

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

CASE NUMBER: 40135/2016

DELETE WHICHEVER IS NOT APPLICABLE

1.REPORTABLE: NO

2.OF INTEREST TO OTHER JUDGES: NO

3.REVISED: NO

A handwritten signature in black ink, appearing to read "Alfred Dippenaar".

Judge Dippenaar

In the matter between:

CITY OF JOHANNESBURG

APPLICANT

AND

CHANGING TIDES 74 (PROPRIETARY) LTD

RESPONDENT

IN RE:

CHANGING TIDES 74 (PROPRIETARY) LTD

PLAINTIFF

AND

CITY OF JOHANNESBURG

DEFENDANT

JUDGMENT

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by e-mail. The date and time for hand-down is deemed to be 10h00 on the 16th of AUGUST 2023.

DIPPENAAR J:

[1] This application for a separation of issues under r 33 (4) relates to a damages claim instituted by the respondent against the applicant pursuant to an eviction order granted by Claassen J in favour of the respondent on 14 June 2012 ("the main proceedings"). A central issue which must be determined in the main proceedings is whether the applicant's delay in providing temporary emergency accommodation to the occupiers of the respondent's property was wrongful and can sustain a damages claim.

[2] The litigation pertaining to the eviction has been protracted. It is not necessary to set out all the facts pertaining thereto in any detail, suffice it to state that the respective parties each blamed the other for the delay. After the launching of the action during November 2016, the matter was designated a commercial case subject to the Commercial Court Directives of this court. The designated commercial court was not available to entertain the separation application and it was accordingly enrolled in the opposed motion court.

[3] Subsequently, and after the pleadings were delivered, a statement of case and responsive summary statement have also been delivered by the respective parties. Those documents however do not form part of the application papers before me. The separation

application is predicated on the particulars of claim. The applicant did not amend its separation application nor seek any opportunity to do so.

[4] Pursuant to the first case management conference held before the designated commercial court judge, various directives were issued on 22 October 2021. In terms thereof, it was *inter alia* directed that pleadings had closed and the parties were directed to file their expert notices and summaries on or by 25 February 2022 in respect of the issues on which the respective parties bore the onus and on or by 14 March 2022 in response to the summaries filed on 25 February 2021. The respondent delivered its expert summaries. To date, no expert summaries have been delivered by the applicant, despite seeking and obtaining an extension of the period by an additional three weeks.

[5] On 11 May 2022, the applicant's attorney raised the issue of a separation of the debate surrounding the quantum of damages. In relevant part, the letter provided:

"A reading of the pleadings makes it plain that there are multiple issues that fall to be determined by the trial Court, these pertain all to the question of our client's liability for the damages claimed by your client. Given the novel points of law, as were foreshadowed in our client's exception and in its plea, the issue of liability is one of immense public importance generally. We anticipate that whichever party is unsuccessful on the question of liability would seek to appeal that decision and, it seems inevitable to us, that the issue would need to be finally determined by the Constitutional Court for the reasons aforesaid. In these circumstances we take the view that the debate surrounding quantum of damages which, but for a question whether your client's expert has applied the correct principles in reaching the quantum asserted by your client, is capable of expeditious resolution once the dispute on liability is finally determined. To this end we propose that there be a separation of issues before the Trial Court....this has several advantages. First, the amount of evidence that will be required to address these issues will be truncated thus resulting in a saving of time and legal costs. Second, the hearing of the matter will also be substantially truncated"

[6] In its notice of motion, launched on 07 November 2022, the applicant sought a separation of the issues identified in paragraphs 7 to 24 of the respondent's particulars of claim. No reference was made to any paragraphs in the applicant's plea.

[7] As pointed out by the respondent during argument, the paragraphs of the applicant's plea however do not in all respects correspond with or line up to the paragraphs of the particulars of claim sought to be separated.

[8] The applicant argued that its proposed separation was convenient as it raises two discrete and substantial triable issues: the first; whether the defendant has any liability to the plaintiff arising from the order of Claassen J on 14 June 2012 as pleaded in paragraphs 7 to 24 of the particulars of claim. The second; the quantification of any damages the plaintiff may have suffered as pleaded at paragraphs 25 to 29 and 30 to 32 of the particulars of claim. The notice of motion refers only to the first issue. In essence the application entails separating the issue of liability from quantum.

[9] The applicant's case was that the trial of each of the discrete issues would be lengthy and that in the event of the respondent being unsuccessful in establishing its case, a substantial amount of court and preparation time and legal costs would be saved by the proposed separation.

[10] The applicant contended for convenience on the basis that (i) the action was the first of its kind against a local authority flowing from an eviction order; (ii) the question of liability turned substantially on the issue of the wrongfulness of the applicant's conduct seen in the context of the facts and issues of public policy; (iii) the decision of liability would undoubtedly go to the Supreme Court of Appeal and the Constitutional Court because of the importance of the case and its substantial public interest; (iv) at a pre-trial conference held on 26 October 2022, the duration of the trial on all issues was estimated to be as much as 10 days.

[11] According to the applicant, the respondent in the main proceedings seeks to claim damages flowing from a breach of constitutional rights on the one hand and delictual damages on the other. It was argued that a decision on this issue would have a substantial consequence to the calculation of damages. It argued that the determination of Claim A would be a lengthy trial involving evidence by the respondent's representatives and experts. It was not disputed that the determination of Claim B would substantially comprise of legal argument. The applicant argued that the only disadvantage to the respondent would suffer is that any damages award would be delayed "a little further".

[12] The respondent opposed the application and disputed that the separation would be convenient or would result in any substantial saving of time, preparation and legal costs. It argued that a separation would rather only serve to delay an already long delayed action, specifically if appeals were to follow. Its case was that the quantification of its claims is a minor portion of its case and that the separation application was aimed at delaying any damages award for many years.

[13] It contended that there was a significant overlap of evidence on the liability and quantum issues and that a few issues of law and fact overlap, resulting in a likely duplication of witnesses and the real risk of conflicting decisions were a separation to be granted. It was further argued that witnesses may no longer be alive or may suffer from fading memory were there to be further delays. The respondent contended for far reaching prejudice exacerbating the prejudice already suffered by it as a result of the delays caused by the applicant.

[14] In reply, the applicant complained that the respondent failed to establish a cognisable ground why a separation would not be convenient on any factual basis. It characterised the respondent's complaints as unsubstantiated conclusions, devoid of cogent primary facts to support it, given that the respondent *inter alia* did not particularise the evidence referred to or the witnesses whose evidence would be duplicated.

[15] As stated, the parties blamed each other for the various delays which have occurred during the protracted litigation which has endured for many years. It is not for present purposes necessary to make a determination of all these complaints or who is responsible for the delays. The undisputed existence of substantial delays in the litigation is however a factor to be taken into account in considering the issue of convenience.

[16] The relevant principles to assessing whether a separation is convenient are set out in *African Bank*¹. It is not necessary to repeat them, save where salient in the present context.

[17] As a general principle, notwithstanding the wide powers conferred on a court under r 33(4) it is ordinarily desirable, in the interests of expedition and finality of litigation, to have one hearing only at which all issues are canvassed so that the court at the conclusion of the matter dispose of the entire case.

[18] It is incumbent on a party in the position of the respondent to illustrate that a separation would not be convenient and that the balance of convenience favours it.² Convenience is in the first instance, the convenience of the court and in the second, the convenience of the parties.

[19] It is necessary to weigh up the extent of the advantages and disadvantages of the separation as sought. Given the broad characterisation adopted by the applicant, essentially distilling into issues of “merits” or “liability” and “quantum”, I am not persuaded that the applicant has formulated the proposed separation with sufficient specificity to be viable or convenient.

[20] In addition, the proposed separation is based on particulars of claim which have effectively been overtaken by the respondent’s statement of case. The applicant’s plea, which does not in all instances overlap with the paragraphs sought to be separated, was not referred to as part of the separation. The applicant has further delivered a responsive summary statement, which in any event has overtaken its plea. The risk of disputes arising in due course over exactly what was separated, were the order to be granted in the terms sought, cannot be ruled out in these circumstances.

¹ *African Bank Ltd v Covmark Marketing CC; African Bank Ltd v Soodhoo and Others* 2008 (6) SA 46 (D) at 51B-52E and the authorities cited therein.

² *Braaf v Fedgen Insurance Ltd* 1955 (3) SA 938 (C) 939G-942C

[21] It is apposite to refer to Denel³, wherein the Supreme Court of Appeal held:

"In many cases, once properly considered, the issues will be found to be inextricably linked, even though, at first sight, they might appear to be discreet. Even where the issues are discrete, the expeditious disposal of the litigation is often best served by ventilating all the issues at one hearing, particularly where there is more than one issue that may be readily dispositive of the matter".

[22] In such a broad characterisation of the proposed separated issues, as opposed to a clear and prescribed delineation of specific issues, there may well be a risk of factual and legal issues overlapping as well as an overlap of witnesses, albeit that the respondent did not in its answering papers provide any details of such evidence nor disclose the identity of such witnesses.

[23] Given the various issues which are to be determined in the main proceedings, including the alternative bases contended for by the applicant which the respondents raise to claim damages, there may well be more than one issue that may be readily dispositive of the matter, more so if the applicant is correct in its contention that the respondent is hedging its bets in claiming delictual or constitutional damages. In the latter instance the issues pertaining to what appropriate constitutional damages may be may well be inextricably linked to the issue whether such damages are appropriate. Moreover, even if the issues are discrete, as the applicant contended, the expeditious disposal of the litigation would be best served by a ventilation of all the issues at a single hearing.

[24] The substantial public interest and the interests of justice in the outcome of this matter is further a factor which militates against the granting of the separation application. It would in my view be in the public interest if the main proceedings be determined as a whole so that clarity may be obtained on all the relevant issues, including the quantification issue, more so if the matter is to enjoy the attention of the appeal courts.

[25] The distinct possibility of appeals on the issue of liability, which was first raised by the applicant, is also a factor which strongly militates against the granting of the

³ Denel (Edms) Bpk v Vorster 2004 (4) SA 481 (SCA) at 484I-485E

separation. Not only would that result in substantial delays in the finalisation of the litigation, as argued by the respondent, but the issues surrounding the existence and calculation of the damages as well as the issue of causation may be inextricably linked.

[26] Moreover, given that the matter has been allocated to a single judge as a commercial court matter, that judge would be seized with determining all the issues, including the quantification of the respondent's claims, were it ultimately to be successful on the liability issues. Effectively, that would result in the matter becoming part heard before such judge if the liability issue is taken on appeal and would result in a separation not being convenient to the court.

[27] It would also be inconvenient for any appeal court if it were to be constrained to consider only a portion of the issues between the parties, as the issues surrounding the quantification of the respondent's claim would not have been determined if the separation is granted. That further militates against a separation being convenient to the court.

[28] Whilst it can be accepted that a separation would be convenient to the applicant as it has not yet delivered an expert report and it is unclear whether the applicant has in fact expended funds in that regard, convenience only exists from the perspective of the applicant. It was not strenuously disputed that the evidence pertaining to the actual quantification issues would be limited and would not be of a long duration. It was further common cause that the respondent's claim B was to be dealt with mainly by way of legal argument.

[29] Seen from the respondent's perspective, there would be inevitable delays of a substantial nature, were appeals to follow on a determination of the liability issue. The respondent has already delivered its expert summaries pertaining to the calculation of the quantum of its claims.

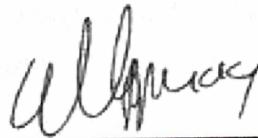
[30] Although there is merit in the applicant's criticism that the grounds advanced by the respondent in opposition to the separation are in oblique terms and constitute conclusions, considering all the facts, it cannot be concluded that the respondent has failed to illustrate a balance of convenience in its favour.

[31] I further do not agree with the applicant's argument that the respondent was unable to dispute that the proposed separation application would result in a substantial truncation of time and reduction in costs. The potential prejudice to the respondent in relation to the envisaged appeals is significant.

[32] For these reasons, I conclude that the separation proposed by the applicant would not be convenient and that the application must fail. There is no reason to deviate from the normal principle that costs follow the result.

[33] I grant the following order:

The application for separation under rule 33(4) is dismissed with costs, including the costs of two counsel where so employed.



**EF DIPPENAAR
JUDGE OF THE HIGH COURT
JOHANNESBURG**

APPEARANCES

DATE OF HEARING	: 24 July 2023
DATE OF JUDGMENT	: 16 August 2023
APPLICANT'S COUNSEL	: Adv. A.W. Pullinger

APPLICANT'S ATTORNEYS

: Esthe Muller Inc. Attorneys
c/o Couzyns Inc.

RESPONDENT'S COUNSEL

: Adv. C.H.J Badenhorst SC
Adv. R. Willis

RESPONDENT'S ATTORNEYS

: Kunene Ramapala Inc.