IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL DIVISION, PIETERMARITZBURG

Appeal Case No: AR 325/21
Court a *quo* Case No: 9690/20
REPORTABLE

In the matter between:

BUSISIWE BEATA SHABALALA	**APPELLANT**
(Identity No. [....])	**(Defendant *a quo*)**
and	
BIXOFLO CC t/a BLUE CLOVER N.O.	**RESPONDENT**
(Registration No. 2010/156585/23)	**(Plaintiff *a quo*)**

ORDER

It is ordered:

1 The appeal is upheld;

2 The costs occasioned by the appeal will be costs in the cause of the action;

3 The order granted in the court a *quo* on 11th June 2021 is substituted with the following:

'1 The application for summary judgment is dismissed;

2 The defendant is given leave to defend the action;

3 The costs of the summary judgment application are reserved for determination by the court finally adjudicating over the trial of the matter.'

JUDGMENT

Khan AJ (Sibiya J concurring):

Background

[1] The plaintiff in the court a *quo* is the respondent in this appeal. It sued in its capacity as administrator of the respondent, having been duly appointed thereto in terms of s 16 of the Sectional Titles Schemes Management Act 8 of 2011 (the STSMA), by way of an order of the Durban High Court dated 11th September 2019. It instituted action against the defendant, who is the appellant in this appeal, for payment of the sum of R122 256.80 in respect of arrear contributions/levies; interest thereon at the rate of 2% per month, calculated and compounded monthly from date of demand to date of final payment; and costs as taxed or agreed in accordance with Management rule 25(4) as per its bill of costs annexed to its particulars of claim, marked "E", in the Durban Magistrates' Court.

[2] The defendant's delivery of her appearance to defend that action prompted an application for summary judgment by the plaintiff, which was granted by the court a *quo*, subsequent to an opposed hearing, in the following terms:

'1. Payment of the sum of one hundred and twenty two thousand two hundred and fifty six rand and eighty cents (R122 256.80);

2. Interest at 24% per annum calculated and compounded monthly from the date of service of the summons to the date of final payment;

3. Costs of suit on the attorney and client scale as taxed or agreed in accordance with Management Rule (25) (4) see annexure

"E" of the particulars of claim;'

[3] This is an appeal by the defendant against such summary judgment.

Merits

[4] In its particulars of claim in that action, the plaintiff, by reference to provisions of the STSMA and rules promulgated under the Sectional Titles Schemes Management Regulations, demonstrated the defendant's liability, *qua* owner of a flat in the relevant block of flats, to pay contributions, which included levies, to the Body Corporate of such block of flats.

[5] The plaintiff alleged in its particulars of claim that:

(a) the defendant was in arrears with the payment of contributions;
(b) the Body Corporate gave notice to the defendant in terms of rule 25(2) of the prescribed Management Rules, requiring her to remedy such breach of her obligation within 14 days of receipt of such notice; and
(c) the defendant failed to remedy such breach.

[6] The nub of the defendant's defence raised in her plea is, apart from her denial of liability for the amount claimed or any other amount, that the plaintiff has been remiss with its maintenance obligations of the common property. She claims that:

(a) she attends to not only repairs and maintenance of her flat but also to the common property; and
(b) no meeting with the plaintiff has occurred for the past five years and that she has no recollection of the passage of any resolution.

[7] In her opposing affidavit to the plaintiffs summary judgment application, the defendant raised much the same defences, but in addition thereto, she alleged that the plaintiffs claim is not for a liquidated amount and

therefore unsuited to a summary judgment application. The plaintiffs counsel correctly conceded that a defendant is entitled to raise a defence in his/her opposing affidavit to a summary judgment application which he/she had not raised in his plea, after having initially argued the contrary.

[8] On 16th March 2021, shortly after commencement of the opposed summary judgment application hearing, the defendant's attorney announced that he intended placing in issue the plaintiff's non-compliance with the 15 days' time limit prescribed by Magistrates' courts rule 14(2), computed from the date of delivery of the plea, for the purpose of instituting the application for summary judgment.

[9] This was met with resistance from the plaintiffs attorney who argued that such issue had not been raised in the defendant's opposing affidavit to the summary judgment application and it was therefore unsuited.

[10] There then raged a strenuous debate between the parties as to whether the defendant was entitled to raise such point *in limine* for the first time during the course of the opposed summary judgment application hearing. Indeed, the defendant complains that the magistrate in the court *a quo* misdirected himself in refusing to entertain this point *in limine,* alternatively in dismissing such point *in limine* on the basis that it had not been raised in the opposing affidavit. The defendant points out that the written judgment was silent on such issue.

[11] During the hearing of the appeal however, the defendant's attorney, who again appeared for the defendant, was constrained to concede that the record of the opposed summary judgment hearing reflects that the learned magistrate in the court a *quo* did entertain such point *in limine* and availed the parties' legal representatives the opportunity of arguing such issue, although he omitted to address and make a ruling thereon in his judgment.

[12] The defendant's attorney referred us to the two undermentioned

cases in support of the proposition that a defendant in an opposed summary judgment application hearing is not precluded from raising an issue/issues relating to the validity of the application for summary judgment at the opposed hearing simply because he has not referred to such issue/s in his opposing affidavit ie. he is not precluded from raising a point *in limine* during the course of the opposed summary judgment hearing for the first time:

(a) in *Arend and another v Astra Furnishers (Ply) Ltd* 1974 (1) SA 298 (C) at 314B-C, Corbett J said:

> '... I hold that a defendant in summary judgment proceedings is not precluded from raising issues relating to the validity of the plaintiff's application merely because he has not referred to these matters in his opposing affidavit.'

(b) in *Weavind & Weavind Incorporated v Manley N.*O (A213/18) 2019 ZAGPPHC 1030 (6 December 2019) para 16, NV Khumalo J stated:

> 'Nevertheless, the raising of complaints for the first time *in limine,* as points of law during the hearing of the Application would normally be allowed even if they were not pleaded or raised in the Answering Affidavit; see *Arends v Astra Furnishers (Pty) Ltd* 1974 (1) SA 298 (C) when Corbett, J, as he then was, held that a Defendant in summary judgment proceedings is not precluded from raising issues relating to the validity of the Plaintiff's application merely because he has not referred to these issues in his opposing affidavit. The learned Judge at 314 8 C observed as follows:
>
> "Where the attack is upon the ground that the Plaintiff's particulars of claim do not substantiate a valid cause of action, then, in my view, this is [not] strictly a defence and it does not fall within the ambit of rule 32 (3) (b) regarding the Defendant's obligation to fully disclose his defence. It raises rather the question as to whether the Plaintiff has complied with rule 32 (1) and (2) relating to the requirements of an application for summary judgment."'

[13] The learned judge in the *Weavind* case further referred to the cases of *Geyer v Geyer's Transport Services (Pty) Ltd and others* 1973 (1) SA 105 (T) at 107C-E and *Transvaal Spice Works and Butchery Requisites (Ply) Ltd v Conpen Holdings (Pty) Ltd* 1959 (2) SA 198 (W), where he said the same approach was followed.

[14] This approach, however, must be juxtaposed with the approach of the Supreme Court of Appeal in the unreported case of *Biyela v Minister of Police* (1017/2020) [2022] ZASCA 36 (01 April 2022) para 8 where the court per Musi AJA with Petse AP, Dlodlo JA and Matonjane and Molefe AJJA concurring said:

> 'It goes without saying that a trial by ambush is unfair; courts should be very slow to allow a party to mount a case at trial other than the one that the party has pleaded. In *Minister of Safety and Security v Slabbert* [(2009] ZASCA 163; (2010) 2 All SA 474 (SCA) para 11] it was stated that:
>
> > "The purpose of pleadings is to define the issues for the other party and the court. A party has a duty to allege in the pleadings the material facts upon which it relies. It is impermissible for a plaintiff to plead a particular case and seek to establish a different case at trial.'" (Footnote omitted.)

[15] The words of Corbett J in *Arend* at 3148-C, that, 'I refrain from expressing any view on the duty of the defendant in such a case to give notice of his intention to raise such an issue, since this point does not arise in this appeal', are particularly apposite. Clearly, the learned judge influenced by considerations similar to those expressed by the Supreme Court of Appeal in *Biyela v Minister of Police,* referred to but refrained from expressing a view on the matter of prior notice being given of the intention to raise a point *in limine* which was not addressed before.

[16] It is to be expected that the issue of the necessity to give notice to

raise a point *in limine* will again arise and seized with it, this court must charter a course that finds the balance between the right to raise such points *in limine* and the duty to give prior notice thereof to the opposition.

[17] Should prior notice be obligatory, it will prejudice a party who discovers a material point *in /imine,* for the first time during the course of argument. Therefore, the balance, to my mind, lies in the author of such point *in limine* not being obstructed from raising it, despite there having been no prior notice thereof, but the opposition being afforded an adjournment ranging from a few hours, subject to the discretion of the court, to a few days, to enable him to prepare adequately to meet the challenge. It would be prudent to reserve the determination of the issue of costs occasioned by such adjournment jointly with the determination of the summary judgment application as there exists prospects of such costs order being determined in favour of either one of the parties.

[18] Adverting to the merits of this point *in limine,* it is common cause that the summary judgment application bore the clerk of the court's date stamp 14th October 2020 and that it was served per email, as agreed upon between the parties, on 14th October 2020, the final date for instituting the summary judgment application. As a precautionary measure, the plaintiff also served the application for summary judgment through the Sheriff and such application bears the Sheriffs date stamp, 15th October 2020. It is common cause that service through the Sheriff was effected some days later.

[19] The defendant's attorney argued that there should have been two date stamps affixed to the application, the one when it was issued prior to service thereof and the other when it was filed with the clerk of the court post service, and that both such date stamps could not be later than 14th October 2020. He argued that the fact of the Sheriffs date stamp 15th October 2020 appearing on the application suggested that it could not have been filed before 15th October 2020 and that the application was unsuited for not

having been delivered timeously. When asked the definition of the word ''deliver'' in terms of the Magistrates' court rules, the defendant's attorney correctly responded that it meant ''serving and filing'' of process.

[20] The plaintiff contends that it both served and filed the application on 14th October 2020, as evidenced by the date stamp of the clerk of the court and the defendant's acknowledgment of receipt on that date. The Sheriffs date stamp, it argued, relates to an additional cautionary service of the papers through the Sheriff and did not detract from compliance with the rules relating to delivery by the plaintiff.

[21] The plaintiff having delivered the application for summary judgment, timeously, I find that there is no merit in this point *in limine.*

[22] The following three further issues also require determination by this court, namely, whether:

(a) the summary judgment application satisfied the requirements of Magistrates' courts rule 14;
(b) the plaintiffs particulars of claim is excipiable and if so, whether the appeal court is entitled to take this into account when determining the appeal if it had not been raised in the court a *quo;* and
(c) the claim is for a liquidated amount.

First further issue

[23] In respect of the first of such further issues, the plaintiff, under amended Magistrates' courts rule 14(2)(b) (Uniform rule 32) is required to 'verify the cause of action, the amount claimed, if any, identify any point of law relied upon, state the facts upon which the plaintiffs claim is based, and explain briefly why the defence as pleaded, does not raise any issue for trial'. In essence, the plaintiff should prove its claim and discredit the plea. It will not suffice to merely state that the defendant has no *bona fide* defence.

[24] During the hearing of the opposed summary judgment proceedings in the court a *quo,* the learned magistrate pointed out that the affidavit annexed to the application for summary judgment was in the old format and not in the requisite post-amended form. Indeed, the "high water" mark of the plaintiffs supporting affidavit to its summary judgment application is at paragraph 5.2, where it alleges:

> 'The Defendant is the owner of unit 12 of the body corporate of Perseus Road No. 9 and have failed to make levy contributions for the period February 2011 to March 2020 as evidenced by annexure "B" of the particulars of claim and therefore the plea does not disclose a defence.'

[25] The plaintiffs supporting affidavit is inaccurate in that in paragraph 5.2 thereof, referred to above, its claim is described as one for the payment of arrear levies. However, annexure "B" to the plaintiffs particulars of claim includes charges other than levies. The position is exacerbated for the plaintiff by its counsel's argument before us that the plaintiffs claim is for contributions which include levies. In addition, in such supporting affidavit the plaintiff fails to identify the points of law relied upon, the facts upon which the plaintiffs claim is based and why the defence as pleaded, does not raise any issue for trial. This falls short of the abovementioned requirement in the amended rule.

[26] The court *a quo* having correctly identified the deficiency in the application for summary judgment did not pursue the matter further. This observation appears to have been abandoned in "mid-flight". The learned magistrate in the court *a quo* ought to have found that the plaintiff had failed to discharge the onus upon it to show that the application satisfied the provisions of Magistrates' courts rule *14(2)(b).*

[27] However, the aforegoing is not to be construed as Magistrates' courts rule *14(2)(b)* conferring the right to deliver unnecessarily copious affidavits in

support of summary judgment applications. Balance must be maintained between presenting the plaintiff's case succinctly, yet with sufficient particularity.

Second and third further issues

[28] Is the particulars of claim on which the application for summary judgment is founded excipiable, and is the plaintiffs claim for a liquidated amount? An excipiable particulars of claim cannot found the basis for an application for summary judgment. In *Weavind,* the learned judge said at para 24 that 'the Respondent must set out all material facts with sufficient particularity in order to justify the legal conclusion in relation to the relief sought'; and at para 23, 'where a pleading is found to be excipiable summary judgment cannot be granted'.

[29] In paragraph 6 of its particulars of claim, the plaintiff claimed that in terms of s 3(1*)(c)* of the STSMA, the Body Corporate is authorised and empowered to require the owners of sections within it, whenever necessary, to make contributions.

[30] In paragraph 8, the plaintiff concludes that owners in the Body Corporate, including the defendant, were liable to pay contributions to the Body Corporate.

[31] In paragraph 10 of its particulars of claim, the plaintiff alleges that the defendant failed to make payment of her contributions or made part payment to the Body Corporate for the period February 2011 to March 2020.

[32] In paragraph 11 of its particulars of claim, the plaintiff alleges that the defendant is indebted to the Body Corporate in an amount of R122 256.80. Annexed to the particulars of claim, marked "B", is a copy of the arrear *levy account* (my emphasis).

[33] The plaintiffs counsel at the appeal hearing was adamant that the contributions referred to in the particulars of claim included but were not limited

to the levies payable by the defendant.

[34] The alleged arrear levy account has a balance of R122 256.80, being the same amount as the alleged arrear contributions. Consequently, the plaintiff's particulars of claim presents with a material contradiction viz. is the amount of R122 256.80 claimed in respect of arrear levies only or is it claimed in respect of arrear contributions?

[35] This defect is exacerbated by the fact that the statement does not bear scrutiny. It commences with a zero-balance brought forward as at 28th February 2011, yet on 1st March 2011, there is an opening balance in the sum of R21 680.40. Reference is made in an entry on that statement to an invoice that fell due on 8th March 2011 in the sum of R21 680.44. However, that invoice does not form part of the papers nor are the contents of that invoice provided.

[36] There are several debits in the sum of R363.51 per month which appear to be amounts payable in respect of levies. The anomaly is that there having been a zero-balance as at 28th February 2011, how is it that a balance arises on 1st March 2011 in an amount which appears to exceed the amount of the levy? The fluctuation in the figures of what appear to be levy charges without any explanation as to the computation thereof is also a matter of concern.

[37] There are no less than five entries on annexure "B" that bear the endorsement "legal". This, the plaintiffs counsel conceded were debits in respect of the untaxed legal costs which the plaintiff claims to have incurred.

[38] Rule 25(4) of the Management Rules prescribed in terms of s 10(2)(a) of the STSMA provides that:

> 'A member is liable for and must pay to the body corporate all reasonable legal costs and disbursements, as taxed or agreed by the 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 or the Act.'

[39] The total amount claimed by the plaintiff in its action, as indeed in its summary judgment application is the sum of R122 256.80. This amount appears to embody claims for contributions that include levies, legal costs and other claims that have not been identified in the plaintiffs particulars of claim. The plaintiffs counsel too, could not identify such other claims during the course of the hearing of the appeal. The legal charges claimed had not been taxed nor agreed and the plaintiffs counsel conceded that such other unidentified claims might have included damages claims that had not been quantified nor proved.

[40] A prerequisite for the determination of the reasonableness of the plaintiffs legal costs is an itemised bill and only upon taxation thereof would the fairness and reasonableness of such fees be determined. In the absence of such itemised statement and the contemplated taxation, an agreement between the parties as to the quantum and reasonableness of such fees is essential. There was no such taxation or agreement.

[41] In *Weavind,* Khumalo J said at para 18:

> 'In *casu* not only were the new issues *in limine* not raised in the affidavit resisting summary judgment but it was also neither raised during the hearing of the Application in the court a quo nor by way of a Notice to Appeal. It was only raised in the Appellant's written heads of argument in the Appeal. However for the reason that an inherently defective summons or particulars of claim cannot sustain a summary judgment or be corrected of its defectiveness by overlooking or disregarding the defect, I am not persuaded that there is justification for not allowing the raising of these *limine* issues for the first time on appeal and for them to be considered.'

See also *Arends v Astra Furnishers (Pty) Ltd.* at para 12(b) above.

[42] The defendant raised complaints in paragraphs 9 and 10 of its notice of appeal that were suggestive of the particulars of claim lacking in particularity and being vague and embarrassing. In paragraphs 12 to 15 of the defendant's heads of argument too, the defendant complains of the lack of clarity relating to material aspects of the plaintiffs particulars of claim.

[43] The plaintiffs particulars of claim are indeed vague and embarrassing. Consequently, the learned magistrate in the court a *quo* misdirected himself in granting summary judgment for the reason that the particulars of claim was vague and embarrassing, if not inherently defective and therefore could not sustain an application for summary judgment.

[44] The plaintiffs counsel could not point to any part of the plaintiffs pleadings which furnished an adequate computation of the claimed sum of R122 256.80. This amount was simply not quantified with the requisite degree of particularity. The plaintiffs claim was for a globular amount of R122 256.80 in respect of arrear levies or arrear contributions. In annexure "B" to the plaintiffs particulars of claim where such amount was supposedly quantified, there appear various debits and reference to invoices and save for several cryptic endorsements eg "legal", the majority of such debits were not explained nor were the invoices referred to furnished.

[45] Further in *Weavind,* the learned judge referred to the test for determining a liquidated amount of money as described by Corbett J in *Botha v Swanson and Company (Pty) Ltd* 1968 (2) PH F85 (C) as:

> '[A] claim cannot be regarded as one for "a liquidated amount in money" unless it is based on an obligation to pay an agreed sum of money or is so expressed that the ascertainment of the amount is a mere matter of calculation'

The learned judge, in my respectful opinion, correctly said that the decision as to whether an amount of a debt is capable of speedy and prompt ascertainment is a matter left to the discretion of the court in each particular case.

[46] Furthermore, on the authority of *Benson and another v Walters and others* 1984 (1) SA 73 (A) at 868-C, the learned judge said that 'an attorney's cause of action for fees and disbursements accrued when his mandate had been performed, and not only when his bill of costs has been taxed'. Taxation is not a prerequisite to a client's liability. However, if a client insists on taxation, the action cannot proceed until the bill has been taxed. In the absence of agreement, the appellant has to render an itemised bill to be taxed from which the fairness and reasonableness of its fees would be determined. Absent such bill and taxation, it cannot be said that such fees are reasonable. This would also compromise the liquidity of such claim.

[47] Consequently, for the reasons that:

(a) the plaintiff has failed to demonstrate that it complied with the provisions of Magistrates' courts rule 14(2) for a summary judgment application;

(b) the particulars of claim are clearly excipiable; and

(c) the plaintiff has failed to demonstrate that its claim is for a liquidated amount, the learned magistrate in the court a *quo* misdirected himself in granting summary judgment.

[48] The plaintiffs counsel indicated that if the court was of the mind to allow the appeal, that it should consider directing that the costs of the appeal be costs in the cause of the action. Despite the defendant's attorney initially resisting this prayer, he eventually conceded that it is a prudent course to follow as the court ultimately determining the case will be in the best position to make an award of costs that is just and suited to the circumstances.

Order

[49] In the result, the following order shall issue:

1 The appeal is upheld;

2 The costs occasioned by the appeal will be costs in the cause of the action;

3 The order granted in the court a *quo* on 11th June 2021 is substituted with the following:

'1 The application for summary judgment is dismissed;

2 The defendant is given leave to defend the action;

3 The costs of the summary judgment application are reserved for determination by the court finally adjudicating over the trial of the matter.'

Khan AJ

I **agree**

Sibiya J

Attorney for the appellant	MR C. ATHMAN
Appellant's Attorneys	CLIFFORD ATHMAN ATTORNEYS
Counsel for the respondent	MR M. STEWART
Respondent's Attorneys	ERASMUS VAN HEERDEN ATTORNEYS
Date of hearing	7 October 2022
Date of judgment	10 March 2022