrastructure of the residential estate.

The respondent’s application for summary judgment and supporting affidavit

[21] In its affidavit in support of the application for summary judgment, the respondent countered the prescription issue on two bases: firstly, the appellant being a member of the governing body of the plaintiff at all relevant times,

prescription does not run by virtue of section 13(1)(a) of the Prescription Act;³ and secondly, the appellant continued to pay the running account which amounts were allocated to the oldest debt first and thereby acknowledged liability and interrupted prescription.

[22] In relation to the membership issue, the respondent contended it is clear from the terms of the title deed that the appellant is a member of the respondent and liable to pay levies to the respondent. Admitting being the owner, there is no basis upon which the appellant can be unaware of the terms and provisions of the title deed.

[23] In relation to the counterclaims, the respondent stated that:

[23.1] The appellant cannot simultaneously allege that, in so far as she is a member of the respondent, the respondent was obliged to collect levies and special levies and in the same breath refuse to make payment of such levies and special levies and admit to not making any payments.

[23.2] The appellant cannot plead that, although she was not a member of the respondent, there were members of the respondent who were obliged to pay levies and special levies and from whom the respondent was obligated to collect levies and special levies, without specifying on what basis such other owners are to be members.

[23.3] The appellant's suggestion that her property no longer has any value is without foundation in fact or in law.

[24] Referring to the appellant's admission of having made payments to the respondent from time to time, the respondent contended that the appellant had failed to set out any basis for such payments other than her being a member of the respondent and being liable to make payment of levies to the respondent.

The affidavit resisting summary judgment

[25] In her affidavit resisting summary judgment, the appellant objected to the respondent raising the prescription issue in its supporting affidavit, contending

³ Act 68 of 1969.

that the respondent may only address the special pleas by way of a replication, which it had not done. On the appellant's calculations, at least R 40 850.00 had become extinguished by prescription.

[26] In relation to the membership issue, the appellant admitted being a registered owner of the property. She contended that the relationship between a homeowners' association and its members is contractual in nature, and that a member becomes a member consensually. Her case is that the provisions of the title deed do not result in an automatic membership of the respondent and a subscription to its MOI, and that a separate legal act was required for her accession. The separate legal act entails her being registered as a member.

[27] In respect of her counterclaim, the appellant contended that the respondent did not deny the market value of the appellant's property (and attached a copy of a building contract as well as the offer to purchase she made in acquiring the property); nor did it deny the tacit term in the MOI she contends for; it did not deny that the respondent failed to acquit itself of the obligations alleged by the appellant notably including the collecting of levies of some 20 named members of the HOA.

The judgment of the court below

[28] The court below found against the appellant on all scores and granted judgment in favour of the respondent as claimed.

[29] In relation to the membership issue, the magistrate reasoned that the appellant's defence emphasised the contractual nature of the relationship between a homeowners association and its members. The court below rejected the appellant's submission that her membership of the HOA required a separate legal act. It held that the terms and conditions of a title deed are binding and sacrosanct, and that the appellant's argument that an agreement between the owner and the HOA post-transfer undermines the inherent certainty provided by a title deed. The interpretation contended for by the appellant would lead to absurdity as it would necessitate a single body to impartially manage disparate contractual relationships among multiple

members. Accordingly, the magistrate held that the defence is not only needlessly bald, but also “*clearly bad in law*”.

[30] In respect of the baldness of her defence regarding the membership issue, the court below held that the appellant failed to plead the material facts in support of her denial of membership, she made no mention of her knowledge or not of the terms of the title deed of her property, nor did she deal with the MOI in place prior to the adoption of the most recent version in 2015, and her membership prior to 2015. Additionally, the respondent did not dispute the contents of schedule of payments.⁴

[31] In respect of the prescription issue, the court below rejected the appellant’s submission that the respondent was not entitled to deal with it in its supporting affidavit. The written judgment only refers to respondent’s argument on the interruption of prescription based on the provisions of section 13(1)(e) of the Prescription Act, finding that given the appellant’s failure “*to provide a bona fide defence concerning membership, by neglecting to disclose the grounds of her defence, it logically follows that the [respondent’s] defence of prescription also lacks bona fide.*”

[32] In relation to the counterclaims, the court below held that the failed to set out in sufficient particularity, the grounds why the respondent would owe her a duty in circumstances when she was not a member of the HOA. The magistrate commented on the contradiction in the appellant’s respective versions in respect of the defence presented to it and the counterclaim the appellant’s intended pursuing in the High Court, describing it as clearly disingenuous. The court below found the counterclaim to be sketchy and the appellant’s intention clearly being to delay the proceedings and impede the respondent’s claim by seeking a stay the proceedings in the lower court and pursue her counterclaim in the High Court.

⁴ Annexure “D” to the particulars of claim.

The grounds of appeal

[33] The appellant's notice of appeal contains 18 grounds which can conveniently be grouped under four headings:

[33.1] In respect of the prescription issue, the magistrate ought to have found that the special plea of prescription constituted at least a partial defence.

[33.2] The magistrate erred because the excipiability of the particulars of claim makes it impossible for the respondent to verify a complete cause of action, thus rendering the application for summary judgment fatally defective (*"the excipiability issue"*).

[33.3] The court below ought to have found that the particulars of claim were excipiable as they lack averments to sustain a finding that the appellant was in fact a member of the HOA (*"the membership issue"*).

[33.4] The magistrate misdirected himself regarding the main counterclaim being conditional and erred in holding that the counterclaim was a delaying tactic (*"the counterclaim issue"*).

The merits of the appeal

[34] I am satisfied that the order of the court below must stand. I deal with each of the issues on appeal below.

The prescription issue

[35] A claim such as the respondent's is a "debt" subject to a three year prescription period. By virtue of section 15 (1) of the Prescription Act, service of the summons on 9 January 2023 interrupted prescription of the respondent's claim. Thus, bar any other form of interruption, any amounts due earlier than 9 January 2000 would have become extinguished. The appellant's defence is that HOA lost its right of action against her, and at least R 40 850.00 of the respondent's claim had become extinguished.

[36] The respondent's response to the extinctive prescription issue is premised on two bases:

[36.1] Firstly, the appellant being a member of the governing body of the HOA, that the running of prescription has been delayed by virtue of section 13(1)(e) of the Prescription Act which provides for a delay of prescription states that:

“If –

...

(e) the creditor is a juristic person and the debtor is a member of the governing body of such juristic person;

...

(i) the relevant period of prescription would, but for the provisions of this subsection, be completed before or on, or within one year after, the day on which the relevant impediment referred to in paragraph ... (e) ... has ceased to exist, the period of prescription shall not be completed before a year has elapsed after the day referred to in paragraph (i).” [own emphasis]

[36.2] Secondly, that the appellant’s payment of an amount 16 February 2021 interrupted prescription as envisaged by section 14(1) of the same Prescription Act which provides:

“(1) The running of prescription shall be interrupted by an express or tacit acknowledgement of liability by the debtor.

(2) If the running of prescription is interrupted as contemplated in subsection (1), prescription shall commence to run afresh from the day on which the interruption takes place or, if at the time of the interruption or at any time thereafter the parties postpone the due date of the debt from the date upon which the debt again becomes due.”

[37] In the heads of argument filed on behalf of the appellant, the judgment of the court below on the prescription issue was described as “*somewhat strange*” in that the magistrate did not make an actual finding on the issue, and it was submitted that there is no logic to the finding that, because the appellant did not disclose a *bona fide* defence on the membership issue it logically followed that

the defence of prescription also lacks *bona fides*. The appellant also criticised as illogical and difficult to comprehend, the finding that absent genuine grounds to dispute membership, which would trigger the applicability of section 13(1)(e) of the Prescription Act as a triable issue, the defence of prescription is not *bona fide*.

[38] Before this Court, the appellant again pressed the argument that, absent a replication, the respondent was not permitted to address the prescription issue in its verifying affidavit to the application for summary judgment.

[39] Whilst the judgment of the court below is scant on its reasons, it is patent that the prescription defence was rejected, and correctly so.

[40] Firstly, I am satisfied that the provisions of section 17 of the Prescription Act do not assist the appellant. Subsection (1) prevents a court of its own from taking notice of prescription. Subsection (2) mandates a litigant who seeks to invoke prescription, to do so in the relevant document filed of record in the proceedings. The proper way to raise prescription is by way of a special plea,⁵ which is what the appellant did. This having been one of her defences, Magistrates' Court Rule 14(2)(b) required the respondent explain briefly why the prescription issue does not raise an issue for trial, which it did on two bases. There is accordingly no merit to the appellant's objections in this regard.

[41] Secondly, denying as she does in the main, that she is a member of the HOA, the appellant did not explain why, despite her denial of liability to do so, she made the payments to the respondent. She also did not seek repayment of any of the amounts she had paid to the respondent. As will appear later in this judgment, I am satisfied that the appellant's denial of her membership of the HOA is not *bona fide*, and that she is in fact a member of the HOA. I am however not satisfied that she was "*a member of the governing body*" or a director of the HOA, which would cause a delay in the running of prescription

⁵ *Rand Staple-Machine Leasing (Pty) Ltd v ICI (SA) Ltd* 1977 (3) SA 199 (W).

of the respondent's claim against her by virtue of the provisions of section 13(1)(e) of the Prescription Act.

[42] Thirdly, the appellant did not dispute the contents of the statement of account nor that her most recent payment had been made on 16 February 2021, being less than three years prior to the institution of the action in the court below. Mr Prinsloo, for the respondent, relying on *Eerste Nasionale Bank Van Suidelike Afrika Bpk v Vermeulen*,⁶ persuasively argued that the appellant's account with the respondent is a running account akin to a current banking account, and that each of her payments to the respondent constituted an acknowledgement of her liability which interrupted prescription, as envisaged by section 14(1) of the Prescription Act. It was also argued that, but for a bald denial, the appellant presented no material facts to negate the presumption that her payments to the respondent amounted to anything but an admissions of liability.

[43] Accordingly, the respondent's claim has not been extinguished, and the prescription defence lacks merit and thus does not constitute an issue for trial.

The excipiability issue

[44] The excipiability and membership issues are intertwined and centre around the appellant's contention that her accession to membership of the HOA demanded more than just the terms of the title deed in relation to her property.

[45] The magistrate held view that the "new" summary judgment procedure discounted a "defence of excipiability" as the appellant had already pleaded to the supposed defective particulars of claim. In this regard, he was mistaken.

[46] The rules of court do not attempt to curb the power of a court to order that an exception stands over for the trial's court's decision in situations such as where a proper determination of the exception is bound up with the merits of the

⁶ 1997 (1) SA 498 (O).

dispute.⁷ An “informal” exception may be raised at trial, at the risk of an adverse costs order.⁸

[47] A litigant’s failure to raise a formal exception against a pleading does not amount to an embargo from doing so in opposition to an application for summary judgment. A defendant is entitled to attack an application of summary judgment on any aspect. When a defendant attacks the particulars of claim on the basis that it does not sustain a valid cause of action, it is not strictly a defence but rather raises the question whether the summary judgment application complies with the provisions of the rule requiring the plaintiff to verify the cause of action.⁹

[48] Accordingly, the appellant was fully entitled to adopt her attack even if she never filed an exception against the particulars of claim. If the particulars of claim did not sustain a valid cause of action, summary judgment ought to have been refused. But as found, the respondent’s particulars of claim were not excipiable.

The membership issue

[49] At its core and relying on *Cohen NO v Deans*¹⁰(*Deans*), the appellant’s argument is that the deponent to the respondent’s verifying affidavit could not validly verify the pleaded cause of action, as it was excipiable, and thus summary judgment could not be granted. The facts and the reason for the finding in *Deans* differs from the present case. The central point made in *Deans* was that the verification of the cause of action for the payment claimed was not based payment due but on an entitlement to payment pleaded based on incorrect terms of the Trust Deed.

⁷ E.g. *Minerals & Quarries (Pty) Ltd v Henckert* 1967 (4) SA 77 (SWA) at 84.

⁸ E.g. *Algoa Milling Co Ltd v Arkell & Douglas* 1918 AD 145; *Myers v Shraga* 1947 (2) SA 258 (T); *Allen and Others NNO v Gibbs* 1977 (3) SA 212 (SE); *Ngwenya v Hindley* 1950 (1) SA 839 (C).

⁹ *Arend and Other v Astra Furnishers (Pty) Ltd* 1974 (1) SA 298 (C) at 314 A – B; *Cohen NO and others v Deans* (368/2022) [2023] ZASCA 56 (20 April 2023) at [22].

¹⁰ (368/2022) [2023] ZASCA 56 (20 April 2023).

[50] In the present case, verification contention is based on the disputed membership. In this regard, I am satisfied that the particulars of claim is not excipiable.

[51] The respondent is a non-profit company, incorporated in 2004 in terms of the 1973 Act. The appellant became the registered owner of the property in August 2007, when the 1973 Act was in force. Accordingly, the membership issue must first be determined with reference to the 1973 Act. Section 103 of the 1973 Act defines the members of a company as being:

- “ (1) The subscribers of the memorandum of a company shall be deemed to have agreed to become members of the company upon its incorporation, and shall forthwith be entered as members in its register of members.
- (2) Every other person who agrees to become a member of a company and whose name is entered in its register of members, shall be a member of the company.” [own emphasis]

[52] At the time of incorporation of the respondent, the appellant was not yet the registered owner of the property and could not have “subscribed for membership.” Accordingly subsection (1) does not find application and the membership issue must be determined with reference to the provision of section 103(2) of the 1973 Act.

[53] The appellant accepted that the relationship between her and the respondent is contractual in nature but submitted that the particulars of claim were silent on the existence of such an agreement between the parties or her name having been entered into the register of members. This submission loses sight of the difference between *facta probanda* (the essential facts of the cause of action) and *facta probantia* (the evidence to prove the essential facts), and of the duty which rested on the appellant to set out fully the nature and grounds of her defence. The appellant’s response was nothing but a bare denial of membership. She proffered no grounds for her denial of membership, such as her name not having been entered into the register of members.

[54] In its judgment and referring to the sacrosanct nature of a title deed, the court below held that the appellant's defence of *res inter alios acta*, suggesting a separate agreement with the HOA after registration of transfer, undermines the inherent certainty provided by a title deed. It also found that the interpretation contended for would lead to absurdity as it would imply the potential for an *impasse*: while the transfer of ownership has occurred and the new owner is duly reflected, the prospect of reaching a definitive agreement remains uncertain. Accordingly, the magistrate held the defence of *res inter alia acta* not only needlessly bald, but also bad in law.

[55] I agree that the defence is bad in law, but for different reasons.

[56] Under the 1973 Act, the appellant would have become a member of the HOA upon fulfilment of the requirements of section 103. In his *Commentary on the Companies Act*, Prof Blackman, at 5-292, which forms part of an analysis of section 103 of the 1973 Act, writes: "*In all other cases, both agreement to become a member and entry in the register are essential (s 103(2) and (3)). A person cannot become a member of a company without having expressly or impliedly agreed to become a member, and hence the unilateral act of a company in wrongfully placing a person's name on its register of members does not make that person a member. ... A person agrees to become a member when he assents to become a member; it is not necessary that there be a binding contract between him and the company; and therefore where the name of a person is entered in the register with his consent, he is a member. A person who is aware that his name has been placed on the register without his consent, and who fails to take responsible steps to get the company to rectify its register, may, in the circumstances, be taken to have impliedly acquiesced to become a member.*" [footnotes omitted, underlining added]

[57] To become a member of the HOA, the appellant had to agree to become and member, and her name had to be placed on the register. Once these requirements are met, the appellant is a member of the HOA.

[58] It was the respondent's pleaded case that by virtue of being an owner of the property she became a member of the HOA and "a subscriber" of the MOI, having regard to the title deed. The MOI complied with the applicable legislation as well as the Companies Act and is binding on both the appellant and the respondent by virtue of the Companies Act.

[59] The appellant contended that a separate legal act was required for her membership, but what the nature of that legal act ought to be was not detailed during argument.

[60] It was argued on her behalf that by virtue of the provisions of section 2(b) of Schedule 1 to the 2008 Act, the appellant "must not presume the membership of any person, regard a person to be a member, or provide for the automatic or ex officio membership of any person, on any basis other than life-time membership awarded to a person - (i) for service to the company or to the public benefit objects set out in the company's Memorandum of Incorporation; and (ii) with that person's consent." But it was not the appellant's case in her plea or her affidavit resisting summary judgment that her name was not entered into the register of members, or that she had not consented to being a member of the HOA.

[61] Ostensibly, neither party nor the court below took into consideration the terms of the offer to purchase attached to the affidavit resisting summary judgment. This Court raised those terms at the hearing.

[62] When the appellant chose to purchase the property, she agreed to become a member of the HOA and to be bound by its rules.¹¹ Her assent thereto appears from the offer to purchase she concluded with the seller on 2 May 2007.

[62.1] Clause 17.1 provides that the purchaser (the appellant) acknowledges that she is required upon registration of the property to become a member of the Homeowners Association and agrees to do so in accordance with

¹¹ *Mount Edgecombe Country Club Estate Management Association II RF NPC v Singh And Others* 2019 (4) SA 471 (SCA) at [19].

the Memorandum and Articles of Association, which document shall be deemed to have been accepted by the purchaser upon signature of the offer to purchase. [underling added]

[62.2] In clause 17.2, she agreed to, for as long as she is the registered owner of the property, remain a member of the Association and be bound by its Memorandum and Articles of Association.

[63] Accordingly, at the time of her offer to purchase the property, the appellant had assented to becoming a member of the HOA, and it was not necessary for the appellant and the respondent to enter into a separate transaction to accord the appellant membership of the HOA.

[64] At the commencement date of the Companies Act, Act 71 of 2008 on 1 May 2011 (*“the 2008 Act”*):

[64.1] The respondent was a non-profit company.

[64.2] The respondent was a pre-existing company for purposes of the 2008 Act, being a *“a juristic person that, immediately before the effective date was registered in terms of the [1973 Act]..”*¹²

[64.3] As a pre-existing company, the respondent *“continued to exist as a company, as if it had been incorporated and registered in terms of [the 2008 Act], with the same name and registration number previously assigned to it.”*¹³

[64.4] The respondent, as a pre-existing company incorporated in terms of section 21 of the 1973 Act *“is deemed to have amended its Memorandum of Incorporation as of [1 May 2011 being] the general effective date to expressly state that it is a non-profit company, and to have changed its name in so far as required to comply with section 11 (3).”*¹⁴

[64.5] The appellant was a member of the respondent.

[65] The MOI adopted at the September 2015 meeting provides that those persons who qualified for membership immediately prior to the adoption of the MOI,

¹² The definition of a company in section 1 of the 2008 Act.

¹³ Section 2(1) of Schedule 5 to the 2008 Act.

¹⁴ Section 4(1)(a) of Schedule 5 to the 2008 Act.

such as the appellant, remain members, and it does not contain any presumption of membership in contravention of section 2 of Schedule 1. The court below appropriately remarked on the appellant's failure to deal with the MOI in place prior to 2015 and whether she dispute being a member prior to the adoption of the most recent MOI. It was also correct in finding that the appellant did not indicate whether she disputes the former MOI nor that she did not detail the reasons for her resistance to the 2015 MOI.

[66] In fact, the minutes of the in the annual general meeting of members of the HOA of 12 September 2015, during which the new MOI was adopted by the HOA, evidence the appellant having granted a proxy to the chairman of the HOA. The inescapable conclusion is that that the appellant must have regarded herself as a member at the time.

[67] In the circumstances, there is no reason to upend the finding of the court below that the appellant did not disclose the grounds of her defence, and she did not satisfy the court below that she has a *bona fide* defence regarding her membership of the HOA.

The counterclaim issue

[68] It is trite that an unliquidated counterclaim may be set up as a defence to an application for summary judgment,¹⁵ and that such a counterclaim should be considered in the same way as a plea for the court to consider whether the counterclaim is frivolous, unsubstantial and intended only to delay.¹⁶ Therefore, a defendant must set out the grounds of its counterclaim with sufficient particularity to satisfy a court that it is *bona fide*.

[69] The interplay between the provisions of Magistrates' Court Rules 14 and 17(4) allows for an overriding discretion to refuse summary judgment even where a defendant's opposing affidavit does not pass muster.¹⁷ The refusal of summary

¹⁵ *Weinkove v Botha* 1952 (3) SA 178 (C).

¹⁶ *Du Toit v De Beer* 1955 (1) SA 469 (T) at 473; *HI Lockhat (Pty) Ltd v Domingo* 1979 (3) SA 696 (T) at 698; *Muller and Others v Botswana Development Corporation Ltd* 2003 (1) SA 651 (SCA).

¹⁷ *Soil Fumigation Services Lowveld CC v Chemfit Technical Products (Pty) Ltd* 2004 (6) SA 29 (SCA) at [11].

judgment constitutes a postponement of judgment on the plaintiff's claim, which requires a defendant to persuade the court that good cause exists to do so, and which the court will determine by exercising a wide judicial discretion "*in accordance with the tenets of justice, fairness and reasonableness, and with reference to all the relevant facts and circumstances.*"¹⁸

[70] The appellant's main counterclaim is conditional upon a finding that she became and remains a member of the HOA. She contended for a tacit term of the MOI, and in the alternative, in the event of her not being a member, a legal duty towards her, which the HOA had breached. in that:

[71] As a result of the alleged breaches, the defendant contends she suffered damages being the difference of the market value of her property when she acquired it and the present market value.

[72] I am satisfied that both the appellant's counterclaim and her opposing affidavit lack allegations to support a finding that the main and/or alternative counterclaims are *bona fide*, on the bases proffered on behalf of the respondent.

[73] In respect of the main conditional counterclaim, the appellant's complaint is that the because the HOA had not acquit its obligation to collect levies, it was not able to maintain the infrastructure of the estate. The court below appeared to have lost sight of the conditional nature of the counterclaim, when finding a glaring contradiction between the defence presented on the membership issue and the counterclaim. In this he erred, however, he correctly found the appellant had not asserted material facts to support her allegation that the HOA failed to collect levies – rather ironic given the respondent's claim against her.

[74] In respect of the alternative counterclaim, the court below cannot be faulted for its finding that the appellant failed to detail grounds for why the respondent would owe her the legal duty when she is not a member of the HOA.

¹⁸ *Consol Ltd t/a Consol Glass v Twee Jongegezellen (Pty) Ltd and another* 2002 (2) SA 580 (C) at [20].

[75] Absent such material facts or grounds, the counterclaim was sketchy and did have the hallmarks of a delaying tactic.

[76] Ultimately, the court below cannot be faulted for finding that the counterclaim did not amount to a *bona fide* defence for purposes of averting the application for summary judgment. This finding amounted to judgment being granted in favour of the respondent akin to the procedure envisaged in Rule 17(4). The finding does not result in the doors of court being finally closed on the appellant. She remains at liberty to pursue her claims against the respondent by issuing summons in the appropriate division of the High Court.

Order

[77] In the result, the appeal is dismissed with costs, including counsel's fees on scale C.

SARITA LIEBENBERG
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, JOHANNESBURG

I agree

NTY SIWENDU
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, JOHANNESBURG

This order is made an Order of Court by the Judges whose names are reflected herein, duly stamped by the Registrar of the Court, and is submitted electronically to the Parties / their legal representatives by email. This Order is further uploaded to the electronic file of this matter on Caselines/CourtOnline by the Judges' secretaries. The date of this order is deemed to be 21 January 2025.

For the appellant:

Adv D Marais

Instructed by:

Mohamed Randera & Associates (Ref M Randera)

For the respondent:

Instructed by:

Heard on:

Judgment on:

Adv WJ Prinsloo

Rooseboom Attorneys (Ref: C Rooseboom)

21 November 2024

21 January 2025