

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

- (1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

CASE NUMBER: 2023-036536
2022-046773

SIGNATURE

DATE

29/11/2025

In the matter between:

HERBERT DUBE

1st Excipient/1st Defendant

HILDAH DUBE

2nd Excipient/2nd Defendant

and

HARBOUR TOWN HOMEOWNERS ASSOCIATION NPC

Respondent/Plaintiff

and in the matter between:

NEIL COTHILL

Excipient/Defendant

and

HARBOUR TOWN HOMEOWNERS ASSOCIATION NPC

Respondent/Plaintiff

Heard: 12 June 2025

Delivered: 20 November 2025

J U D G M E N T

YACOUB, J:

[1] The respondent in these two exceptions ("Harbour Town") has issued summons against the respective excipients ("the Dubes" and "Cothill") for payment of levies it contends are due and owing. The excipients each delivered exceptions to Harbour Town's particulars of claim on the basis that the particulars lack averments necessary to sustain a cause of action.

[2] The excipients in both matters are owners of properties which fall within a residential estate of which the respondent is the homeowners' association. The basis of the exception now before me¹ in both matters is that the particulars do not contain averments which sustain a conclusion that the excipients are members of Harbour Town, or that they are bound by Harbour Town's Memorandum of Incorporation.

[3] Both the excipients before me became owners of properties within the estate after the establishment of Harbour Town. It is pleaded that the title deeds of the properties contain recordals that the owner of the relevant property becomes a member of Harbour Town and subject to its constitution² for as long as they are an owner, and that no property within the estate may be transferred to someone who has not bound themselves, to the satisfaction of Harbour Town, to membership of Harbour Town, and that an owner may not transfer such a property without a clearance certificate from Harbour Town.

[4] The basis of the exception is that the averment regarding the provision in the title deed, without more, does not sustain a conclusion that a purchaser of property within the estate becomes, on transfer of the property, and without more, a member of Harbour Town, and party to and bound by Harbour Town's constitution, for as long

¹ There were previous exceptions but the particulars were amended, and new exceptions delivered.

² The constitution is identical to the Memorandum of Incorporation.

as they are an owner, and that the respective purchaser is bound by the Memorandum of Incorporation in terms of the Companies Act.³

[5] Before the matter was heard, the attorney of record for the Dubes filed a notice of withdrawal as attorneys of record. The Dubes had initially been represented by the same attorney and counsel as Mr Cothill, and the issues are the same. The Dubes did not appear at the hearing. Mr Dobie, for the plaintiff/respondent, requested that the exception be dealt with substantively rather than on the basis of non-appearance. Since the exceptions are identical, it is convenient to deal with them in a single judgment.

[6] At the time of hearing I was informed that there was another, identical, exception that had been already argued before my brother Aucamp AJ, and that there were other similar cases awaiting hearing. Aucamp AJ has since handed down judgment, which was brought to my attention by the parties, both of whom declined to make further submissions.⁴

[7] I was also referred to a judgment in a Full Bench appeal, *Mtshali v Harbour Town Homeowners Association*,⁵ which dealt with similar issues, but I was invited to find that the issue now before me was not dealt with, and that the judgment is distinguishable. As may be inferred from the names of the parties in that appeal, the respondent in that matter was also the respondent/plaintiff in these two matters, and the appellant an owner from whom arrear levies were claimed.

³ The exception refers to the 2008 Companies Act, but the Particulars of Claim do not specify which Companies Act is referred to, and since membership is alleged to have occurred in 2007, the likelihood is that the 1973 Act is meant.

⁴ *Harbour Town Homeowners Association NPC v Viba* 2025 JDR 3347 (GJ)

⁵ [2025] ZAGPJHC 84 (21 January 2025)

[8] The appellant in *Mtshali* raised the same points in the appeal as is now raised in the exceptions, although as defence to summary judgment rather than as an exception. However, that particular issue, of whether Ms Mtshali's membership of Harbour Town was sufficiently made out in the pleadings, was dealt with differently because there was an affidavit resisting summary judgment, in which Ms Mtshali provided merely a bald denial of membership. In this case, there being no affidavits and no plea, the issue is simply whether the particulars of claim contain averments that support the legal conclusion of membership and being bound.

[9] It was argued before me, although not articulated in the exception, that an additional step was necessary, of entering the owner's name into the register of members of Harbour Town, to complete the owner's membership of Harbour Town, and make the owner subject to the Memorandum of Incorporation. This was consistent with the provisions of section 103(2) of the Companies Act, 63 of 1973 which provides that a person who agrees to become a member of the company after it is incorporated, and whose name is entered in the register of members becomes a member of the company. It seems to me that this point was raised as a result of the *Mtshali* judgment in which it was pointed out that there was no allegation by Ms Mtshali of the basis on which she denied membership, such as that her name had not been entered in the register of members. This contention was also contained in supplementary heads filed the day before the hearing.

[10] The identical issues were raised, and in the same manner, before Aucamp AJ, and it seems that the facts and pleadings in Aucamp AJ's matter are on all fours with those before me.

[11] Aucamp AJ, in *Harbour Town Homeowners Association NPC v Viba*,⁶ assuming in the excipient's favour that the issue was properly raised, found that the formal fact of recordal in the register is merely evidence of the essential fact of the owner's membership of Harbour Town, and that the essential fact which needed to be pleaded was that the owner is a member. The legal act needed was consent, which was pleaded, and the entry in the register was only a consequence to that. I cannot find fault with that finding, and I believe it is correct. There being nothing different in these two matters, and neither party submitting that I should differ from Aucamp AJ, I find similarly.

[12] As pointed out in the *Viba* judgment, the excipient raising an exception that no cause of action is disclosed, must demonstrate that the conclusion of law on which the plaintiff relies is not supported by any reasonable interpretation of the pleaded facts, that it is not possible to lead any evidence which will disclose or confirm the existence of the cause of action, and that the courts must take a common-sensical rather than over technical approach.⁷

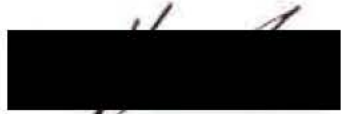
[13] It is clear that the exception should not be sustained as it is entirely possible to lead evidence on the point raised at the hearing, and there is no other definitive point in the excipients' favour.

⁶ Note 4 above.

⁷ At para [11], relying on *Lowenthal v Street Guarantee (Pty) Ltd* [2017] ZAGPJHC 83 at [3]; *H v Fetal Assessment Centre* 2015 (2) SA 193 (CC at [10]) and *McKelvey v Cowan* NO 1980 (4) SA 525 (Z) at 526D-E.

[14] For these reasons, I make the following order:

1. The exceptions are dismissed with costs.
2. The defendants are directed to deliver their plea and any counterclaim within 15 days of this judgment.


 S. YACOOB
 JUDGE OF THE HIGH COURT
 GAUTENG DIVISION, JOHANNESBURG

Delivered: This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the Parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 20 November 2025.

APPEARANCES

In case number 2023-036536:

For the excipient:	No appearance
For the respondent:	JG Dobie
Instructed by:	Rooseboom Attorneys

In case number 2022-046773:

For the excipient:	L Hollander
Instructed by:	Mohamed Randera & Associates
For the respondent:	JG Dobie
Instructed by:	Rooseboom Attorneys