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

Case Number: **2022-046219**

(1) REPORTABLE: **NO**

(2) OF INTEREST TO OTHER JUDGES: YES

(3) REVISED: **NO**

DATE 23 July 2025

In the matter between:

BEFORE THE HONOURABLE JUSTICE, AUCAMP AJ

In the matter between:

HARBOUR TOWN HOMEOWNERS ASSOCIATION NPC

Plaintiff

And

JIVAN VIBA

Defendant

JUDGMENT

[1] The plaintiff, the Harbour Town Homeowners Association NPC, (“***the Association***”) seeks to hold the defendant, Jivan Viba, the owner of a certain immovable property, Erf 1[...] Vaalmarina Holiday Township Extension 6, Midvaal Local Municipality, Gauteng liable in respect of certain unpaid levies declared by the

Association. For this purpose, the Association issued summons against the defendant claiming an amount of R285,974.00 together with interest and costs.

[2] The defendant in turn, delivered an exception to the plaintiff's particulars of claim, alleging that the particulars lack the necessary averments to sustain a cause of action as against the defendant.

[3] The issue, initially raised by the defendant in his exception was whether the allegation—namely, that the defendant has become a member of the Association by virtue of a condition in the title deed stating that the owner of the property shall become and remain a member of the Association, constitutes sufficient allegations to establish that the defendant is indeed a member of the Association. However, at the hearing of the exception, plaintiff's counsel, Adv Dobie referred this court to a judgment of this division, ***Sibongile Beatrice Mtshali v Harbour Town Homeowners Association***¹ in respect of which Liebenberg AJ found the allegations of the Association to have been sufficient. Adv Dobie argued that the judgment of Liebenberg AJ was dispositive of the exception and that the exception must be dismissed.

[4] Adv Hollander for the defendant, however, argued that the judgement of Liebenberg AJ was not dispositive of the issue relevant to this exception before this court as it did not consider and express itself in respect of the provisions of section 103(2) of the Companies Act, Act 63 of 1973. Section 103 of the referred to Companies Act, defines a member as being: *“(1) The subscriber of the memorandum of incorporation of a company shall be deemed to have agreed to become a member 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 become a member of the company.”*² Adv Hollander argues that the

¹ An unreported judgment Appeal judgment of this division, Case no: A2024-034881, heard on 21 November 2024 and delivered on 21 January 2025

² The Companies Act, Act 71 of 2008 contain similar provisions. Section 50(1) in this regard inter alia provides: “The company must establish or cause to be established a register of its issued securities in the prescribed form.” Section 50(2) further provides: “ The register must show (a) the number of

plaintiff was required to allege in its particulars of claim that the defendant's name was entered in the register of members of the Association.

[5] I am not convinced that the issue which Adv Hollander now seeks to place before this court has been properly raised in the exception. However, for purposes of this exception as well as the fact that no objection was raised by and on behalf the Association, I am prepared to accept that the issue is before me.

[6] In the context of a homeowners' association, established as a non-profit company, membership arises upon the sale and transfer of a property, in accordance with binding conditions contained in the title deed or offer to purchase. This means that a new owner, *ex lege*, acquires membership of the association by virtue of having accepted the provisions of the title deed and the Association's memorandum of incorporation. The Association shall thereafter record the owner's details in its register. In ***Willow Waters Homeowners Association (Pty) Ltd v Koka N.O and Others***,³ the Supreme Court of Appeal confirmed that membership of such an association consists of the registered owners of properties within the estate. Accordingly, all owners automatically become members and are bound by the Association's memorandum of incorporation. Maya JA in *Willow Waters supra* continued to explain that the association funds its operations by recovering levies from its members, thereby confirming that the obligation to pay levies flows directly from such contractual membership. In effect, the defendant, by accepting transfer subject to the title deed conditions and the association's founding documents, is deemed to have consented to membership, and the subsequent entry of the owner's name in the register is a mere formality. Upon its incorporation, and without more, the subscribers of the memorandum are members of the company.⁴ The title deed or sale agreement often contains a clause binding the transferee to the Association's memorandum of incorporation and rules. The result is that on transfer the buyer

securities issued (b) the names and addresses of the of the persons to whom the securities were issued and (c) the number and class of shares held by each person."

³ (768/2013) [2014] ZASCA 220; [2015] 1 All SA 562 (SCA); 2015 (5) SA 304 (SCA) (12 December 2014)

⁴ *Moosa v Lallo* 1957 (4) SA 207 (D) at 210

“agreed to become a member of the Association and [to] be bound by its rules”⁵. Courts have repeatedly treated this as creating an immediate contractual membership. All owners are held to be members by operation of law and no further act is required to “subscribe” or join the Association as member. In ***Mtshali v Harbour Town HOA*** *supra* Liebenberg AJ further held that the purchaser’s assent via the offer to purchase and the title deed sufficed to make her a member and obligate her to pay levies. The association’s pleaded case was that “*by virtue of being an owner of the property [the appellant] became a member of the HOA and ‘a subscriber’ of the MOI, having regard to the title deed. The MOI ... is binding on both the appellant and the respondent by virtue of the Companies Act*”.

[7] In other words, the “*essential fact*” (*factum probandum*) is that the owner bound herself to the Association and agreed to pay levies. The formal fact of recordal in the register (*factum probans*) is merely evidence of that membership. As one commentary notes, under the 1973 Companies Act a person cannot become a member without agreeing to do so – but once the name is entered with consent the person is a member. Here, the defendant’s consent was implicit in the title-deed conditions. No additional “*separate legal act*” was needed beyond that agreement.

[8] When a plaintiff sues for unpaid levies, the particulars of claim must set out the essential facts of the cause (the *facta probanda*), not every evidentiary detail (*facta probantia*). The core allegation is that the defendant, as member of the Association, agreed in terms of the title deed and/or memorandum of incorporation, to pay levies and has defaulted. It is not necessary to enumerate in the pleadings every formal requirement of membership, such as alleging that the defendant’s name was recorded in the Association’s register. unless this is in dispute.

[9] The Association, alleges that the defendant by virtue of having been an owner of the property within the sectional title scheme, became a member of the Association and a subscriber of the memorandum of incorporation of the Association with specific reference to the relevant provisions of the title deed:

⁵ Sibongile Beatrice Mtshali v Harbour Town Homeowners Association *supra*

(a) Every owner of the erf or any subdivision thereof or any interest therein or any unit thereon as defined in the Sectional Title Act, Act 95 of 1986 shall become and shall remain a member of the Association and be subject to its constitution until he ceases to be an owner as aforesaid. Neither the erf nor any subdivision thereof nor any interest therein nor any unit thereon shall be transferrable to any person who had not bound himself to the satisfaction of the Association to become a member of the Association.

(b) The owner of the erf or any subdivision thereof or any interest therein or any unit thereon, as defined in the Act, shall not be entitled to transfer the erf or any subdivision thereof or any interest therein or any unit thereon without a clearance certification from the Association that the provisions of the articles of the Association have been complied with.

[10] The Association further alleges that it had raised levies and special levies in accordance with its own procedures and rules and which levies the defendant in the amount of R285,974.00 failed to pay, placing the defendant in breach of the Association's memorandum of incorporation.

[11] To succeed with this exception, defendant is required to demonstrate that:⁶

- (a) the conclusion of law for which the Association contends cannot be supported on any interpretation that can be put upon the facts pleaded;
- (b) it must not be possible to lead any evidence which can disclose a cause of action; and
- (c) a sensible over a technical approach is to be adopted.⁷

[12] The exception is a legal objection to plaintiff's particulars of claim. The exception must be considered based on, assuming for the moment that all the allegations in the particulars of claim are true. If even with such admission the pleadings do not disclose a cause of action, then the exception is good.⁸It follows

⁶ Lowenthal v Street Guarantee (Pty) Ltd (425588/2014) [2017] ZAGPJHC 83, at para [3]; H v Fetal Assessment Centre [2014] ZACC 34; 2015 (2) SA 193 (CC) at para [10]; McKelvey v Cowan NO 1980 (4) SA 525 (Z) at para 526D-E.

⁷ Lowenthal *supra* at para [3]

⁸ Champion v JD Selliers & Co Ltd 1904 TS 788 at 790 - 791

that the court must look at the pleading accepted to as it stands⁹ and no facts outside those can be brought into issue.

[13] The object of an exception is to dispose of the case or a portion thereof in an expeditious manner, or to protect a party against an embarrassment which is associated as to merit the cost even of an exception.¹⁰ Thus, an exception that particulars of claim disclose no cause of action, is designed to obtain a decision on a point of law which will dispose of the case in whole or in part and avoid the leading of unnecessary evidence at the trial. If it does not have that effect, the exception should not be entertained.¹¹

[14] For the reasons advanced, I am of the view that there is no merit to the exception and the that the exception must fail.

JUDGEMENT AND ORDER

- a. The exception is dismissed.
- b. The defendant is directed and ordered to deliver his plea and any counterclaim, if any, within 15 (fifteen) days of this judgment and order.
- c. Payment of costs, such costs to be taxed on the attorney and client scale.

S AUCAMP
ACTING JUDGE OF THE HIGH COURT
JOHANNESBURG

DELIVERED: *This judgment was handed down electronically by circulation to the parties' legal representatives by e-mail and publication on CaseLines. The date and time for hand-down is deemed to be **10h00 on 23 July 2025.***

HEARD ON: 13 March 2025

⁹ Salzmann v Holmes 1914 AD 152 at 156

¹⁰ Colonial Industries Ltd v Provincial Insurance Co Ltd 1920 SPD 627 at 630

¹¹ Johnston v Leal 1980 (3) SA 927 (A) at 947

DATE OF JUDGEMENT: 23 July 2025

For the Plaintiff / Respondent

Adv G Dobie

instructed by:

Rooseboom Attorneys, Mr C Rooseboom

For the Defendant/Excipient

Adv L Hollander

instructed by:

Mohamed Randera & Associates, Mr Randera