



**REPORTABLE**

**Republic of South Africa**

**IN THE HIGH COURT OF SOUTH AFRICA**

**(WESTERN CAPE HIGH COURT, CAPE TOWN)**

**CASE No: 7596/2007**

In the matter between:

**PETER LAWSON**

**Plaintiff / Respondent**

**and**

**SCHMIDHAUSER ELECTRICAL CC**

**Defendant / Applicant**

**JUDGMENT DELIVERED : 9 NOVEMBER 2010**

***CORAM : MOOSA, J***

***Application for separation of certain issues heard on:*** 1 November 2010

For Plaintiff / Respondent : Adv Rob Patrick

Attorney(s) : Webber Wentzel

For Defendant / Applicant : Adv A Ferreira

Attorney(s) : Glyn Marais Inc

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**MOOSA, J:**

**The Separation of Issues**

1]The Applicant who is the Defendant in this matter, during the course of the trial brought an application, in terms of Rule 33(4) of the Uniform Rules of Court, for the separation of certain issues. For the sake of convenience I shall refer to the parties as in the action, namely, the Applicant as the Defendant and the Respondent as the Plaintiff. In the Notice of Motion the Defendant is seeking the separation of the issues in the following terms:

- (i) Whether Applicant was in breach of the labour Rates Agreement – annexure “S2” (“the agreement”) to Applicant’s amended Plea.
- (ii) If the answer to the issue in paragraph (i) is in the affirmative then whether Respondent placed Applicant in *mora*.
- (iii) If the answer to the issue in paragraph (ii) above is in the affirmative then whether Respondent was entitled to cancel the agreement.

- (iv) That the other issues in dispute between the parties be postponed *sine die* and the determination thereof be stayed pending the finalisation of the separated issues.

The application is opposed by the Plaintiff.

## The Law

2]Rule 33(4) envisages the convenient and expeditious disposal of litigation in a fair and appropriate manner. When it comes to the question of convenience, not only must the interest of the court but also that of the litigants must be taken into consideration (**Braaf v Fedgen Insurance Ltd** 1995 (3) SA 938 (C) at 940C-D). In making that determination the court must take into consideration the advantages and disadvantages of ordering the separation. If the advantages of separation outweighs the disadvantages and moreover will materially shorten the proceedings, the court would normally grant the application (**Berman & Fialkov v Lumb** 2003 (2) SA 674 (C) at para [17]. The court has a wide discretion to order separation where convenience dictates such a course. The court is obliged to grant the application for separation unless it appears to the court that the issues cannot conveniently be decided separately (**Braaf v Fedgen Insurance Ltd** (supra) at 939G. The Supreme Court of Appeal has cautioned against piece-meal adjudication of a case and indicated that issues on the face may appear to be discrete but on closer scrutiny may found to be inextricably interlinked (**CAN v MTN** 2010 (3) SA 382 at 408H).

## The Agreement

3]In accordance with the pleadings, the parties entered into two written agreements in

terms of which the Defendant agreed to provide certain electrical installations to the Plaintiff at his premises in Camps Bay. The first contract was based on a lump sum agreement. This contract was subsequently superseded by a labour rate agreement (“the agreement”). The Plaintiff’s claim is based on damages arising from the alleged breach of the agreement. The Defendant denies such breach and pleads that it fulfilled its obligation up until the Plaintiff repudiated the agreement and prevented it from completing the work

4]It is common cause that the agreement does not stipulate a date by which the Defendant had to perform i.e. *mora ex rei* nor does it contain a forfeiture clause or a *lex commissoria*. In the absence of such provisions and in the event of a breach, the Plaintiff was required to place the Defendant in *mora* prior to cancelling the agreement by giving it reasonable notice to remedy the default (**Breytenbach v Van Wyk** 1923 AD 541 at 549).

## **The Breach**

5]The Plaintiff in his pleadings sets out a series of breaches allegedly committed by the Defendant in carrying out its obligations in terms of the agreement. The breaches can be divided into three broad categories: the first is that the Defendant “*required the provision of and ordered components surplus to those required in order to complete the work*”; the second is that the Defendant “*invoiced the plaintiff for time in excess of reasonably required by the defendant’s staff in order to have performed or perform the work*”; and the third is that the Defendant, “*failed to perform all work in a professional, alternatively workmanlike manner and using components that were free of detectable*

*defects”.*

6]According to the pleadings, it appears that the major portion and extent of the breaches were attributable to poor workmanship. The Plaintiff alleged that the Defendant was unable and/or unwilling to remedy the breaches of the agreement and on 12 February 2007, alternatively on 23 February 2007, cancelled the agreement. The Plaintiff’s claim for damages essentially arises from remedial work effected to rectify the alleged breaches.

7]The Defendant in this application alleges that in the evidence led by the Plaintiff in the trial thus far, it emerged that the *“ability of the Plaintiff to prove his case essentially hinges upon one succinct point of fact and law. That is whether or not the Defendant could have been in breach of the so-called Labour Rates Agreement, annexure S2 (page A128 of the pleadings bundle) to Applicant’s amended plea”.*

### **The Lex Commissoria**

8]The Defendant states that the agreement contains no date for performance and no *lex commissoria* and in the circumstances the Plaintiff was required *ex personae* to place the Defendant in *mora*. The Plaintiff has failed to do so and in the circumstances the Plaintiff was not lawfully entitled to cancel the agreement. If this court finds in his favour on that issue, it will be dispositive of the whole matter.

9]The evidence is that the Defendant requested further particulars as to “*whether Defendant was provided with an opportunity to remedy the alleged breaches as well as the manner in which such opportunity was given*”. The Plaintiff’s response thereto was that “*this question was a matter for evidence*”. The matter was further raised by the Defendant’s attorneys in a letter dated 23 October 2009 addressed to the Plaintiff’s attorneys and the Plaintiff was call upon to provide proper particulars in this regard but no such particulars were forthcoming.

### **The Evidence**

10]The Plaintiff in his evidence confirmed that by 12 February 2007, he had resigned himself to the fact that the Defendant was neither able nor willing to complete the work and had at that stage decided to employ another electrician to complete the work. The Plaintiff further confirmed that a representative of the Defendant came to the property to attend to the complaints but that he was refused access to the property by the Plaintiff. Gaunt who gave expert evidence for the Plaintiff said that those issues that were visibly evident on 12 February 2007 were relatively minor issues and most could have been cleared up with an almost superficial correction.

### **The Issues**

11]The first issue that the court has to determine is whether the agreement has been validly cancelled. If the court finds that the agreement has not been validly cancelled, the other issue in terms of the agreement that remains to be decided is whether the Plaintiff had been overcharged for work that had been completed prior to the operation

of the agreement. That agreement provides further that all work performed by the Defendant in terms of the contract to date of the agreement would be recalculated in accordance with rates and/or tariff set out in the agreement.

12]The Plaintiff in the Answering Affidavit for the first time raises the issue that: *“The greatest portion of the my claim arises from the defendant having invoiced me for time in excess to that reasonably required for the defendant’s staff to have performed work that was (defectively) performed by the defendant”*. He states further the fact, whether or not he has lawfully cancelled the contract in February 2007, has no bearing upon this aspect of the claim. The pleadings do not set out what times were reasonable for work performed by the Defendant.

### **The Claim**

13]In its claim the Plaintiff deducts all amounts paid to the Defendant less the amounts allegedly due to the Defendant and adds the costs of remedial work, the cost of components damaged by the Defendant, and the cost of surplus components ordered. In respect of the amounts allegedly due to the Defendant, the Plaintiff in paragraph 19 of his Particulars of claim states: *“The consideration due to the defendant by the plaintiff in terms of the contract in respect of the portion of the work completed by the defendant in terms of the contract was R176 082.50”*. It is not clear whether this refers to work performed by the Defendant prior or subsequent to coming into operation of the second agreement or both.

### **The Question of Overcharging**

14]The Plaintiff states further that in order to deal with the question of the alleged overcharging, it will be necessary to lead evidence as to the work actually done by the Defendant, the defects in its work, the remedial work required and what a reasonable amount of time was for the Defendant to have spent on such work. With regard to the defects and the remedial work referred to, the Plaintiff states that it is not necessary to place the Defendant in *mora* but even if it was necessary, he in fact did so.

15]These issues have not been pleaded by the Plaintiff. What has been pleaded is that the Defendant has overcharged in respect of the work done prior to operation of the agreement. In any case, if the Plaintiff in his claim relies on the defects in the works and the remedial work done, the question once more arises was the Defendant placed in *mora* and given an opportunity to remedy the defects before the remedial work was undertaken by the Plaintiff. The determination of this issue may be dispositive of a substantial portion of the claim arising from being overcharged.

### **The Disadvantages**

16]However, the Plaintiff does not set out in his Particulars of Claim the nature and extent of defects in the works and the remedial work to be done or already done. In addition thereto the particulars of claim of the Plaintiff are vague, imprecise and lack clarity. It may be advantageous for all concerned that the Plaintiff be afforded an opportunity to amend his pleading in order to clearly and succinctly identify the issues and the Defendant to be given an opportunity to replicate thereto.

17]The Plaintiff submitted that he will be prejudiced by the separation of the issues because in the first place the court has already heard the evidence of two witnesses; in the second place the evidence is intertwined and it may be disadvantageous to separate the issues; in the third place separation will create a fragmented record and disadvantage the court and the parties; and in the fourth place, it can also lead to the lengthening of the proceedings instead of shortening the proceedings. I disagree.

### **The Advantages**

18]I am of the view that a separation of the issues will be to the advantage of both the parties as well as the court for the following reasons: firstly, it will clearly and succinctly identify the issues; secondly it will afford the parties an opportunity to amend their pleadings to meet those issues and bring their case within the ambit of the separated issues; thirdly, it is likely to limit the issues and the scope and extent of the evidence to be led on those issues, if any; fourthly, those issues could be decided on the basis of a stated case in terms of Rule 33(1) of the Uniform Rules of Court ; and fifthly, it can considerably shorten the proceedings and save time and costs;

### **The Convenience**

19]Having regard to the advantages and disadvantages of separation, I am of the view that the advantages far outweigh the disadvantages and it will be convenient and in the interest of all parties concerned to separate the issues in this matter. In **Denel Edms Bpk v Vorster** 2004 (4) SA 481B-C **Nugent JA**, says: *"It is only after careful thought*

*has been given to the anticipated course of the litigation as a whole that it will be possible properly to determine whether it is convenient to try and issue separately. But where the trial Court is satisfied that it is proper to make such an order – and, in all cases, it must be so satisfied before it does so – it is the duty of that Court to ensure that the issues to be tried are clearly circumscribed in its order so as to avoid any confusion.”* (See also **CNA v MTN** 2010 (3) SA 382(supra) at para [90].)

## **The Order**

20]After having given careful consideration to the future conduct of the matter, I come to the conclusion that the convenient and expeditious disposal of the matter in a fair and appropriate manner dictates that the issues be separated. In the premises the following issues, in terms of Rule 33(4) of the Uniform Rules of Court, are separated:

- (i) Whether the Plaintiff lawfully cancelled the Labour Rates Agreement – annexure “S2” to the Defendant’s Amended Plea;
- (ii) If not, did the Plaintiff repudiate the said Agreement and was such repudiation accepted by the Defendant;
- (iii) In respect of the greater portion of Plaintiff’s claim arising from the defective work performed by the Defendant prior to the coming into operation of the Labour Rates Agreement and the remedial work undertaken by the Plaintiff in pursuant thereto:
  - (a) Firstly, whether the Plaintiff was required to place the Defendant in *mora* and grant the Defendant a reasonable opportunity to remedy such defective work; and
  - (b) Secondly, given the fact that the work performed by the Defendant was signed off by the quantity surveyor in the employ of the Plaintiff, whether the Plaintiff is by law

entitled to claim from the Defendant in respect thereof ;

(c) That the other issues in dispute, if any, be postponed *sine die* and the determination of such issues be stayed pending the finalisation of the separated issues;

(d) That the costs of this application stand over for later determination.

  
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