

**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE LOCAL DIVISION, PORT ELIZABETH)**

CASE NO: 3223/2017

Heard on: 30 January 2020

Delivered on: 06 February 2020

In the matter between:

**RENNIE CHARLES BLAINE
PRICE, N.O.**

FIRST PLAINTIFF

**MICHAEL LOWELL BLAINE
PRICE, N.O.**

SECOND PLAINTIFF

**ROBIN OWEN JEFFERSON,
N.O.**

THIRD PLAINTIFF

**TORTELLO INVESTMENTS
N.O. 20 (PTY) LTD**

FOURTH PLAINTIFF

**EQUISTOCK PROPERTIES 7
(PTY) LTD**

FIFTH PLAINTIFF

And

SUN CITRUS PACKERS (PTY) LTD

DEFENDANT

JUDGMENT

GQAMANA J:

[1] This matter was set down for trial on the separated issues as per Madam Justice Revelas' Order of 28 June 2019.¹ On the morning of the trial on 29 January 2020, the plaintiffs filed a substantial application for postponement as well as for other relief, including and more importantly a relief that, the Order for separation of issues taken by agreement be revisited/rescinded. Through some negotiations between the parties, an agreement was reached in respect of postponement as well as other relief sought, save for the issue relating to the revisiting of the Order of Revelas J referred to above. The main action was accordingly postponed *sine die* and that the costs occasioned by such postponed were reserved.

[2] Reverting to the issue at hand, Revelas J on 28 June 2019 made the following order by agreement:

"1. That the Plaintiffs' claims 2 and 3 (paragraphs 38, 39, 64, 65, 90 and 91 of the Plaintiffs' amended particulars of claim, read in conjunction with the defences pleaded thereto) be and is hereby separated from the remaining issues.

2. That the hearing in regard to the remaining issues be postponed until judgment is granted on the issues referred to in paragraph 1 above."

¹ The Order is at pages 260 – 261 of the bundle of notices and I shall revert to this Order later.

[3] The plaintiffs' application to revisit the aforesaid order was vehemently opposed by the defendant.

[4] As a point of departure, the Order which is the subject matter herein was granted in terms of rule 33 (4) of the Uniform Rules and by agreement between the parties. Rule 33 (4) of the Uniform Rules of Court reads:

“If, in any pending action, it appears to the Court mero motu that there is a question of law or fact which may conveniently be decided either before any evidence is led or separately from any other question, the Court may make an order directing the disposal of such question in such manner as it may deem fit and may order that all further proceedings be stayed until such question has been disposed of, and the Court shall on the application of any party make such order unless it appears that the questions cannot conveniently be decided separately.”
[my emphasis]

[5] The order of Revelas J was not proceeded by or granted pursuant to a formal application in support of the agreed separation but was moved on an informal basis.

[6] The parties are in agreement that such an order is interlocutory in nature and this court has the authority to revisit same.² I agree that this court has the power to revisit the order which is the subject matter herein.

[7] Both parties referred the court in detail on the purpose of rule 33 (4) which is aimed at facilitating the convenient and expeditious disposal of litigation.³

² Kelbrick and Others v Nelson Attorneys and Another [2019] JOL 43037 (SCA) at para [28], see also Wallach v Lew Geffin Estates CC 1993 (3) SA 258 (AD) at 262 – 263.

³ Denel (Edms) Bpk v Vorster 2004 (4) SA 481 (SCA) at 485 A – E.

[8] Mr Buchanan SC, counsel for the plaintiffs, referred the court to some authorities wherein the Supreme Court of Appeal admonished parties in dealing with the procedure on rule 33 (4) on an informal basis.⁴

[9] In *Adlem* (*supra*) the Supreme Court of Appeal said this:

“[5] It appears that the parties adopted, and the court sanctioned, an informal approach based on rule 33 (4). That is not acceptable. As this court held in ABSA Bank Ltd v Bernert 2011 (3) SA 74 (SCA) para 21:

‘It is imperative at the start of a trial that there should be clarity on the questions that the court is being called upon to answer. Where issue are to be separated rule 33 (4) requires the court to make an order to that effect. If for no reason but to clarify matters for itself a court that is asked to separate issues must necessarily apply its mind to whether it is indeed convenient that they may be separated, and if so, the questions to be determined must expressed in its order with clarity and precision’.

[10] In this case too, the informal procedure which was adopted by the parties in obtaining the order of Revelas J must be frowned up and parties must refrain from adopting informal procedures especially in matters of significance where issues to be separated are not as clear as they might think so.

[11] Mr Buchanan SC, further argued that with the benefit of hindsight and there being no aspersions cast against Revelas J, the issues that were sought to be separated are not discreet but are inextricably linked and that it was the fault of the legal representatives to agree to the separation order.

⁴ See for instance *Adlem v Arlow* 2013 (3) SA 1 (SCA) at para 5 and also *ABSA Bank Ltd v Bernert* 2011 (3) SA 74 (SCA) at para [21].

- [12] Mr Beyleveld SC, counsel for the defendant, argued to the contrary. His argument is that claims 2 and 3 are discreet and are able to be conveniently disposed and are not inextricably linked to claim 1. His argument was that claims 2 and 3 are for monetary claims i.e. whether the defendant was entitled to the remuneration and commission already paid to it, whilst claim 1 is for accounting and debatement. Therefore, so the submissions go, the original idea to separate was sound on the pleadings and should stand.
- [13] The question to be answered in this application is whether, it will be convenient to both parties for the trial to proceed only on the separated issues as set out in the Order of Revelas J. The word “convenient” in the context of rule 33 (4) conveys not only the notion of facility or ease or expedience, but also the notion of appropriateness and fairness.⁵
- [14] Not only convenience must be considered but also the fashioning of the order is equally important. The questions/issues to be determined must be expressed by the court with clarity and precision in its order.⁶
- [15] I must indicate that having read the pleadings (both the particulars of claim and the amended plea) and having regard to the affidavits filed both by the plaintiffs in this application and the defendant in opposition thereto, I hold the view that the issues contested by the parties in the main action are inextricably link.
- [16] It has also not escaped me that, the source of the entire *lis* is rooted from the contracts entered into between the parties⁷ attached as annexures “POC1A”,

⁵ See: Erasmus Superior Court Practice at D1 – 437.

⁶ FirstRand Bank Ltd v Clear Creek Trading 12 (Pty) Ltd 2018 (5) SA 300 (SCA) at 306 C – E.

⁷ Using the word “parties” loosely so for the time-being.

“POC5” and “POC6” to the plaintiffs’ amended particulars of claim. I am alive to the point raised by Mr Beyleveld SC that claim 1 is for accounting and debatement and that claims 2 and 3 are for monetary claims. However, it does not appear to me having read the pleadings as they currently stand and the affidavits filed by both parties in this application, that it will be convenient to separate the hearing and for the trial to proceed only in respect of claims 2 and 3.

[17] In my objective assessment there is an overlap of issues in claims 1 and 3. More so, if one has regard to the defence pleaded by the defendant that of prescription, although at the last moment during hearing, Mr Beyleveld SC abandoned the prescription defence in respect of claim 1. Despite such abandonment, I still hold the view that there will be an overlap of evidence and it will not be convenient to separate the issues.

[18] Insofar as the issue of costs are concerned, although the plaintiff argued that the costs should follow the results, but if one has regard to the reasons and the manner in which the order was obtained separating the issues and the concession by Mr Buchanan SC, that it is the parties’ legal representatives that are at fault in agreeing to the separation and to fashioning the relief in the manner in which it currently stands. On those bases it will not be fair to mulct one party with a costs order at this stage, therefore the costs of this application should be the costs in the trial.

[14] In the circumstances the following order is issued:

1. The order of Revelas J taken by agreement on 28 June 2019 for separation of the issues is revisited and set aside.
 2. The costs of this application shall be costs in the main trial.
-

N W GQAMANA

JUDGE OF THE HIGH COURT

APPEARANCES:

For the plaintiffs : R. G. Buchanan SC (with D Gess)

Instructed by : Rushmere, Noach Inc.

5 Ascot Office Park

Conyngham Road

Greenacres

PORT ELIZABETH

Tel: 041 399 6700

For the defendant : A. Beyleveld SC (with T. Zietsman)

Instructed by : Schoeman Oosthuizen Inc.

167 Cape Road

PORT ELIZABETH

Tel: 041 373 6878

Fax: 041 373 5303