



**IN THE HIGH COURT OF SOUTH AFRICA
WESTERN CAPE DIVISION,
CAPE TOWN**

Case No: 20121/2021

In the matter between:

RED TREE CAPITAL (PTY) LTD

Plaintiff / Respondent

and

KINNEY OOSTHUIZEN

Defendant / Applicant

JUDGMENT

ANDREWS, AJ

Introduction

[1] This is opposed Rule 33(4) application in terms of which the Applicant seeks an order separating the issues identified in prayer 1 of the Notice of Motion in the following terms:

- (a) That the following issues be heard *in initio* and that all other issues stand over for later determination:
- (i) Whether the agreements relied upon demonstrate benefit to Defendant, as required by CPA Regulation 5(1);
 - (ii) If not, whether the agreements are void by reason of their contravening CPA Regulation 5(1);

- (iii) Alternatively, whether Defendant duly cancelled the agreements, exercising the right she has under Section 14(2) read with 14(3) of the CPA.

Factual Background

[2] According to the Particulars of Claim, the Plaintiff instituted action against the Defendant pursuant to having entered into two Master Rental Agreements on or about 18 April 2019 and 5 June 2019 respectively.¹ The agreements provide for the rental of the equipment set out in paragraph 6.5 of the Particulars of Claim for a sixty (60) month period.²

[3] On or about 25 February 2019 and 5 June 2019 respectively, the Defendant signed two Consumer Confirmation Letters. The goods were duly delivered to the Defendant on or about 19 April 2019 and 6 June respectively. On or about 20 April 2021, the Defendant addressed a letter to the Plaintiff which purported to terminate the agreements as envisaged under section 14(2)(b)(ii) of the Consumer Protection Act 68 of 2008. The agreements were accordingly terminated 19 May 2021.

[4] The Plaintiff alleges that in breach of the agreements, the Defendant failed to immediately return the goods to the Plaintiff pursuant to the termination as certain goods were only returned on or about 30 July 2021. It is alleged that as a result of the Defendant's holding over of the said goods for the period 19 May 2021 to 30 July 2021, the Plaintiff has suffered damages which are equal to the market rental value of the goods in the amount of R44 342.99 being an equivalent to the combined monthly rentals payable in terms of the agreements for the period 19 May 2021 to 30 July 2021.

[5] The Plaintiff's Second Claim against the Defendant is as a consequence of the termination. The Plaintiff alleges that the Defendant is liable to the Plaintiff for the payment of the Net Present Value at the Prime Interest Rate of the rentals which would have been payable by the Defendant had the agreements continued until their expiry in the amounts of R576 951 and R124 348.65 respectively. The Plaintiff furthermore alleges that the Defendant is indebted to it in the total amount of R701 300.59.

¹ Index Pleadings: Particulars of Claim, paras 4 and 5, page 4; See also Annexures "B1" and "B2" attached to the Particulars of Claim.

² Index Pleadings: Particulars of Claim, para 6.5, page 5

[6] The Plaintiff's Third Claim also flows from as a consequence of the termination in terms of which the Plaintiff alleges that the Defendant is liable to make payment to the Plaintiff of a reasonable cancellation penalty. In this regard, the Plaintiff avers that the unexpired rental periods under the agreements were 34 and 36 months respectively. The Plaintiff asserts that the reasonable cancellation penalty in respect of the agreements is equal to three months' rental in the sum of R57 276.36.

[7] On 25 August 2021 and 13 October 2021 respectively, the Plaintiff sold the goods procured to Integro and WeBuyCopiers respectively, for an amount of R50 000 and R400 respectively. The Plaintiff tendered the set-off of these amounts received against the damages that it allegedly suffered leaving a remaining amount of R744 959.94 still due owing and payable by the Defendant.

[8] Alternatively, the Plaintiff alleges that the Defendant has been enriched at the Plaintiff's expense in the amount of R744 959.94 due to the Plaintiff's performance in terms of the allegedly void agreements.

Principal Submissions by the Defendant

[9] It is the Defendant's contention that the issues identified in the Notice of Motion ought to be decided *in initio*. In augmentation thereof, the Defendant submitted that the terms of the agreement as set out in Annexure "A" are a clear acknowledgement that the terms of the CPA apply, which provides an assurance to the consumer with whom the agreement is entered that the consumer is afforded the protection measures promulgated by the Act, and the Regulations. Specific reference to the provisions of Sections 14(2)(b) and 14(3) of the CPA were made.

[10] The Defendant highlighted that the two agreements on which the Plaintiff relies, are for a period in excess of 24 (twenty-four) months which is contrary to the provisions of Regulation 5(1) of the CPA, that states that the maximum period of a fixed term consumer agreement is 24 months from date of signature, unless such longer period is expressly agreed with the consumer and the supplier can show a demonstrable benefit to the consumer. It was contended that the Plaintiff failed to specifically aver that the agreements have any demonstrable benefit to the consumer. It is the Defendant's contention that there are not such benefits. The Defendant argued

this this would render the agreements unlawful and void as it is contrary to the provisions contained in Regulation 5(1).

[11] The Defendant further asserts that it is in any event entitled to cancel the agreements on 20 days' notice, which cancellation was duly effected. According to the Defendant all amounts owing up to the date of cancellations were paid. In addition, the Defendant avers that the agreements are unlawful and void and that the Plaintiff's claim, being for the enforcement of such unlawful and void agreements, falls to be dismissed. In the alternative it is contended that the Defendant is entitled to exercise her right in terms of Section 15 of the CPA and cancelled the agreements in the exercise of such rights and paid all amounts owed by her up to date of cancellation.

[12] According to the Defendant once the Reply to the Request for Further Particulars are received the only issue outstanding will be whether the demonstrable benefits which Plaintiff avers exist are proved. On this issue the Defendant is of the view that the parties would be able to agree on the following common cause facts *inter alia*:

- (a) The value of the monthly payments;
- (b) The price at which the goods once repossessed were sold by Plaintiff;
- (c) The Defendant will be prepared to admit the allegations in paragraphs 42 and 43 of the Particulars of Claim;
- (d) The exact nature of the demonstrable benefit to the consumer on which Plaintiff relies for purposes of CPA Regulation 5(1).

[13] The Defendant submitted that the reasoning applied in **Basson v Chilwan and Others**³ can be of assistance to the matter *in casu* even though it applies to a restraint of trade matter. In this regard it was argued that it is for the court to decide what is reasonable.

³ 1993 (3) SA 742 'The parties' own views, as reflected in the agreement, as to what is reasonable can never be decisive. Firstly, the reasonableness of the restraint is judged only after consideration by a court on the basis of factors which might not necessarily have been present to the minds of the parties. Secondly, the content of the agreement cannot itself be the exclusive measure of what is reasonable because that would result in the propriety of the agreement being tested against itself.'

[14] It was further argued that the holding over amount cannot constitute an enrichment claim and as such it was submitted that the Plaintiff has not discharged the onus of proving that the separation is not convenient.

[15] Lastly, the Defendant contended that the separation of issues will be in the interest of the parties and reduce costs significantly and curtail the length of the trial which could be dealt with as a matter of legal argument only without requiring evidence.

Principal Submissions by the Plaintiff

[16] The Plaintiff contended that the Defendant is not entitled to a separation of the identified issues for the following reasons that:

- (a) the Defendant wishes to separate issues for determination by the Court which are already common cause;
- (b) the proposed separation is not convenient to either of the parties, or to the Court.

[17] In amplification it was submitted that the Defendant cannot allege that the agreements did not present a financial benefit to her as contemplated under Regulation 5 as the Defendant in her Plea expressly admits that the agreements were concluded. Moreover, the Plaintiff set out averments in the Particulars of Claim to demonstrate what the rental payments due by the Defendant would have been, had the agreements endured for 24 months rather than 60 months. It was furthermore contended that the computation set out in "D2" to the Particulars of Claim do not appear to have been disputed by the Defendant and that its exchange is expressly admitted in the Plea.

[18] Additionally, it was contended that there is no need to separate to determine whether the agreements were cancelled as it is common cause that the agreements were cancelled by the Defendant as contemplated under section 14(2) read with section 14(3) of the CPA.

[19] The Plaintiff furthermore submitted that the separation proposed by the Defendant will not result in an expeditious resolution of this action. In this regard, it was contended that the Plaintiff has an alternative enrichment claim in the event of a finding

that the agreements are void. In addition, the Plaintiff holds the view that the evidence to be led in the separate trials will overlap significantly insofar as it pertains to the agreements, their terms, the parties' intentions, the goods supplied by the Plaintiff to the Defendant and the Defendant's use thereof.

[20] It was argued that the proceedings will as a result not be shortened. Lastly, the Plaintiff contended that the possibility exists of an appeal against the findings in the separation hearing, which will potentially exacerbate the delay. The Plaintiff requested the court to consider the potential prejudice and as such, it was submitted, that the proposed separation of the issues is not convenient.

Legal Principles

[21] Rule 33 (4), provides that:

'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 question cannot conveniently be decided separately.'

[22] In ***Rauff v Standard Bank Properties***⁴ Flemming DJP stated the following:

'The entitlement to seek the separation of issues was created in the Court Rules so that an alleged lacuna in the plaintiff's case or an answer to the case can be tested; or simply so that a factual issue can be determined which can give direction to the rest of the case and in particular to obviate a parcel of evidence. The purpose is to determine the fate of the plaintiff's claim (or one of the claims) without the costs and delays of a full trial. Proper handling of litigation – and accordingly professional handling of litigation – requires that this avenue be explored to the advantage of the own client, the flow of Court hearings and even of the other client.'

⁴ 2002 (6) SA 693 (W) at 703.

[23] ***In Consolidated News Agencies (Pty) Ltd (in liquidation) v Mobile Telephone Networks (Pty) Ltd and Another***⁵, it was held that:

*‘Piecemeal litigation is not to be encouraged. Sometimes it is desirable to have a single issue decided separately, either by way of the stated case or otherwise. If a decision on the discrete issue disposes of a major port part of a case, or will in some way lead to expedition it might well be desirable to have that issue decided first. This court has warned that in many cases, once properly considered, issues initially thought to be discrete are found to be inextricably linked. And even where the issues are discrete, the expeditious disposal of the litigation is often best served by ventilating all the issues at one hearing. A trial court must be satisfied that it is convenient and proper to try an issue separately.’*⁶

[24] Regulation 5 of the CPA deals with the maximum duration for fixed-term Consumer Agreement, states as follows:

‘(1) For the purposes of section 14(4)(a) of the Act, the maximum period of a fixed-term consumer agreement is 24 months from the date of signature by the consumer –
(a) Unless such longer period is expressly agreed with the consumer and the supplier can show a demonstrable financial benefit to the consume...’

[25] Section 14 (2) of the CPA deals with the expiry and renewal of fixed-term agreements states as follows:

‘...
(2) If a consumer agreement is for a fixed term –

⁵ [2009] ZASCA 130; [2010] 2 All SA 9 (SCA), paras 89 - 90.

⁶ See also *Edward L Bateman Ltd v C A Brand Projects (Pty) Ltd* 1995 (4) SA 128C – D; *Berman & Fialkov v Lumb* 2003 (2) SA 674; *Denel (Edms) Bpk v Vorster* 2004 (4) SA 481 (SCA) at 485A – B where the following was stated:

‘In many cases, once properly considered, the issues will be found to be inextricably linked, even though, as first sight, they might appear to be discrete. And 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 might be readily dispositive of the matter. 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 an issue separately.’

- (a) *that term must not exceed the maximum period, if any, prescribed in terms of subsection (4) with respect to that category of consumer agreement;*

...

(3) *Upon cancellation of a consumer agreement as contemplated in subsection (1)(b) –*

- (a) *the consumer remains liable to the supplier for any amounts owed to the supplier in terms of that agreement up to the date of cancellation; and*
- (b) *the supplier –*
 - (i) *may impose a reasonable cancellation penalty with respect to any goods supplied, services provided, or discounts granted, to the consumer in contemplation of the agreement enduring for its intended fixed term, if any; and*
 - (ii) *must credit the consumer with any amount that remains the property of the consumer as of the date of cancellation*

as prescribed in terms of subsection (4).

(4) *The Minister may, by notice in the Gazette, prescribe –*

- (a) *the maximum duration for fixed-term consumer agreements, generally or for specified categories of such agreements;*

...'

Issues not in dispute

[26] The following issues appear to not be in dispute between the parties, namely:

- (a) the conclusion of the two agreements, annexed to the Particulars of Claim marked "B1" and "B2";
- (b) the agreements provided for the rental of the equipment set out in paragraph 6.5 of the Particulars of Claim for a period of sixty (60) months;
- (c) the two agreements on which the Plaintiff in the main action constitute transactions as defined by Section 1 of the Consumer Protection Act ("the CPA") and were fixed term agreements as contemplated in Section 14 of the CPA;
- (d) the CPA Regulations published in the Government Notice 293 gazetted in April 2011 ("the CPA Regulations") are applicable and
- (e) the Defendant cancelled the agreement.

Issues for determination

[27] The crisp issue for determination is whether the identified issues should be decided *in initio*.

Onus

[28] It is trite that a party who opposes an application for separation made bears the onus to satisfy the court that the questions sought to be separated cannot conveniently be decided separately and, accordingly, that the application should not be granted.

Discussion

[29] The Defendant seeks an order separating the issues as identified in the Notice of Motion. It is apparent that the parties in both Agreements agreed that the term of the agreement exceeded 24 months, and as such constituted a financial benefit to the Defendant.⁷ Regulation 5 of the CPA applies to the transaction, as set out above which specifically deals with the maximum duration for fixed-term consumer agreements and unequivocally states that a longer period is to be expressly agreed upon and the supplier is to show a demonstrable financial benefit.

[30] The Defendant argued that if the demonstrable benefit to the consumer existed as contemplated in Regulation 5(1), the Particulars of Claim should have pleaded that such benefit existed and what such benefit was. In this regard, it is the Defendant's contention that Uniform Rule 18(4) is clear in that Particulars of Claim must contain a clear and concise statement of the material facts constituting the claim. The Plaintiff contended that the letter referred to as Annexure "D2" has been admitted by the Defendant in her plea and in particular, the benefit is specified as the lower monthly instalment due to the extended period.

[31] The Plaintiff contended that separation is not convenient for the following reasons:

⁷ Clause 2.3 "*The Parties agree that the Initial Rental Period of the Agreement shall exceed a fixed term of 24 (twenty-four) months in the circumstances where the rental amount has been calculated based on your affordability and the economic life of the Goods rented is of a financial benefit to you and we are able to demonstrate this should you so request.*"

- (a) It will not result in an expeditious resolution of this action. In amplification it was mooted that even if the agreements are void, the Plaintiff's alternative claim will remain;
- (b) The cause of action will still need to be ventilated in a trial in due course. In augmentation of this submission it was submitted that the evidence to be led in the separate trials will overlap significantly in terms of the parties' intentions, the goods supplied by the Plaintiff to the Defendant, and the Defendant's use thereof will have to be canvassed more than once;
- (c) There would be an unnecessary duplication of efforts, which would only serve to escalate the parties' legal costs and unnecessarily take up court time;
- (d) If, on the premise that the issues to be separated are crisp as contended by the Defendant, it could be canvassed at the main hearing together with the balance of the action;
- (e) It is contended that whilst the Defendant accepts that her agreement constituted a demonstrable benefit, the defence is centred around this and could be canvassed together at the main hearing without it being done in a fragmentary fashion;
- (f) A separation will not shorten proceedings and will ultimately have the effect of splintering the matter into at least 3 hearings comprising of *inter alia*, the applicability of the CPA, unjust enrichment and quantum;
- (g) The possibility of an appeal may ensue, which may not serve to curtail the action and
- (h) The parties as well as the court will suffer prejudice.

[32] The accepted legal principle is that a litigant is required to plead material facts that are necessary to support his right to judgment. It is trite that a Defendant must know the case he needs to meet and plead to it. The matter of **McKenzie v Farmers' Co-operative Meat Industries Ltd**⁸ clearly defined meaning of a "cause of action".

'...every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to judgment of the court. It doe[s] not comprise every piece of evidence which is necessary to prove its fact, but every fact which is necessary to prove.'

⁸ *McKenzie v Farmers' Co-operative Meat Industries Ltd* 1922 AD 16 at 23.

[33] The Defendant is essentially requesting the court to apply the test akin to that on an Exception. In this regard the court dealing with the separation would have to determine whether on all possible readings of the facts, no cause of action may be made out. The Defendant would therefore have to satisfy the court that the conclusion of law from which the Plaintiff contends cannot be supported on every interpretation that can be put upon the facts in much the same way as the court would have if this aspect was raised by way of Exception.⁹ It has been held that to the extent that the procedure envisaged by the subrule and the procedure of Exceptions may overlap, it is not contemplated that questions of law arising from the pleadings and capable of being resolved on Exception should be the subject of the more cumbersome procedure of an application under this subrule.¹⁰

[34] The question that calls to be answered is whether it would be convenient to deal with the issues identified in the separation order; more particularly, the *lacuna* identified by the Defendant in the Plaintiff's case. The purpose of this subrule has been aptly crystallised as follows:

*'... is to confer on the court the power of shortening the duration or facilitating the final determination of actions, the court has a wide discretion under the subrule and it can decide any question of law or fact separately from any other question in the dispute in a case if it is convenient to do so. There is no room in the rule for a court, on ordering of separation of issues, to make an order in respect of what evidence may or may not be relevant. The fashioning of an order assists in defining the precise ambit of the enquiry to be undertaken. Unless an order is made, the court is required to deal with the action as a whole.'*¹¹

⁹ *Theunissen v Transvaalse Lewende Hawe Koop Beperk* 1988 (2) SA 493 (A); *Lewis v Oneanate (Pty) Ltd and Another* 1992 (4) SA 811 (A) at 817; *TSI Communications CC v Omega M Projects* (2022/13169) [2023] ZAGPJHC 1081 (27 September 2023) at paras 3 – 4; *H v Fetal Assessment Centre* 2015 (2) SA 93 (CC) at 199B

'The test on an exception is whether, on all possible readings of the facts, no cause of action may be made out. It is for the excipient to satisfy the court that the conclusion of law from which the plaintiff contends cannot be supported on every interpretation that can be put upon the facts.'

¹⁰ Superior Court Practice, Vol 2, Uniform Rules of Court: Rule 33, [SERVICE 20, 2022], D1-437.

¹¹ Superior Court Practice, Volume 2, Uniform Rules of Court: Rule 33 [Service 20, 2022] D1-440.

[35] The procedure envisages the convenient and expeditious disposal of litigation. The aspect of convenience consists of many layers, including *inter alia* appropriateness and fairness.¹² It is therefore incumbent on the court to consider the nature and extent of the advantages and disadvantages which would flow from the granting of the order sought. In addition, the court is to consider whether or not a preliminary hearing for the separate decision of specified issues will materially shorten the proceedings.

[36] This court is mindful that even if the application were to be granted, which may result in curtailing days of evidence in court, there may be other delays before a final decision is ultimately reached which includes but are not limited to the following scenarios, namely; the interlude between the hearing of the separation and the commencement of the main trial. This will no doubt also have cost implications. Moreover, there is the likelihood that an appeal against the separated issues may ensue, which will exacerbate the delay.

[37] Of seminal importance is the potential overlapping of evidence required to prove issues in the separation and that of the remaining issues for the trial hearing. Witnesses may have to be recalled to cover issue which they had already testified about, resulting in duplication of evidence and again cost implications as well as the potential of conflicting findings of facts and credibility findings.

[38] In this matter, it is manifest the most of the issues are common cause, more especially the issues identified in paragraphs 1.1 and 1.3 of the Notice of Motion. It appears that the main issue in contention is rooted in whether the Plaintiff has properly pleaded a cause of action based on the CPA on which reliance is placed. This aspect in my view, could have been dealt with by way of exception as it is trite that the purpose of an exception is to raise a substantive question of law which may have the effect of settling the dispute between the parties.

¹² *Gometis (Pty) Ltd v Fountainhead Property Trust and Others* (2021/16959) [2022] ZAGPJHC 487 (27 July 2022).

[39] I am furthermore of the view that even if the court were to find that the agreements are void by virtue of contravening CPA Regulation 5(1), (I make no finding in this regard), the claim for damages suffered as a result of the holding over of the goods for the period 19 May 2021 to 30 July 2021, cannot be ignored as well as the penalty which the termination may have attracted. I am mindful not to make a pronouncement on what evidence may or may not be relevant, and I make no such finding(s) in this regard.

[40] These aspects will need to be ventilated at a trial in due course. It is not for this court to decide whether, for example, the holding over amounts to an unjust enrichment claim, neither can this court determine that the only issues pertaining to the penalty would be the reasonableness thereof. To suggest that the Plaintiff should deal with this issue in the Magistrates Court would in my view not curtail proceedings, especially as piecemeal litigation is not encouraged. Furthermore, the possibility exists that the issues are inextricably linked necessitating the same witnesses to be called to testify. The mere fact that the quantum for certain claims falls within the jurisdiction of the Magistrates Court does not prevent the High Court from making an appropriate costs order on the appropriate Magistrates Court tariff. The Defendant in any event makes the following submission *'[t]he fact that, subsequent to retaking possession of their goods, Plaintiff sold the goods for an amount of R50 400 may well constitute an important factor in assessing the reasonableness of the penalty.'*¹³ This in and of itself is suggestive that there is a triable issue and as such, separation may prove to not be dispositive of the matter in its entirety.

Conclusion

[41] This court heeds the caution as expressed in ***Consolidated News Agencies (Pty) Ltd*** (*supra*) *'that in many cases, once properly considered, issues initially thought to be discrete are found to be inextricably linked. And even where the issues are discrete, the expeditious disposal of the litigation is often best served by ventilating all issues at one hearing.'*¹⁴

¹³ Defendant's Heads of Argument, para 2.

¹⁴ Para 91.

[42] I am therefore satisfied that the Plaintiff has sufficiently placed cogent facts before this court to show that separation would be inconvenient. Consequently, in the exercise of this court's wide discretion in matters of this nature, the application falls to be dismissed.

Costs

[43] The Plaintiff argued that the application was blatantly stillborn from the outset and is tantamount to a delay tactic which Plaintiff likened to textbook Stalingrad litigation, justifying a punitive cost order. The Plaintiff contended that paragraph 18 of the agreements provides for the payment of costs on an attorney and client scale. In light of the fact that the agreements are common cause, the Plaintiff seeks an order of costs on the scale agreed to between the parties. It was placed on record that Counsel for the Defendant is acting *pro amico*.

[44] It has been held that '*a party who failed to raise an exception at the stage when he could have done so and at the trial invokes the procedure under this subrule may be mulcted for costs.*'¹⁵

[45] Taking into consideration that the crisp issues which Defendant contended ought to be dealt with *in initio*, will now be dealt with in the hearing of this action in due course; the trial court will best be placed with making a determination as to whether the issues raised are indeed inextricably linked with the evidence required to prove any of the remaining issues. Thus, it is my considered view that a cost order at this stage will be premature.

[46] Therefore, in the exercise of my judicial discretion, I am of the view that the issue of costs should stand over for later determination.

¹⁵ Superior Court Practice, Vol 2, Uniform Rules of Court: Rule 33, D1 -437.

Order:

[47] In the result, the Court, after hearing the submission on behalf of the respective parties and having considered the documents filed on record makes the following orders:

- (a) The Application is dismissed.
- (b) Costs are to stand over for later determination.

ANDREWS, AJ

Acting Judge of the High Court, Western Cape Division

Appearances

For the Plaintiff / Respondent: Advocate L Van Zyl

Instructed by: Vanderspuy, Cape Town

For the Defendant / Applicant: Advocate A C Oosthuizen S.C.

Instructed by: Schnetlers Inc.

Date of Hearing: 02 February 2024

Date of Judgment: 19 February 2024

NB: The judgment is delivered by electronic submission to the parties and their legal representatives.