

SOUTH AFRICA / JUDGMENT

Buttertum Property Letting (Pty) Ltd v Dihlabeng Local Municipality (A260/2015) [2016] ZAFSHC 157; [2016] 4 All SA 895 (FB) (22 September 2016) [2016] ZAFSHC 157

COURT

Free State High Court, Bloemfontein

BEFORE

J.P. Daffue, K.J. Moloi

CASE / FILE NUMBER

A260/2015

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IN

THE HIGH COURT OF SOUTH AFRICA,
FREE STATE
DIVISION, BLOEMFONTEIN

Case

No.: A260/2015

In

the matter between:

BUTTERTUM
PROPERTY LETTING (PTY) LTD
Appellant
and
DIHLABENG
LOCAL MUNICIPALITY
Respondent

CORAM:

MOLOI,
J et
DAFFUE, J

JUDGMENT

BY: DAFFUE, J

HEARD ON: 12 SEPTEMBER 2016

DELIVERED ON: 22 SEPTEMBER 2016

I

INTRODUCTION

[1] This appeal is directed at the judgment and findings of the magistrate of Bethlehem dated 25 March 2015 in terms whereof summary

judgment was granted in favour of the plaintiff in the amount of R19 090.84 plus interest at the rate of prime plus 1% from 1 December 2013 to date of payment together with costs on attorney and client scale, including preparation costs.

II THE PARTIES

[2] Appellant is Buttertum Property Letting (Pty) Ltd, a private company with principal place of business situated at 99 Malherbe Street, Clarens, Free State. Appellant was the unsuccessful defendant in the court a quo against whom summary judgment was granted.

[3] Respondent is the Dihlabeng Local Municipality. It instituted action against the defendant in the court a quo and eventually obtained summary judgment as mentioned above.

[4] For ease of reference the parties will be referred to as cited in this court.

III RELEVANT AVERMENTS IN THE SUMMONS

[5] Paragraph 1 of the summons reads as follows:

“Payment of the sum of R19 090.84 (nineteen thousand and ninety rand and eighty four cents), being the amount which is due, owing and payable by the defendant to the plaintiff for rates and taxes imposed on erf 900, Clarens, being the property of the defendant as well as charges levied in respect of municipal services including sanitation to the defendant on the latter’s special instance and request during the period February 2008 till November 2013 which amount is currently due and payable and which said sum, despite demand, remains unpaid.”

[6] It is further alleged that respondent was entitled to levy interest on the arrear amount at the prime interest rate plus 1% in respect of its by-laws read with s 98(1) of the Systems Act. This must be a reference to the Local Government: Municipal Systems Act, 32 of 2000.

- [7] It is apparent from the summons that respondent relied on claiming payment of one sum of money whilst this amount is the total amount allegedly due and payable in respect of different causes of action, to wit (1) rates and taxes (2) levies for sanitation services (3) municipal services not described, but which could be (a) levies for water supply, (b) levies for electricity supply,
- (c) water usage and
- (d) electricity usage and (4) refuse removal levies. I shall deal with this aspect later herein.

IV THE SUMMARY JUDGMENT APPLICATION

- [8] The acting municipal manager of respondent deposed to an affidavit in support of summary judgment and he inter alia made the following allegations:

“2. I can swear positively on (sic) the facts contained herein.

3. I confirm the action as stated in the summons against the defendant as well as the amount claimed therein. The defendant owes the amount of R19 090.84 (nineteen thousand and ninety rand and eighty four cents) to plaintiff together with costs with regards to the facts stated in the summons.
4. I confirm that I am truly of the opinion that there is no bona fide defence against the plaintiff’s claim and that the notice of intention to defend has been filed solely to delay this action.”

(emphasis added)

- [9] During my discussion hereunder I shall return to the allegations contained in paragraph three of the affidavit in order to adjudicate

whether there was compliance with the provisions of rule 14 of the Magistrate’s Courts’ Rules of Court.

- [10] Rule 14(2)(a) of these Rules reads as follows:

“The plaintiff shall within 15 days after the date of service of notice of intention to defend, deliver notice of application for summary judgment, together with an affidavit made by the plaintiff or by any other person who can swear positively to the facts verifying the cause of action and the amount, if any, claimed and stating that in his or her opinion there is no bona fide defence to the action and that notice of intention to defend has been served solely for the purpose of delay.” (emphasis added)

V BRIEF HISTORY OF THE LITIGATION

- [11] Although I am of the opinion that the appeal can be disposed of by simply considering the summons and founding affidavit of respondent’s deponent in support of the summary judgment application, it is deemed necessary to set out the history of the litigation between the parties as this will have a bearing on the costs orders to be made.

- [12] Action was instituted on 9 April 2014 and the summons was served on 6 May 2014 by affixing a copy thereof to the “outer or principal door” of the appellant’s address, to wit 99 Malherbe Street, Clarens.
- [13] On 5 June 2014 a notice of intention to defend was served which caused respondent to issue an application for summary judgment which was served on appellant’s attorneys on 26 June 2014, the date of hearing indicated to be 30 July 2014.
- [14] On 30 July 2014 the magistrate removed the application for summary judgment from the roll, alleging that a so-called “short form” was used. No doubt this was clearly a mistake as this has been the method used to apply for summary judgment over decades. The magistrate should have dealt with the application for summary judgment there and then. At that stage no answering affidavit

was filed on behalf of the appellant.

- [15] On 2 October 2014 Messrs Breytenbach Mafuso Inc, attorneys of Bethlehem, filed a notice indicating that they would from then

onwards act on behalf of respondent. Prior thereto the respondent’s officials were driving the litigating in that no

practising attorney represented respondent with the issuing of summons and the application for summary judgment to be heard on 30 July 2014.

- [16] Respondent’s attorneys caused a notice of set down to be served and filed for the summary judgment application to be heard on 12 November 2014. Appellant’s attorney was not satisfied with this procedure and filed a notice in terms of rule 60A, incorrectly alleging that the notice was served “before litis contestatio has occurred in terms of rule 21A and therefore (respondent) has committed an irregular step.” The matter did not proceed on 12 November as it was postponed by agreement to 26 November 2014 for opposition of the summary judgment

application. The rule 60A application was removed from the roll. It should be noted that appellant’s answering affidavit in terms of rule 14 was served on respondent’s attorneys on 25 November 2014 at 14h44 and only thereafter filed with the clerk of the court. The filing was at least 2¾ hours late in that rule 14(3)(b) stipulates that the defendant opposing an application for summary judgment must deliver his/her affidavit before noon on the court day but one preceding the day on which the application is to be heard. Thus, instead of filing the answering affidavit before 12 noon on the 25th, it was served 2¾ hours late.

- [17] In its answering affidavit appellant’s deponent stated that the amount claimed was incorrectly calculated in the summons and summary judgment application and that the deponent had made several unsuccessful attempts at the offices of respondent to correct the amount. It was further alleged that respondent had not provided any documentation to prove the amount claimed in the summons and that the amount claimed was disputed.

[18] On 26 November 2014 the matter was postponed to 21 January 2015. On 20 January 2015 appellant caused a supplementary affidavit to be filed and on 21 January the matter was postponed for a week to 28 January 2015. Again, as in the first two instances, appellant waited until the day before the hearing to file a further supplementary affidavit which was done on 27 January

2015. On 28 January 2015 the matter was postponed to 25 March 2015.

[19] On 25 March 2015 appellant's attorney argued the matter and indicated from the bar that summons had been issued against appellant for outstanding rates and taxes in respect of erf 900, Clarens whilst appellant was not even the owner thereof. According to him a sectional title complex was erected on erf 900. He then asked for postponement to ensure that a supplementary affidavit indicating the appellant's defences be placed before the court. It is unclear why he decided upon that route as he should have brought an application for condonation for the late filing of the affidavits and/or for leave to file the supplementary affidavits which dealt with the issues raised in oral argument. Respondent's attorney argued that appellant's answering affidavit had to be filed before 12 noon on 29 July 2014, the court day but one preceding the day on which the application was to be heard initially, but that it failed to do so. Therefore appellant's attorney should not even be heard by the court as there was no valid opposition of the application for summary judgment. Consequently judgment was granted as mentioned above.

[20] A request for reasons was made on 9 April 2015 to which the magistrate replied. A notice of appeal was filed on 30 June

2015 whereupon the magistrate filed additional reasons to deal with all the grounds of appeal. The first ground in the notice of appeal reads verbatim as follows:

"The Honourable Magistrate erred in granting the summary judgment in the application where the founding affidavit deposed to on behalf of the Respondent failed to verify the cause of action, thus not complying with the Court's rules."

[21] In the additional reasons the magistrate mentioned that this aspect was not raised as a defence in the answering affidavit of the appellant and that the attorney also did not make any submission in this regard to the court. The magistrate relied on *Jacobson Van den Berg SA (Pty) Ltd v Triton Yachting Supplies 1974 (2) SA 584 (OPD)*. Erasmus J found at pp. 586H - 587A of this judgment that although a "...claim for a balance due and in arrear (sic) on an open account over a stated period the Courts are invariably dealing with numerous

separate causes of action, it is generally looked at as a combined cause of action and an affidavit verifying the 'cause of action based on the grounds referred to in the summons,' or words to that effect, should in my judgment prove to be sufficient

verification for purposes of Rule 32(2) (of the Uniform Rules of Court).” The court a quo was correct in finding that a deponent does not have to repeat the allegations in the summons, but as mentioned, the cause of action

must be verified. No verification can be found in casu. I shall deal with the court a quo’s reasons and the dictum of Erasmus J later herein.

[22] The appellant did not prosecute the appeal in accordance with the Uniform Rules of Court and consequently a condonation application was required. This was filed on 27 November 2015 in terms whereof appellant seeks that condonation be granted for its non-compliance

with the rules of court and furthermore that leave be granted to extend the grounds of appeal. The application was not formally

opposed, but during oral argument respondent’s counsel made certain submissions why condonation should not be granted. He submitted that appellant failed to explain the reasons for non-compliance with the rules fully.

[23] The appeal was set down for hearing on 18 April 2016. Three days prior to the hearing respondent filed an application for leave to introduce new evidence. Respondent considered that the appeal became moot in that the matter was settled insofar as appellant had paid the capital of the claim in full. This caused the appeal to be removed from the roll.

[24] The matter was again set down for hearing of the appeal on 12 September 2016. The original answering affidavit in respect of the application for leave to introduce new evidence was filed on 19 August 2016 although copies thereof had been filed as long ago as 15 April 2016. In response to respondent’s version appellant indicated that the offer made to respondent was without prejudice, that the settlement offer was never accepted and therefore the information could not be placed before the court. It was also denied that appellant acquiesced in the summary judgment and that the offer was made for that reason.

VI THE AUTHORITIES IN RESPECT OF SUMMARY JUDGMENT APPLICATIONS

[25] The authorities referred to herein dealt with rule 32 of the Uniform Rules of Court in respect of the practice in the High Court, but these authorities are equally applicable to rule 14 of the rules of the Magistrates’ Courts. The locus classicus is certainly *Maharaj v Barclays National Bank Ltd* 1976 (1) SA 418 (AD). Corbett JA, writing for a unanimous court, confirmed the correctness of the requirements set out in previous judgments pertaining to rule 32(2) of the Uniform Rules of Court and in regard to the second requirement relevant in casu, he explained the reliance on verification or “verifying” from 422B and I quote from 422E-H the following:

“Moreover, the word 'verifying' cannot be taken to qualify the word 'facts' and to be part of the definition of the 'any other person' who may make the affidavit,... since this would run counter to the meaning of the word 'verifying' and the grammatical construction of the sentence in which these words occur. The relevant meanings of 'verify' in the Short Oxford English Dictionary are:

'to testify or affirm formally or upon oath;... to testify to, to assert as true or certain'.

Clearly facts do not verify; a person verifies an alleged state of facts. And where the verification takes the form of a sworn affidavit it may be said, figuratively, that the affidavit verifies the facts. In addition, the words 'and stating', appearing later in the same sentence as 'verifying', qualify the same subject-matter. Were this not so the word 'and' linking the two participles would be inappropriate and redundant. It can hardly be suggested that the word 'stating', and what follows thereon as to what must be stated, can have reference to anything but the content of the affidavit. It is, therefore, plain that the words 'verifying the cause of action and the amount, if any, claimed...' also refer to the content of the affidavit.

[26] At 423E-H of the judgment in Maharaj Corbett JA stated the following:

“While undue formalism in procedural matters is always to be eschewed, it is important in summary judgment applications under Rule 32 that, in substance, the plaintiff should do what is required of him by the Rule. The extraordinary and drastic nature of the remedy of summary judgment in its present form has often been judicially emphasised ... The grant of the remedy is based upon the supposition that the plaintiff's claim is unimpeachable and that the defendant's defence is bogus or bad in law.” (emphasis added)

[27] Navsa JA recently stated the following in Joop Joop Investments (Pty) Ltd v Stocks Mavundla Zek Joint Venture 2009

- (5) SA 1 (SCA) at para [33]: “Having regard to its purpose and its proper application, summary judgment proceedings only hold terrors and are “drastic’ for a defendant who has no defence. Perhaps the time has come to discard these labels (‘extraordinary’ and ‘drastic’) and to concentrate rather on the proper application of the rule, as set out with customary clarity and elegance by Corbett JA in the Maharaj case at 425G – 426E.” It is to be noted that the court was at that stage concerned with whether the defendant presented a sustainable defence or triable

issue in order to prevent summary judgment being granted against it. Navsa JA did not deal with the dicta of Corbett JA quoted above. Insofar as the court a quo relied on Jacobsen van den Berg *supra*, that judgment is not only distinguishable from the case in *casu*, but appears to be clearly wrong if the first quotation of Corbett JA is considered. It is unclear what Erasmus J meant when he referred to “or words to that effect” as an alternative to “verify”, but that dictum, not being part of the ratio decidendi, should not be followed. In that matter the claim was based on amounts due on an open account, whilst in *casu* the claims are founded on two different Acts as will be shown later.

[28] In Gulf Steel (Pty) Ltd v Rack-Rite Bob (Pty) Ltd and Another 1998 (1) SA 679 (OPD) the court found at 683H – 684B that there were two basic requirements that the plaintiff had to meet in summary

judgment

applications, namely a claim clearly established and pleadings which are technically correct before the court. The court went so far to state that if either of these two requirements is not met, it is obliged to refuse summary judgment, even if a defendant fails to put up any defence or puts up a defence which does not meet the standard required to resist summary judgment. See

also *Absa Bank Ltd v Coventry* 1998 (4) SA 351 (NPD) at 353D and further. Meskin J relied on a dictum in *Mowschenson and Mowschenson v Mercantile Acceptance Corporation of SA Ltd* 1959 (3) SA 362 (W) and found that if *ex facie* the founding affidavit the requisite verification of the cause of action has not occurred, the court would not have jurisdiction to grant summary judgment.

[29] In *Standard Bank of South Africa Ltd v Roestof* 2004 (2) 492 (WLD) at 496F – H the court found that a plaintiff should not be non-suited if the papers are not technically correct due to obvious and manifest errors, causing no prejudice to the defendant, especially such as in that case where the defendant set out what he perceived to be an answer to the plaintiff's case as required by rule 32. The court proceeded at 498C and stated that the papers as a whole must be looked at in order for a court to come to a conclusion as to whether leave to defend should be granted to a defendant or not and it is not the function of the court to protect dishonest defendants because a plaintiff's pleadings are less than perfect. The court criticised the judgments in *Coventry* and *Gulf Steel supra* which emphasised the technical correctness of the plaintiff's pleadings as a prerequisite for granting summary judgment as unjustified.

[30] I am of the view that the court in *Gulf Steel supra* has put the bar a bit too high for a plaintiff. I refer to pars

[13] – [15] of my unreported judgment in *Absa Bank Ltd v René Haynes NO and Others*, case number 3619/2013 delivered on 12 December 2013. Although I reject reliance on unnecessary formalism, the underlying principles set out by the courts as indicated herein should be applied.

[31] In *Coetzee and Others v Nassimov* 2010 (4) SA 400 (WCC) the court preferred the view expressed in *Roestof supra* above that in *Coventry supra*. In that case three defendants were cited in the summons and in the heading of the summary judgment application, but in the founding affidavit the deponent referred to “defendant” in the singular instead of “defendants.” In that case the defendants did not file an answering affidavit. Cleaver, J who dealt with an application for rescission of the summary judgment granted, indicated that the judge dealing with the summary judgment application and eventually granted relief, was clearly of the view that the application for summary judgment was brought against all three defendants as all three were cited.

At para [8] Cleaver J held that the error in referring to only one defendant in the affidavit did not non-suit the plaintiff.

[32] In *Standard Bank of SA Ltd v Naude and Another* 2009 (4) SA 669 (ECP) a similar typing error as in *Nassimov supra* occurred. Clearly, according to the papers and the mortgage bond attached to the summons, two respondents were correctly cited, i.e. the husband and wife married in community of property. In the founding affidavit the word “respondents” was used twice, but in one paragraph there was a reference to “respondent” in the singular only. The respondents filed an answering affidavit, but also took a point in limine pertaining to the above technicality. The court found that on the facts *Coventry* was not decided incorrectly, but could be distinguished from the facts before it. It accepted the reasoning in *Roestof* and found that the respondents’ reliance on a technicality and an insignificant typographical error was not justified as respondents were not prejudiced and the error could not mislead the court or anybody else. The judgment is supported.

[33] I am in respectful agreement with the following views of Wallis J, as he then was, in *Schackleton Credit Management (Pty) Ltd v Microzone Trading 88 CC & Another* 2010 (5) SA 112 (KZP). In that case an attorney acting for the cessionary deposed to the affidavit in support of a summary judgment application. The court found that the attorney did not and could not state that he had direct and personal knowledge of the Absa Bank claims which were ceded to his client; that he relied on hearsay and that rule 32(2) precluded such a person to depose to the required

affidavit. Although Wallis J made it clear that *Roestoff* was correctly decided on the particular facts of the case, he criticised the approach of *Blieden J* as follows at para [25]:

“Insofar as the learned judge suggested that a defective application can be cured because the defendant or defendants have dealt in detail with their defence to the claim set out in the summons, that is not in my view correct. That amounts to saying that defects will be overlooked if the defendant deals with the merits of the defence. It requires a defendant who wishes to contend that the application is defective to confine themselves to raising that point, with the concomitant risk that if the technical point is rejected, they have not dealt with the merits. It will be a bold defendant that limits an opposing affidavit in summary judgment proceedings to technical matters when they believe that they have a good defence on the merits. The fact that they set out that defence does not cure the defects in the application, and to permit an absence of prejudice to the defendant to provide grounds for overlooking defects in the application itself seems to me unsound in principle. The proper starting point is the application. If it is defective, then cadit quaestio. Its defects do not disappear because the respondent deals with the merits of the claim in the summons”

[34] *Joffe et al, High Court Motion Procedure: A Practical Guide*, at 1-58 makes the point, relying on *Naudé* and *Nassimov supra*, that courts should not refuse to grant orders for summary judgment on the stroke of technical objections that are not prejudicial to the respondents in the summary judgment application. The authors clearly have in mind insignificant typographical errors when the remainder of their text is considered.

- [35] If there is more than one cause of action in a summons the applicant for summary judgment must take care that all causes of action upon which the plaintiff relies are verified. Summary judgment cannot be granted in respect of a cause of action not so verified. See *Pillay v Andermain (Pty) Ltd* 1970 (1) SA 531 (TPD) at 536C-E. See also in general: Jones & Buckle, *The Practice of the Magistrates' Courts in South Africa*, vol 2 at 14.20D and further.
- [36] In *Standard Bank of SA Ltd v Secatsa Investments (Pty) Ltd* at 236I – 237A the court suggested that the case law quoted to it all pre-dated our Constitution and whereas there was a traditional insistence on strict compliance with the requirements of rule 32(2), it is at least arguable that since coming into operation of the Constitution this should even be more so. Section 34 of the Constitution provides that everyone has the right to have his/her dispute resolved in a fair, public hearing before a court, or where appropriate, such other forum as mentioned.

VII LEGISLATION APPLICABLE TO MUNICIPALITIES

- [37] At least two pieces of legislation are applicable in casu, to wit the Local Government: Municipal Systems Act, 32 of 2000 ("the Systems Act") and the Local Government: Municipal Property Rates Act, 6 of 2004 ("the Rates Act").
- [38] A municipal council must, in terms of s 74 of the Systems Act, adopt and implement a tariff policy on the levying of fees for municipal services provided by the municipality itself or by way of service delivery agreements. The municipal council must also in terms of s 75(1) adopt by-laws to give effect to the implementation and enforcement of its tariff policy. It is true that s 102 stipulates that a municipality may consolidate any separate accounts of persons liable for payment, but this does not apply where there is a dispute between the municipality and a person. Furthermore the municipality must provide an owner of property in its jurisdiction with copies of accounts sent to the occupier of the property for municipal services supplied if the owner requests such accounts in writing from the municipality. Municipal accounts may be issued for sanitation fees, refuse removal fees, water and electricity levies as well as water and electricity consumption. The usage of water and electricity is determined by metering systems and the amounts charged will for obvious reasons vary from month to month.
- [39] Rates are levied on all rateable property within a municipality's area of jurisdiction and these rates are levied in accordance with a rates policy. See in general: Chapters 2 and 3 of the Rates Act. All rateable properties in the municipality's

jurisdiction must be valued during a general valuation to establish the market value of the properties. See Chapter 4 of the Rates Act. A rate levied by the municipality on property must be an amount in the rand on the market value of the property. See s 11(1) of the Rates Act. Rates payable in respect of rateable property qualify as a tax and in accordance with s 11 of the Prescription Act, 68 of 1969, the prescription period is 30 years. Contrary thereto the normal three year prescription period applies to debts in respect of water and electricity usage.

- [40] Although a municipality may consolidate accounts, it is evident from a legal point of view that separate causes of action arise in the event of failure by a property owner to pay his or her dues to the municipality.

VIII EVALUATION OF THE EVIDENCE AND SUBMISSIONS OF THE PARTIES

- [41] Respondent's counsel vigorously argued that we should refrain from being too technical. He emphasised that formalism in the manner in which the founding affidavit was formulated "should sway before the meaning conveyed by the ordinary content of the language." He relied on Van Niekerk et al, Summary Judgment: A Practical Guide, Lexis Nexis, 5-27 in support of his argument.
- [42] In dealing with this appeal I shall not consider the defences raised in the two supplementary affidavits filed hopelessly out of time and without condonation being granted by the court. A good argument may be raised to the effect that even the first answering affidavit, which was supposed to be filed before noon on 29 July 2014, but served at 14h44 on 25 November 2014, the day before the matter was set down for hearing of the summary judgment application, should be ignored. My personal view is that notwithstanding the late filing, the matter was enrolled for 26 November 2014 by agreement between the parties and probably to enable appellant to file its answering affidavit which it did, albeit 2¾ hours late, and the magistrate could and should have considered the defence set out in that affidavit. However, bearing in mind my approach to the matter, it is not even necessary to consider the defence raised therein.
- [43] My approach is to consider the founding affidavit in support of the summary judgment application on its own to establish whether a proper case has been made out for summary judgment. Firstly, the respondent's deponent elected to use the word "confirm" instead of "verify". I indicated above what Corbett JA had to say in Maharaj supra pertaining to the word "verify". When one considers the meanings of "verify" and "confirm" in the New Shorter Oxford English Dictionary, 1993 edition, there can be no doubt that "verify" has, generally speaking, a much stronger meaning than the word "confirm". If the legislature would be satisfied with the use of the word "confirm", there was no reason not to make use thereof instead of "verify." However, if this was respondent's only obstacle, I would probably be inclined to find that the mistake could be condoned, but the next obstacle is insurmountable.
- [44] Respondent's deponent failed to verify the separate causes of action. In fact, he did not even verify or confirm a cause of action, but merely confirmed the action as stated in the summons. This is an illogical and meaningless statement. Even if it could be argued that the words "cause of" were accidentally excluded from the text due to a typographical error, and the court a quo could have read that in, respondent's affidavit would still not suffice. As indicated above the respondent necessarily had to rely on more than one cause of action and each of these should have been verified by its deponent in the founding affidavit.

- [45] The summons is not in order for the reasons mentioned above. Respondent should have pleaded separate causes of action and it was not good enough to claim one amount, bearing in mind the allegations made in paragraph 1 of the summons.
- [46] I therefore conclude that even if the defences raised in any of the affidavits of appellant are ignored, the absence of a defence did not cure the defects in the summary judgment application read with the summons. No grounds could be provided for overlooking the defects in the summons and application for summary judgment. Wallis, J (as he then was) mentioned in *Schackleton Credit Management supra* that the starting point in adjudication of a summary judgment application is the application and if that is defective, then *cadit quaestio*.
- [47] The court *a quo* should have found that the summary judgment application was defective and it should have refused the summary judgment application with costs. The appeal must therefore succeed.
- [48] Unfortunately and notwithstanding the relatively small amount applicable, a matter that should have been finalised in July 2014, was only finalised after several unnecessary postponements on 25 March 2015, thereby causing unnecessary further legal costs. In my view the appellant should be burdened with all costs in the magistrate's court since 30 July 2014 and the order to be issued will reflect this.
- [49] Although the reasons provided by appellant's attorney for not prosecuting the appeal timeously were not altogether satisfactory, I am satisfied that condonation should be granted for the failure in this regard, particularly insofar as appellant presented a strong case on the merits.
- [50] In light of the manner in which I decided to deal with this appeal, it is not necessary to thoroughly consider the application by respondent for leave to introduce new evidence. What is apparent from the documentation filed on behalf of the parties in this regard is that appellant offered to pay R22 544.82, being 50% of an amount due to respondent in respect of sectional title unit 1 in the sectional title scheme erected on erf 900, Clarens. This amount has nothing to do with respondent's claim *ex facie* its summons. The offer was made without prejudice of rights and there is no indication that the offer was accepted. The offer, having been made in the course of settlement negotiations, should never have been placed before us. However, it is apparent from respondent's application that appellant's payment was credited to an account in respect of a sectional tile unit I, a totally different property as the one stated in the summons, to wit erf 900, Clarens.

- [51] The argument that the appeal became moot as a result of the offer to pay 50% of an account in respect of a property that differs from the property mentioned in respondent's summons is without substance. Although appellant did not object to the application for leave to introduce new evidence and even filed an answering affidavit, there is no reason to allow the application and it should be dismissed. Each party should be ordered to pay its own costs in respect of this application.
- [52] As indicated above, the appeal was initially set down for hearing on 18 April 2016. On that day it was removed from the roll and no order was made in respect of costs. No argument was presented to us by any of the parties in respect of the wasted costs occasioned by the removal from the roll. Therefore we shall not venture in dealing with those costs, save to say that it appears as if respondent should be blamed for the removal in which event and upon such finding, respondent should bear those wasted costs as well.

IX

ORDERS

[53] Consequently the following orders are made:

1. Condonation is granted to appellant in respect of its non-compliance with the Uniform Rules of Court concerning the timeous prosecution of the appeal, the costs of the application for condonation to be paid by appellant on an unopposed basis.
2. The appeal is upheld with costs.
3. The order of the court a quo is set aside and replaced by the following order:
"The application for summary judgment is dismissed with costs, excluding those costs incurred after 30 July 2014 which shall be borne by the respondent."
4. Respondent's application for leave to introduce new evidence is dismissed, each party to be liable for its own costs.

J.P. DAFFUE, J

I concur.

K. J. MOLOI, J

On behalf of the applicant: Adv. J. S. Rautenbach

Instructed by:

Honey Attorneys

BLOEMFONTEIN

On behalf of the respondent: Adv. J.M.C. Johnson

Symington & De Kok

/eb

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