



IN THE HIGH COURT OF SOUTH AFRICA;
LIMPOPO DIVISION, POLOKWANE.

CASE NO. HCAA 05/2021.

(1) REPORTABLE: YES/NO
(2) OF INTEREST TO THE JUDGES: YES/NO
(3) REVISED.

DATE: 19.01.2022 DJP SEMENYA M.V.

SIGNATURE:

In the matter between

AXTON MATRIX CONSTRUCTION CC

APPELLNAT

And

ROADS AGENCY LIMPOPO SOC LIMITED

FIRST RESPONDENT

MATLA CONSTRUCTION CC

SECOND RESPONDENT

JUDGMENT

SEMENYA DJP:

[1] The first respondent in this appeal (plaintiff in the main action and first respondent in the interlocutory application) instituted action proceedings against the appellant (second defendant in the action proceedings and applicant in an interlocutory application) and the second respondent (first defendant in the main action and second respondent in the appeal and the interlocutory application). The claim for damages in the action proceedings arises out of two separate contracts entered into between the first respondent as the employer, the appellant as the contractor and the second respondent as the engineer appointed by the first respondent to design the road and to supervise the works of the appellant. The contracts were for the upgrading of the road referred to as Road D3537 situated within the Waterberg area in Limpopo Province from gravel to a bitumen surface. The contract between the appellant and the first respondent is governed by the General Conditions of Contract for Construction Works, 2010 (the GCC) to which the second respondent is not a party.

[2] This appeal is against the order granted by Makgoba JP, in which an application for separation of issues raised in the appellant's special plea from other issues as envisaged in Rule 33(4) of the Uniform Rules of Court, launched by the appellant, was dismissed. Leave to appeal against the judgment and order was also dismissed. This appeal comes before us

with leave to appeal having been granted by the Supreme Court of Appeal.

[3] The grounds of appeal are that the court *a quo* did not decide at all what was presented to it for determination *i.e* whether the issue sought to be separated, if found in favour of the appellant, would end the *lis* between the appellant and the first respondent. That the court *a quo* has instead usurped the function of the court which would otherwise preside over the trial of the separated issues had the application been granted, in finding that:

i. it will not be worthwhile to separate the issues in the matter because the second special plea of waiver (*pactum de non petendo*) is not sustainable on the basis that the email relied upon by the appellant was without prejudice. The appellant argues that the court arrived at this finding without, firstly, giving the appellant an opportunity to present more evidence in addition to the email that it had initially relied on in the founding affidavit and, secondly that the order as it stands brings finality to this issue avails the first respondent with a plea of *res judicata*;

ii. with regard to the special plea of time-bar, that the court *a quo* declined to grant separation on the basis that the second

respondent will probably join the appellant back into the proceedings because it is blaming it for the defective road. The appellant argues that this finding is irregular in that the court made it on the bases of what the appellant refers to as "the what ifs";

iii. The appellant states that the finding of the court *a quo* that separation of the issues will be inconvenient and expensive to the first respondent as it will have to prepare its case against the appellant and the second respondent in two separate proceedings is irregular. The appellant argues that this in itself is an anticipation on the part of the court that the appellant was entitled to the order sought in the application for separation.

[4] I agree with the first respondent, for the reasons that shall follow later in this judgment, that this is an oversimplification of the test that was to be applied to the issues before the court *a quo* as developed by our courts in earlier decisions.

[5] It is imperative to state right from the outset that this court finds itself in an invidious position in that, despite the fact that the issues between the parties in this appeal and in the main application revolve around the

pleadings, none of the parties deemed it necessary to make same part of their respective papers. Pleadings therefore do not form part of the appeal record. This court will have to accept that the assertions made by each of the parties and the court *a quo* in relation to the pleadings, in as far as same is not disputed by either of the parties, is correct.

[6] It appears from the papers filed of record that the first respondent's claim is premised on the terms of the contract entered into between the first respondent and each of the other parties, alternatively on delict which is based on the allegations that appellant owed the first respondent a legal duty of care to do its work properly and not to have ignored the fact that the second respondent had provided it with incorrect designs and instructions (as alleged by the appellant in its plea). The appellant raised two special pleas to the first respondent's particulars of claim. In the first special plea, the appellant asserts that the first respondent's claim is time-barred as the disputes between the parties are regulated by clause 10 of the GCC. It is the appellant's averment that clause 10.2 and 10.3 of the GCC requires the parties to submit a dissatisfaction claim to the engineer (the second defendant in the action) within a period of 28 days and to serve the said engineer with a dispute notice, after another 28 days, in the

event of an unresolved claim, failing which the aggrieved party shall have no further right to raise any further dissatisfaction on such matter.

[7] It is common cause that the first respondent alleged in its particulars of claim that it became aware of the fact that there are defects in the work done by the appellant on the 30 June 2017. The first respondent nonetheless instituted action proceedings on the 22 August 2018, way beyond the required 28-day period. The assertions that the first respondent failed to comply with clause 10.2 and 10.3 are therefore not denied.

[8] In the second special plea, the appellant asserts that the first respondent is not entitled to pursue any claim it might have against it on the basis that the first respondent's attorney, one Ms Mangena, addressed an email dated the 17 May 2018 to its attorneys of record, in which the attorney for the first respondent stated that they will not be proceedings against it. This is a plea of waiver (*Pactum de non Petendo*).

[9] It was the appellant's case in the application in terms of Rule 33(4) that should the court find that the first respondent's claim is indeed time-

barred, the litigation between the appellant and the first respondent would be put to an end. As regards the alternative delictual claim, the appellant asserted that the delictual claim arose out of or in connection with the contract and that it falls to be determined by adjudication/arbitration. The appellant asserted that the two special pleas can be determined without the leading of evidence and further that the appellant will be required to participate in a protracted trial in the merit issues involving the first and second respondents. The second respondent elected to abide the decision of the court. The application for separation was therefore opposed by the first respondent only.

[10] At paragraph [28] of the judgment dismissing the application for separation of the issues, Makgoba JP stated the following:

“In my view the following are compelling reasons why a separation of issues in terms of Rule 33(4) should not be ordered:

“28.1 The facts of the disputes between the Plaintiff and the First Defendant and Second Defendant are interwoven. The facts of the disputes are substantially similar and dependent upon the determination of the same question of law.

28.2. *First Defendant blames Second Defendant for not performing properly or at all in terms of the construction contract and the Second Defendant in turn blames the First Defendant for providing Second Defendant with an incorrect design and instructions.*

28.3. *The Plaintiff is not sure whether it is the First Defendant alone alternatively Second Defendant alone alternatively both Defendants who are to blame for the damages suffered by the Plaintiff and more in particular for which part of the damages suffered by the Plaintiff the First Defendant is liable and for which is the Second Defendant liable.*

28.4 *First Defendant is contractually obliged to participate in any of the dispute resolution processes between the plaintiff and the Second Defendant as envisaged in clause 10 of the GCC.*

28.5 *It would be inconvenient and expensive for Plaintiff to prepare and present its case on two occasions, namely, in the proceedings against Second Defendant and then again in separate Court proceedings against the First Defendant. The two sets of proceedings will escalate the costs and duplicate*

the costs of adjudicators and arbitrators and court proceedings.

28.6 The issue of whether or not the Plaintiff's claims are time-barred (the first Special Plea) cannot be swiftly and speedily, in a separate plea, be adjudicated. The determination of the issues will still involve extensive evidence to be led in court- and a shortcut cannot just be taken.

Defence of Waiver (Pactum de non Petendo).

[29] Second Defendant in its special plea alleges that Ms Mangena, the Plaintiff's attorney, on behalf of the Plaintiff, on 17 May 2018 in an email stated: "We hereby confirm that we will not be proceeding with action against your client, Axton Matrix."

The Second Defendant states that by doing that, Ms Mangena, while being fully aware of the Plaintiff's rights in terms of the construction agreement, undertook not to institute action against the Second Defendant.

[30] Whether the contents of the said email constitute waiver/pactum de non petend is a matter of law. In my view the special plea of waiver is not sustainable.

The contents of the email does not, in my view, constitute an unequivocal waiver of Plaintiff's rights to institute court proceedings against the Second Defendant. It will not be worthwhile to separate issues in this matter in order to deal with the special plea of waiver- in a separate trial..."

[11] The first respondent contends that the order of the court *a quo* is not appealable as it is nothing more than a ruling in an interlocutory application which is not of a final effect or definitive of the matter. In response, the appellant argued that the court *a quo* decided to deal with the merits of the issues it was not called upon to decide instead of deciding whether the issues should be separated. The appellant further contends that should the order be left as the it stands, the first respondent may successfully raise a defence of *res judicata* in the subsequent trial. Reliance in this regard was placed on the decision in **Marsay v Dilley**¹ where Corbett CJ stated that:

¹ [1992] 2 All SA 327 (A) at 332

"The law relating to the appealability of decisions of a court of provincial or local division was re-examined relatively recently in the case of Van Streepen & Germs (Pty) Ltd v Transvaal Provincial Division 1987 (4) SA 569 (A). As this judgment shows, this Court has over the years adopted an increasingly flexible approach to the question of appealability. The general principle which, I think, may be extracted from the judgement is the following: where a trial Court has under some competent procedure (such as an application under Rule 33(4) made an order which has the effect of being a final decision (ie one which cannot be corrected or altered or set aside by the trial judge at a later stage of the trial) and the decision is definitive of the rights of the parties and has the effect of disposing of a substantial portion of the relief claimed by the plaintiff in the main action, then this order is a judgment (as understood in sec 20 of the Supreme Court Act 59 of 1959) and is appealable, despite the fact that the main action has not been concluded. (See also in this connection a recent and as yet unreported judgment of this Court in the matter of SA Eagle Versekeringsmaatskappy Beperk v Harford, 27.3.92."

[12] At paragraph 5 of the Court *a quo*'s judgment, the Court agreed with the appellant's contention that the issue that was to be determined in the application was not whether or not the second defendant's defences are good, but that it is whether, if the two special pleas are determined in favour of the second defendant, that the *lis* between the plaintiff and the second defendant would come to an end. The appellant contends that the court *a quo* acted irregularly in finding that the email addressed to the appellant by the first respondent's attorney does not constitute an unequivocal waiver of the plaintiff's rights to institute court proceedings against the appellant and it is therefore not worthwhile to separate the issues in that the second special plea is unsustainable. The appellant has in my view, and with due respect to Makgoba JP, correctly contended that the finding goes against the principle as stated in paragraph 5 of the judgment as it is can only be arrived at after the hearing of argument in support of the special plea. It is again correct that the appellant was denied the opportunity to present more evidence to prove the special plea. It is on this basis, and on the decision in Marsay (above), that this court finds that the order of the court *a quo* is appealable on this ground alone. In the same breath, I agree with the appellant that the court *a quo* acted irregularly in finding that there is a possibility that the second respondent will join the appellant back into the proceedings if the application for separation is granted. The second respondent elected not to participate

in the separation proceedings. There was therefore nothing before the court *a quo* that supported this finding.

[13] The issues between the appellant and the first respondent is not confined to the issues that I have dealt with in paragraph [12] above alone. Therefore, despite the fact that I have agreed with the submissions made by the appellant, this court still has to determine whether the order prayed for by the appellant in the main application ought to have been granted.

[14] Rule 33)4) provides 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 a 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."

[15] First respondent alleges that it received a report from an independent engineer that the vertical alignment of the road was incorrect, causing the road to flood at numerous spots during rainy seasons. In addition to this, the second respondent identified 17 defects in its snag list. From the limited facts at the disposal of this court with regard to pleadings, it appears that the second respondent's plea to the plaintiff's particulars of claim is that the appellant failed to adhere to the specifications of the construction agreement by failing to comply with the designs and instructions it had given to it. The appellant on the other hand pleads that the second respondent has provided it with wrong specifications and designs. The delictual claim is based on the allegation that the appellant owed the first respondent a legal duty/ duty of care to have done its work properly and not to have ignored the alleged defective designs.

[16] It was stated in the minority judgment in **Consolidated News Agency v Mobile Telephone Networks**² that separation of the issues should be avoided where certain issues will remain unresolved after the granting of the separation order. On the basis of this delictual claim this court finds that, contrary to the submissions made by the appellant, the determination of the special pleas in favour of the appellant will not bring the *lis* between

² 2010 (3) SA 382 (SCA) at 91

the appellant and the first respondent to an end. The delictual claim, which according to the first respondent do not expire, will still remain to be determined. It is further correct that the issues raised in the delictual claim cannot be conveniently determined in two separate actions *i.e* an action against the appellant and another against the second respondent. The court *a quo*'s finding in that the defences raised by the appellant and the second respondent cannot be heard separately, even though based on different reasoning, is found to be correct. It is in any event not for this court to determine whether the claim based on delict will succeed or not.

[17] In its determination as to whether the decision to separate the issues will be convenient to all parties, inclusive of the court, would be appropriate and fair and in the interest of justice, the court *a quo* considered the principle laid down in **Minister of Agriculture v Tongaat Group Ltd**³, cited with approval by various Divisions of the High Courts in⁴, where it was stated that the word convenience within the context of the subrule conveys not only the notion of facility or ease or expedience, but also the notion of appropriateness and fairness. It was stated further that it is not the convenience of any of the parties or of the court, but the

³ 1976 (2) SA 357 (D) at 363D

⁴ Mota v Moloantsoa 1984(4) SA 761 (O) at 786D; S v Malinde 1990 (1) SA 57 (A) at 67J-68E; Braaf v Fedgen Insurance 1995 (3) SA 938 (C) (*Erasmus Superior Court Practice second edition Volume 2 D1-437 footnote 8*)

convenience of all concerned that must be taken into consideration. This principle was restated by the Supreme Court of Appeal in **City of Tshwane Metropolitan Municipality v Blair Athol Homeowners Association**- see footnote 4.

[18] I have indicated above that I will provide reasons why I agree with the first respondent's contention that the appellant has oversimplified the issues before the court. I intend to deal with those reasons in the following paragraphs. The court *a quo* referred to the court cases in **The City of Tshwane Metropolitan Municipality v Blair Athol Homeowners Association**⁵; **Denel (Edms) Bpk v Voster**⁶; **Vermuelen v Phoenix Assurance Co Ltd**⁷; **African Bank v Soodhoo**⁸ and concluded that the general principle laid down in these cases can be summarized as follows:

"The court has a wide discretion to grant or refuse an application in terms of Rule 33(4); The overriding consideration in such applications is convenience, in a wide sense, that is to say, the separation must not only be convenient to the person applying for such separation, but must also be convenient to all parties in the

⁵ 2019 (3) SA 398 (SCA);

⁶ 2004 (4) SA 481 (SCA) at par 3

⁷ 1967 (2) SA 694 (O)

⁸ 2008 (6) SA 46 (D) at 51B-D

matter inclusive of the court. The determination of such an application requires a value judgment in weighing up the advantages and the disadvantages in granting such separation. If the advantages outweigh the disadvantages, invariably, the Court should grant the application for separation. The notion of appropriateness and fairness to the parties also comes into the question.” See paragraph 22 of the judgment of the court a quo.

The following may be added to the above conclusion:

- ii. It is ordinarily advisable, in the interest of expedition and finality of litigation, notwithstanding the wide powers given to the court in rule 33(4), to have one hearing only in which all issues are canvassed so that the court, at the conclusion of the case, may dispose of the entire matter-**Tongaat**;
- iii. The purpose of the rule is to test the alleged lacuna in the plaintiff' case and the determination of the facts of the case without the leading of evidence and to avoid costs and delay in finalization of the case. -See **Erasmus, Superior Court practice (2016) 2nd Edition D1-436; Denel.**
- iv. Courts should carefully consider their decisions when considering an application of this nature, more so when the issue appear to be inextricably linked rather than discrete and

that disputes which may at first sight appear to be discrete may later prove otherwise during trial. –**Denel; Consolidate News Agencies (Pty) Ltd (In Liquidation) v Mobile Telephone Networks (Pty) Ltd & another**⁹.

[19] My understanding of the appellant's argument is that the court should have restricted itself to the questions whether the first respondent was time-barred from instituting proceedings against it, having regard to clause 10.1 and 10.3 of the GCC and whether the email addressed to the appellant constituted a desire not to proceed with litigation against the appellant should be decided separately. This contention has merit. However, the authorities referred to earlier dictate that there are other considerations that are to be made, such as the pleadings as a whole, which shall include the defences raised by other parties involved, the issue of appropriateness and fairness to all parties, the interest of justice and whether the facts, in their totality are interwoven or not. The finding of the court a quo that the facts in this case are interwoven is correct. It will therefore not be in the interest of justice, especially in a case where public funds are involved, to separate the issues. The

⁹ [2009] ZASCA 130; 2010 (3) SA 382 (SCA) par 90-91 (abbreviated as CNA v MTN)

appellant must answer to all allegations in one trial where the evidence will be fully ventilated after each party is given the opportunity to present evidence in support of its case.

[20] The court *a quo* dealt with the matter on the basis of what was stated in the founding affidavit. It is evident from the said affidavit that the appellant relied on the email addressed to its attorney of record by the Ms Mangena. The appellant admitted that more evidence was required to establish this claim. The first respondent also claimed that further correspondence between the parties will indicate that the intention was not to waive its right to institute legal proceedings. As already found that the determination of the special pleas will not bring the *lis* between the appellant and the first respondent, I find that it would be appropriate, in the interest of fairness and justice, that each party's evidence in this regard should be ventilated in the same trial as the other issues.

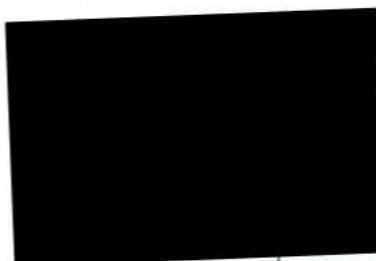
[21] With regard to costs, I am of the view that same should be reserved for determination in the main trial.

[22] In the result the following order is made:

22.1 The appeal is dismissed;

22.2. The order of the court a quo is confirmed;

24.3 Costs are to be costs in the main trial.



M V SEMENYA

DEPUTY JUDGE PRESIDENT;

LIMPOPO DIVISION; POLOKWANE.



G C MULLER;

JUDGE OF THE HIGH COURT;

LIMPOPO DIVISION; POLOKWANE.



M F KGANYAGO

JUDGE OF THE HIGH COURT;

LIMPOPO DIVISION; POLOKWANE.

APPEARANCES:

For the appellant	:ADV S TSHIKILA
Instructed by:	:ORELOWITZ INCORPORATED.
For the first respondent	:ADV MILLS SC.
Instructed by	:MACHABA INCORPORATED.
For the second respondent	:CLYDE AND COMPANY ATTORNEYS.
Date of hearing:	:5 October 2021
Date of handing down	:18 01.2022.