

**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG PROVINCIAL DIVISION, PRETORIA**

CASE NO: A159/2020

DATE OF HEARING: 17TH November 2022

REPORTABLE: ~~YES~~/NO

OF INTEREST TO OTHER JUDGES: ~~YES~~/NO

REVISED

DATE: 19 DECEMBER 2022

In the matter between:

MATOME SOLOMON RALEBIPI

Appellant

and

BEAU RIVAGE HOMEOWNERS ASSOCIATION

Respondent

JUDGMENT

CORAM: CAJEE. AJ (MOSHOANA J CONCURRING)

1. This is an appeal against a summary judgment application granted by the . leaned Magistrate A E Smit sitting in the Brits Magistrates Court, against the Appellant in favour of the Respondent in tile sum of R186, 926-17.

2. The Appellant is the owner of a property known as 1[...] Beau

Rivage, estate D'Afrique, Hartbeespoort and has been the registered owner since 2010. The Respondent is the homeowners association in respect of the estate where the said property is situated. As such, the Appellant is a member of the Respondent homeowners association.

3. A combined summons was issued on the 10th of June 2019 in which the Respondent claimed R186, 926--17 against the Appellant, which amount is made up of four components as follows:

3.1. Arrear monthly levies of R 93 000-00 for the period 20th September 2016 to 20 May 2019;

3.2. Arrear monthly CSOS (community scheme *ombud* service) levies of R1200-00 for the period 20 January 2017 until 20th May 2019. The monthly CSOS levy is alleged to be R40 00 per month for this period.

3.3. A late building completion levy of R 66 000-00 for the period 20th September 2016 to 20 May 2019. This levy is calculated at R2000-00 per month for this period.

3.4. Outstanding water and electricity consumed on the property in the sum of R113 399,98, allegedly based on actual meter readings.

3.5. It is further alleged in the particulars of claim that during the period September 2016 to May 2019 the Appellant made payments which are reflected in annexure BR5. Of this, an amount of R86,673-81 was allocated to the credit of the Plaintiff in respect of the period claimed in this action as reflected in annexure BR4. The balance was allegedly allocated to amounts owing in respect of a previous period and in respect of which separate actions were allegedly instituted.

4. There were five annexes attached to the particulars of claim. They are:

4.1. Annexure "BR.1" which is a deeds search proving that the Appellant is the registered owner of Erf 1[...], Beau Rivage Township. This is not disputed by the Appellant.

4.2. Annexure "BR2" is a copy of the Memorandum of Incorporation of the Respondent containing the terms and conditions to which members of the Respondent, including the Appellant, were bound by virtue of their membership.

4.3. Annexure "BR3" is a copy of the Village Rules which include additional rules to which members of the Respondent are bound.

4.4. Annexure "BR4" is a copy of the reconciliation account in respect of the Appellant compiled by the Respondent for the period 20 September 2016 to 20 May 2019. This reconciliation account is made up of eight columns with the following headings:

DATE	LEVY	INTEREST	LEGAL COSTS	ELECTRICITY AND WATER	LATE BUILDING	csos	PAYMENTS AND CREDITS
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However only the amounts set out in columns 2, 5, 6, 7 and 8 formed the subject matter of the particulars of claim. The amounts reflected in column\.:3 and 4 did not form the subject matter of the particulars of claim.

4.5. Annexure "BR5" being a copy of the detailed ledger in respect of the Appellant kept by the Respondent for the period 20 August 2016 to 20 May 2019.

5. In response to the Appellant filing a notice of intention to defend a

summary judgment application was launched by the Respondent.

6. In the affidavit resisting summary Judgment the following defences are raised:

6.1. that annexure BR5 is replete with legal fees which were not taxed, and that there was no liquid document underpinning this indebtedness.

6.2. that the amount claimed for the late building levies is not a liquidated claim as there are no allegations in the particulars of claim that bring the dwelling within the jurisdictional parameters set out in the allegations in two similarly numbered paragraphs 6.5 of the particulars of claim which read as follows:

"Construction of the dwelling must be completed within 18 (eighteen) months from date of stand handover" and

"a penalty levy will be imposed on owners who have not completed a dwelling within (18) eighteen months from date of site handover".

6.3. It is further claimed in the affidavit that it is common cause that *"my house is complete because I am residing in it"*.

6.4. The electricity accounts proving that the readings contained in reconciliation statement belong to the property are not attached. Hence, it is alleged, that the claim for electricity is disputed and not liquid.

6.4. That the total of amounts as reflected in annexure "BR4" does not agree with the amounts claimed in the summons.

6.5. That the particulars of claim are excipiable

7. In a short but comprehensive judgment the learned magistrate dismissed the opposition to the summary judgment application as not displaying a bona fide defence in respect of any of the grounds raised. In doing so the magistrate found that:

7.1. None of the Plaintiff's claims relates to outstanding legal costs, but that the claims relate to arrear levies, late building penalty levies, arrear CSOS levies and water and electricity consumed on the premises.

7.2. The statement of material facts (particulars of claim) have to be read with the annexures attached thereto. When read together with annexure BR4, where the calculations in respect of each claim are set out, it is clear that the amounts claimed are ascertainable by mere arithmetical calculation.

7.3. That the appellant does not dispute being the registered owner of the property, that he is a member of the Respondent, that he must abide by the memorandum of incorporation and village rules, and that the respondent is entitled to late building completion levies. The magistrate further found that the appellant ought to have completed the construction of the dwelling within eighteen months of the handover of the stand to him in terms of the said memorandum of incorporation and village rules, as alleged in the particulars of claim, and is as a consequence liable for same for the period 20 September 2016 to 20 May 2019. The magistrate found that the fact that the Appellant may be residing on the property is of no consequence, as he didn't provide an inspection release certificate issued by the aesthetics committee and an occupation certificate by the Madibeng Local Authority as required

by the memorandum of incorporation and village rules as proof that the building completion requirements had been complied with.

7.4. that the claim for electricity consumption had been properly quantified in the particulars of claim read together with the annexes.

7.5. that the amounts claimed under the various heads did correspond with the totals in annexure "BR4".

7.6. that an emailed letter attached to the affidavit resisting summary judgment in which the Appellant seeks a debatement of account related to earlier claims in respect of which separate actions were instituted.

8. In the Notice of Appeal as well as the heads of argument the Appellant persisted with the defences raised in the affidavit resisting summary judgment, but concentrated on the following:

8.1. that the learned Magistrate misdirected herself in finding that the Respondent was not claiming any costs as alleged as Annexure BR4 and BR5 are inclusive of legal costs.

8.2. the learned Magistrate misdirected herself in respect of the late building penalty levies by "adding allegations that are not contained in the particulars of claim".

8.3. that annexure "BR4" and "BR5" do not support and complement each other.

8.4. that annexure "BR4" has 6 columns and not 4.

8.5. that the Appellant was entitled to a debatement of account in light of the fact that this claim is related to earlier claims brought by the Respondent against the Appellant.

9. In her heads of argument, counsel for the Appellant persisted with the arguments that the claims were not liquidated, and that the particulars of claim were excipiable. However at the hearing of this matter she abandoned the ground that the claim related to legal costs which were not taxed.

10. At the hearing of this matter the Appellant brought an application for condonation for the late prosecution of the appeal. This was strenuously opposed by counsel for the Respondent, who contended that the appeal had already lapsed and that it had brought a separate application for a declarator to this effect, but that the application was still pending and he wanted us to rule on it. However, the papers in respect of this application were not before us and we refused to entertain same.

11. While no substantive application for condonation for the late prosecution of this appeal was brought, counsel for the Appellant in separate heads of argument dealt with the reasons why the appeal had not been prosecuted timeously. Her submissions were that the Covid 19 lockdown and regulations were to blame for the delay. For reasons of convenience we decided to hear the appeal, without deciding on the issue of condonation or the lapsed appeal.

12. As pointed out in the Respondent's heads of argument, the question of whether a claim is liquidated depends on whether it is capable of prompt ascertainment, which in turn depends on the discretion of the court hearing the matter. As long as this discretion is judiciously exercised, an appeal court is not entitled to disturb this finding.

13. The claims were clearly set out in the particulars of claim as supported by the relevant columns in annexure BR4 and annexure BR5. It cannot not be said that the Magistrate did not exercise her discretion judiciously. Perhaps a greater degree of precision could have been exercised in the

drafting of the particulars of claim, but this does not make them excipiable. A clearer distinction between payments and credits could have been set out. Further, the reference to the requirement that the Appellant complete building within eighteen months of registration of the property in his name finds no correlation in the Village Rules. Village Rule 12.3.2 actually requires a three year period for completion of building. When asked, counsel for the Respondent pointed out that the property was registered in the name of the Appellant in July 2010. Thus, for the purposes of this action, it mattered not whether the period was eighteen months or three years, since it related to a period between six and nine years after the property was registered in the Appellant's name.

14. The Appellant chose technical attacks on the particulars of claim rather than deal with the substance of the allegations. He didn't deny using electricity and water on the property, but doesn't state what he believes the correct amount to be. It is still unclear what the jurisdictional parameters that the Appellant claims needed to be present before he could be sued for late penalties are. Further, the magistrate was correct in holding that the emailed letter attached to the affidavit resisting summary judgment and on which the Appellant relied on for a debatement of his account related wholly to earlier claims instituted against him by the Respondent.

15. In the premises, the appeal is dismissed with costs on a party and party scale.

CAJEE AJ

I concur

MOSHOANA J

APPEARANCES:

Counsel for the Appellant	Ms. L. Mbanjwa
Instructed By	L. Mbanjwa Inc

Counsel for the Respondent	Adv. W Roos
Instructed by	Linda Erasmus Attorneys

Date of Hearing	17 November 2022
Date of Judgment	19 December 2022