



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

Reportable:	YES/NO
Of Interest to other Judges:	YES/NO
Circulate to Magistrates:	YES/NO

Case number: 3806/2020

In the matter between:

RNT MANAGEMENT SERVICES CC

Plaintiff

and

**MALUTI-A-PHOFUNG LOCAL MUNICIPALITY
MUNICIPAL MANAGER: MALUTI-A-PHOFUNG
LOCAL MUNICIPALITY**

1st Defendant

2nd Defendant

CORAM: LOUBSER, J

HEARD ON: 1 NOVEMBER 2023

JUDGMENT BY: LOUBSER, J

DELIVERED ON: 3 NOVEMBER 2023

- [1] This is an application filed by the defendants late on the afternoon before the first trial day. It is an application in terms of Rule 33(4), which provides that if, in any pending action, it appears to the Court *mero moto* that there is a question of law or fact which may be conveniently 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 shall be stayed until such question has been disposed of. The

Court shall on application of any party make such order unless it appears that the questions cannot conveniently be decided separately.

- [2] The plaintiff has instituted action against the defendants arising out of contracts concluded between the plaintiff and the first defendant. The defendants raised two special pleas to the plaintiff's particulars of claim. The first is that the plaintiff has failed to comply with the required six months notice to an organ of state in terms of the Legal Proceedings against Certain Organs of State Act¹. The second special plea relates to an arbitration clause in the said agreements which required that the plaintiff's claim ought to have been referred to arbitration for their resolution.
- [3] The defendants seek a separation of the hearing of the two special pleas from the merits of the remaining issues between the parties. Although such an application is normally a fairly simple matter, this application has unfortunately degenerated into a paper war out of any proportion. The notice of motion and founding papers comprised 22 pages, the answering affidavit 206 pages and the replying affidavit 18 pages. At the hearing of the application on the second day of the trial, counsel for the defendants filed submissions totalling 29 pages, and counsel for the plaintiff filed submissions of 11 pages. In addition, counsel for the defendants provided the court with a bundle of authorities to the extent of 253 pages. The total number of pages the court had to assimilate therefore totalled 539 pages.
- [4] The Court's judgement in the application is delivered on the third and final day of the three days allocated for the hearing of the trial. It means that the 3 days for the trial have unfortunately been lost, and new dates for the hearing will have to be determined, whether the application is successful or not.
- [5] In terms of Rule 33(4), the Court shall on application of any party make an order of separation unless it appears that the questions cannot conveniently be decided separately. This part of the rule is stated in mandatory terms. The only question this Court has to decide, therefore, is whether it appears that the issues cannot conveniently be decided separately.

¹ Act 40 of 2002

- [6] Now convenience in terms of the rule does not only convey a notion of facility or of expedience, but also a notion of appropriateness and fairness.² The convenience is not limited to expediency, efficacy and desirability, but also includes fairness, justice and reasonableness.³
- [7] These elements of convenience necessitate a consideration of the broad history of the events that give rise to the application for separation. The defendants say that a separation will not prejudice the plaintiff, because if any of the special pleas are upheld, he will be liable for the costs of only one day. The whole action will then be disposed of. The plaintiff is of the opinion that there should be no separation due to the long delay that has already occurred, and he will therefore be inconvenienced if the matter is to proceed piecemeal.
- [8] The papers before me show that after the defendants filed their special pleas, the plaintiff's attorneys made many attempts to obtain the defendants' co-operation in respect of a pre-trial minute since 12 September 2022, but without any success. Eventually, on 24 May 2023, a notice of set down for a judicial pre-trial was served on the defendants' attorneys, which would be held on 26 June 2023. The defendants' attorneys withdrew thereafter. On 26 June 2023, Mhlambi, J certified the matter trial ready, again without the attendance of the defendants. On 12 July 2023 the Plaintiff served a notice of set down for the trial hearing on the defendants' attorneys. Thereafter, and during the same month, the attorneys of the defendants withdrew and their current attorneys came on board. Still nothing transpired until a request for a postponement of the trial was made by the current attorneys of the defendants in a virtual meeting on 23 October 2023, that is 5 days before the trial. This request was refused by the plaintiff's attorneys.
- [9] It needs to be emphasized that there was no word from the defendants' attorneys in the last 12 months. The issue of a separation was never raised, only the request for a postponement referred to above. The conclusion is justified that the defendants then filed the present application at the last minute in an attempt to force the postponement they sought unsuccessfully 5 days before the trial. On the other

² *Tshwane City v Blair Athol Home Owners Association* 2019 (3) SA 398 (SCA) at 414 F-G

³ *Absa Bank Bpk v Botha* 1997 (3) SA 510 (O)

hand, the plaintiff is ready to commence with the trial and his witnesses are ready to testify. He has already incurred costs to this end, he says.

[10] The result is that if a separation of issues is granted, the special pleas will be adjudicated first and separately, with the possibility that the remaining merits will only be adjudicated at a later stage. It is so that if the issues are not separated, the special pleas will most likely in the normal course be determined first in any event. But if the special pleas are then dismissed, the trial will proceed to the next stage without further delay. The plaintiff has waited long enough to have his claims heard, while the defendants clearly want to delay such an outcome. I therefore find that it would not be to the convenience of the plaintiff if the issues are separated. In view of the history of the matter, the application therefore stand to be dismissed.

[11] As for the costs, the defendants should pay the costs of the application and the plaintiff's wasted costs on a punitive scale, including the costs occasioned by the employment of two counsel.

[12] The following order is made:

1. The application for a separation of issues in terms of Rule 33(4) is dismissed with costs on an attorney and client scale, such costs to include the plaintiff's wasted costs of the lost trial days, and the costs of 2 counsel.
2. The defendants (applicants) are ordered to pay the costs jointly and severally, the one paying the other to be absolved.
3. The trial is postponed to a date to be arranged between the parties before the close of business today.


P. J. LOUBSER, J

For the Defendants (Applicants):

Instructed by:

Adv. I. P. Ngobese SC, with Adv K.M. Mahlase

Bokwa Attorneys, Pretoria

c/o Hill McHardy & Herbst Attorneys

Bloemfontein

For the Plaintiff (Respondent):

Instructed by:

Adv. N Snellenburg SC, with Adv P.T. Masihlelo

Sesele Attorneys

Bloemfontein