

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

Case no: 4222/2022

REPORTABLE: YES/NO

ON INTEREST TO OTHER JUDGES: YES/NO

CIRCULATE TO MAGISTRATES: YES/NO

In the matter between:

ELRICH RUWAYNE SMITH N.O

1st Applicant

ZIYAD SONPRA N.O

2nd Applicant

[In their respective capacities as liquidators of
Golden Ribbon Trading 86 (PTY) LTD (in liquidation),
Master of the Free State High Court, Bloemfontein,
reference no.B62/2019]

and

JACOBUS FRANCOIS MALAN N.O

1st Respondent

[In his capacity of the estate late Jacobus Francois Malan]

**THE MASTER OF THE FREE STATE HIGH
COURT, BLOEMFONTEIN**

2nd Respondent

CORAM:

RAMDEYAL AJ

HEARD ON:

13 April 2023

DELIVERED ON: 28 April 2023

- [1] Heads of argument were delivered as requested. Counsel for the first respondent requested to reply to the applicant's heads of argument on 19 April 2023 which was permitted but no reply to same has been received. I am therefore of the view that I am at liberty to proceed with writing the judgment in its absence, today the 26th of April 2023 as counsel was permitted to reply and file same by the 24th of April.
- [2] The court is called upon to adjudicate on whether there should be a separation of issues in this matter as the court understood from counsel for the first respondent in terms of rule 33(4) of the Uniform rules of Court.
- [3] Counsel made specific reference to paragraph 17 of the Answering affidavit of the first respondent in support of its application. Paragraph 17 reads as follows:
- “17.1 The administration of the estate of the deceased has been concluded and wound-up. The liquidation and distribution account was accepted by the Master of this Honourable Court and were the creditors paid and the distributions done and transferred to the beneficiaries of the estate in terms of the provisions of section 35(12) of the Administration of Estates Act no. 66 of 1965.
- 17.2 The result of the estate having been distributed, is that the Applicant's have no claim against me in my erstwhile capacity as Executor of the estate or the estate as such. In the event of the Applicant's may have had a claim against the beneficiaries of the deceased's Will, they should have claimed from the beneficiaries of the estate in terms of the *condictio indebiti*.”
- [4] Counsel for the applicant opposed such late application to be adjudicated on separation of issues as no such application was served on the applicants. Counsel for the first respondent called the court to adjudicate this point *mero moto* as he argued that the estate has been finalized and there is no money left in the estate so any application thereafter resulting in an order against the estate will have no consequences, referring to a *moot* order.

[5] Whilst courts generally do not adjudicate on issues where the decision sought will have no practical effect or result *The President of the RSA v DA and Others*¹ there are instances where there have been exceptions to the provision where a court has exercised its discretion to hear a matter even where it was moot.

[6] In *Independent Electoral Commission v Langeberg Municipality*² the Constitutional Court said the following:

“...A prerequisite for the exercise of the discretion is that any order which this court may make will have some practical effect either on the parties or on others.”

[7] Bearing this in mind it is important at this stage to consider whether such application to separate issues is apposite. Firstly, counsel for the first respondent bases his application of separation of issues pertaining to rule 33(4).

[8] Rule 33(4) states as follows:

“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 be decided upon separately.”

[9] Counsel however, concedes in his heads of argument that rule 33(4) indeed refers to ‘*any pending action*’ and not to applications.

[10] It is so that the court called for heads of arguments pertaining to the aspect of separation of issues as per the application by counsel for the first respondent as the argument was detailed and overlapped with other issues.

¹ 664/17[2018] ZASCA 79 (31 May 2018)

² 2001(3) SA 925 (CC) at paragraph 11

- [11] The application of separation of issues is opposed on the ground that rule 33(4) cannot be used in this application, neither can the first respondent now request the court to adjudicate on the first point in limine as that was not the actual application but in the heads of argument for the first respondent he requests the “honourable court to uphold the first point in limine including an order that the applicant’s application be dismissed with costs.”
- [12] Assuming that rule 33(4) did find application in this case the court must still take heed to what was said by the Supreme Court of Appeal in matters pertaining to separation of issues.
- [13] In *Denel (Edms) Bpk v Vorster*³, it was said that Rule33(4) entitles a court to try issues separately in appropriate circumstances aimed at facilitating the convenient and expeditious disposal of litigation. It should not be assumed that the result is always achieved by separating issues....the expeditious disposal of litigation is often best served at ventilating all the issues in one hearing...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.
- [14] The Supreme Court of appeal also warned against the separation of issues in *Consolidated News Agencies (Pty) Ltd (In Liquidation) v Mobile Telephone Networks (Pty) Ltd & Another*⁴, reiterating that piecemeal litigation should be avoided.
- [15] Clearly Rule 33(4) is not the premise for separation of issues in this application and neither can separation be regarded as convenient in the circumstances.

³ 2004 (4) SA 481 (SCA) paragraph 3

⁴ 2009 ZASCA 130; 2010 (3) SA 382(SCA) paragraphs 90-91

[16] I must now consider the question of costs. Counsel for the applicant has requested a punitive cost order against the first respondent on the basis of submissions as filed in its heads of argument. (para 21)

[17] Counsel for the first respondent found it absolutely essential that the matter be separated to consider the first point in limine before the full application as he was of the opinion that the estate is out of funds and any order against such will be a moot order with no effect. There was no actual objection to such application being heard in its informal premise.

[18] The award for costs is a matter wholly within the discretion of the court, ensuring that it is just and fair.

“The Supreme Court of Appeal has over the years developed a flexible approach to costs which proceeds from two basic principles the first being that the award for costs, unless expressly otherwise enacted, is in the discretion of the presiding judicial officer, and second that the successful party should, as a general rule, have his or her costs...”

[19] See *Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others*⁵.

[20] *The Supreme Court of Appeal held in Du Toit No v Thomas NO and Others*⁶

“that a punitive costs order is also justified where an applicant displayed an ‘unconscionable stance’. I am not convinced that the applicant instituted the application for leave to appeal merely to annoy the defendant, or that the application for leave to appeal is a deliberate abuse of process. A court must be mindful not to curtail access to justice. My view is that whilst the applicant was misguided in launching this application, that in itself does not suffice to mulct him with a punitive costs order. In the circumstances a punitive costs order will not be appropriate. However, I am of the view that it will likewise not be appropriate or fair towards the respondents if it is ordered that each party must carry its own costs. I can find no reason why the general principle that costs follow the event, should not apply.”

⁵ 1996 ZACC 2; 1996 (2) SA 621 (CC); Paragraph 3

⁶ (635/15) [2016] ZASCA 94

[21] Whilst the application in terms of Rule 33 (4) may have no premise in the matter before me, it does not appear that counsel for the applicant deliberately abused the process in his application, he may have erred in his application but that does not warrant a punitive cost order.

[22] The application for separation of issues is therefore dismissed with costs.

RAMDEYAL AJ

On behalf of the Applicant: Adv. R Van der Merwe
Instructed by: Badenhorst Attorneys
Bloemfontein

On behalf of the Respondent: Adv. AJR Van Rhyn Sc
Instructed by: JAC N Coetzer Incorporated
Hoopstad
C/O Lovius Block
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