

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
(LIMPOPO DIVISION, POLOKWANE)

(1)	REPORTABLE: YES/NO
(2)	OF INTEREST TO THE JUDGES: YES/NO
(3)	REVISED.
Signature <i>[Handwritten Signature]</i>	
Date <i>31/08/2020</i>	

CASE NO: 5103/2018

In the matter between:

ROAD AGENCY LIMPOPO SOC LIMITED**APPLICANT**

and

MATLA CONSULTANTS CC**FIRST RESPONDENT****AXTON MATRIX CONSTRUCTION CC****SECOND RESPONDENT**

JUDGMENT

MAKGOBA JP

- [1] This is an application wherein the Applicant (hereinafter referred to as “Second Defendant”) seeks an order in terms of Rule 33(4) for the separation and prior determination of two issues as raised by it in its Plea to the Plaintiff’s particulars of claim in an action for contractual alternatively delictual damages (the “main action”) which the Respondent (hereinafter referred to as “Plaintiff”) had instituted against it in this Court on 22 August 2018. Second Defendant also seeks an order that the main action against Second Defendant be stayed, pending the final determination of the proposed separated issues.
- [2] In essence the Second Defendant seeks an order directing that
- 2.1. various issues arising between it and the Plaintiff be separated for prior determination in terms of Rule 33(4) of the Uniform Rules of Court; and
 - 2.2. further proceedings as between the Plaintiff and the Second Defendant be stayed pending the final determination of the separated issues.
- [3] The issues between the Plaintiff and the Second Defendant arise out of a construction contract, the terms of which are largely regulated by the General Conditions of Contract for Construction Works, 2010 (“the GCC”).
- [4] In its plea to the Plaintiff’s particulars of claim, the Second Defendant raised various defences, including the following special pleas:

- 4.1. The Plaintiff's claims arising out of the GCC are time-barred as a result of the Plaintiff's failure to comply with the claims procedure under the GCC. The Second Defendant contends that the Plaintiff has failed to comply with the notice procedure set out in clause 10 of the GCC and is thus time-barred.
- 4.2. Any disputes between the Plaintiff and the Second Defendant arising out of or in connection with the GCC are to be resolved through the dispute resolution mechanism prescribed under clause 10. The Second Defendant contends that any disputes between the two parties ought to be referred to adjudication.
- 4.3. In its second special plea the Second Defendant asserts that with full knowledge of its rights the Plaintiff elected not to proceed with the action against the Second Defendant and that it has accordingly waived its rights to do so. In the circumstances the Second Defendant asserts that the Plaintiff is not entitled to pursue any claim which it might have against the Second Defendant.

This is the defence of *pactum de non petendo* or waiver.

The Issues

- [5] The Second Defendant contends that the issue to be determined in this application is not whether or not the Second Defendant's defences are good. It is whether, if the two special pleas are determined in favour of the Second

Defendant, that the *lis* as between the Plaintiff and the Second Defendant would come to an end.

I agree. However, the main issue to be determined is whether there is any justification to separate the issues in terms of Rules 33(4) as claimed by Second Defendant.

- [6] The Second Defendant contends further that what this case will not require is a prolonged litigation (which would include extensive discovery) in which the Second Defendant is compelled to incur unnecessary expenses, when its special pleas could have been disposed of without such expenses.

This aspect will be considered against the legal principle that when considering separation of issues, the Court should take into consideration that it is not only for the convenience of any one of the parties or of the Court, but the convenience of all concerned that must be taken into consideration.

- [7] The high water-mark of the Plaintiff's case in opposing this application is captured in paragraphs 3.14.4 and 3.14.6 of the answering affidavit.

In paragraph 3.14.4 it is stated:

"Second Defendant followed an extremely technical approach in its plea, by relying on numerous technical defences, such as the two special pleas which relate to non-compliance with dispute resolution provisions by the Plaintiff..... as well as a reliance on an alleged undertaking given by the Plaintiff's attorneys

in an e-mail dated 17 May 2018, not to proceed with an action against Second Defendant”.

In paragraph 3.14.6 the Plaintiff stated:

“However, it is common knowledge between all the parties involved, and that also appears from the report of the engineer (which is attached hereto as annexure RAL 17 to Annexure MM2) that apart from the technical defences raised by the Second Defendant that Second Defendant is of the view that First Defendant, the engineer, is to blame for the deficiencies in the road, because the engineer (First Defendant) had allegedly provided the Second Defendant with defective designs or instructions in respect of certain of the construction works, and that the instructions given by the First Defendant to Second Defendant were also defective”.

- [8] In essence the Plaintiff opposes the application for a separation and submits that the intricate and interwoven questions of law and fact pertaining to the two special pleas cannot conveniently be decided separately, as envisaged in Rule 33(4) before evidence is led in the main action, and that, issues involved cannot be decided separately, without the involvement of the First Defendant’s evidence.

The Plaintiff furthermore submits that the determination of the issues between Plaintiff and Second Defendant are inextricably interwoven with the issues between Plaintiff and First Defendant, and cannot be decided without First

Defendant partaking in such a separate issue hearing. The large parts of evidence on a separated issue will have to be repeated again in the case against First Defendant even if and when Second Defendant falls out of the main action.

Factual Background

- [9] Plaintiff during 2014 appointed Second Defendant as the contractor, and First Defendant as the responsible engineer, to do the upgrading from gravel to tar, of part of the D3537 Road in the Limpopo Province. Second Defendant was paid about R 108 Million for the project, and First Defendant was paid about R 14 Million for the project.
- [10] In November 2016 the First Defendant certified that the project had reached practical completion, subject to the Second Defendant remedying 17 defects in relation to the road works, set out in a snag list by First Defendant. During December 2016 when the First substantial rains fell, it became evident that in addition to the 17 defects referred to in the First Defendant's snag list, it was the situation that the vertical alignment of the road was incorrect, causing the road to flood at numerous spots during rain.

- [11] For the situation the Second Defendant blamed the First Defendant who had been responsible allegedly for incorrectly designing the road, and First Defendant in turn blamed the Second Defendant, who had constructed the road. First Defendant alleged that Second Defendant had abandoned the project, and the site, and had refused to perform any works or services between late November 2016 / December 2016 and therefore refused to issue a certificate of completion.
- [12] Despite numerous written communications and negotiations between the parties they were unable to resolve their disputes about the deficient road, and their relationship broke down irretrievably. Plaintiff, due to the disputes between the First Defendant who was the responsible engineer, and the Second Defendant who was the responsible contractor, and the irretrievable breakdown of the relationships between the parties, appointed an independent firm of engineers to advise the Plaintiff about the deficiencies in the road, who then on 30 July 2017 reported to Plaintiff that there were numerous deficiencies found by them in the constructed road, and that the reasonable and necessary costs for remedial works amount to about R 64.9 Million.
- [13] From January 2017 onwards various meetings were held and letters exchanged between the Plaintiff and Second Defendant, either by the officials of these parties, or as represented by their attorneys, to resolve their issues, which

included the Plaintiff's refusal to pay the retention money held back by Plaintiff. These negotiations (which Plaintiff always averred were without prejudice) however derailed, and on 22 August 2018 Plaintiff issued summons against First Defendant and Second Defendant in the main action, claiming damages from the First and Second Defendants in the amount of R 64.9 Million.

The Applicable Legal Principles

[14] Rule 33(4) of the Uniform Rules of Court 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 questions cannot conveniently be decided separately”.

[15] It is trite that the word “convenient” in the context of Rule 33(4) conveys not only the notion of expeditious disposal of litigation, but also the notion of appropriateness and fairness. In the present case it is not the convenience of the Second Defendant alone, which should be considered by the Court or the

convenience of the Court itself, but also the convenience of other parties concerned, that is Plaintiff and First Defendant.

In **Tshwane City v Blair Athol Homeowners Association**¹ the Supreme Court of Appeal held that issues are to be separated under Rule 33(4) only after careful thought to the implications of doing so, and not where the issues are inextricably linked to other issues and that any order of separation is also to carefully circumscribe the issue or issues to be separated.

[16] Citing with approval **DE Van Loggerenberg Erasmus Superior Court Practice (2016) 2ed at D1 – 436** the SCA stated the following:

“[49] In De van Loggerenberg Erasmus Superior Court Practice (2016) 2ed at D1 – 436, the author states the following:

“The entitlement to seek the separation of issues was created in the rules so that an alleged lacuna in the plaintiff’s 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 the leading of evidence. The purpose is to determine the plaintiff’s claim without the costs and delays of a full trial”

[50] *At D1 – 436 opcit the following is stated:*

“The procedure is aimed at facilitating the convenient and expeditious disposal of litigation. The word “convenient” within the context of the sub

¹ 2019 (3) SA 398 (SCA)

rule conveys not only the notion of facility or ease or expedience, but also the notion of appropriateness and fairness. It is not the convenience of anyone of the parties or of the Court, but the convenience of all concerned that must be taken into consideration”.

- [17] In **Denel (Edms) Bpk v Vorster**² the SCA warned repeatedly that when a decision is called for in terms of Rule 33(4) it should be a carefully considered one, and that it should not be assumed that separation will always facilitate convenient and expeditious disposal of litigation. And even where the issues are discrete, the expeditious disposal of 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.

See also **Consolidated News Agencies (Pty) Ltd (in liquidation) v Mobile Telephone Networks (Pty) Ltd**³.

- [18] The Court is obliged to grant the application for separation unless it appears that the issues sought to be separated cannot be conveniently decided separately⁴. It is thus incumbent upon the plaintiff (which is the party opposing the application for separation) to satisfy the Court that such an order should not be granted.

² 2004 (4) SA 481 (SCA) at para 3

³ 2010 (3) SA 382 (SCA) at paras 90-91

⁴ *Edward L Bateman Ltd v C A Brand Projects (Pty) Ltd* 1955 (4) SA 128 (t) AT 132D

The convenience to be considered is primarily that of the Court and the litigants. Convenience in the context does not only connote facility or ease or expedience but also appropriateness in the sense that in all the circumstances it is fitting and fair to the parties concerned⁵.

- [19] Rule 33(4) confers a wide discretion on the Court and the Court can decide any question of fact separately from any other question in dispute in a case if it is convenient and it thinks is advisable.

See **Vermuelen v Phoenix Assurance Co Ltd 1967 (2) SA 694 (O)**.

The function of the Court, in an application in terms of Rule 33(4) such as the present was stated in **Minister of Agriculture v Tongaat Group Ltd**⁶ as follows:

“... the function of the court in an application of this nature is to gauge to the best of its ability the nature and extent of the advantages which would flow from the grant of the order sought and of the disadvantages. If, overall, and with due regard to the divergent interests and considerations of convenience (in the wide sense I have indicated) affecting the parties, it appears that such advantages would outweigh the disadvantages, it would normally grant the application”.

⁵ Berman & Fialkov v Lumb 2003 (2) SA 674 (C) AT 680H – I
Braaf v Fedgen Insurance Ltd 1995 (3) SA 938 (C) at 939G

⁶ 1976 (2) SA 357 (D) at 364D -E

[20] In **African Bank v Soodhoo**⁷ the Court said the following:

“The general principle in law would appear to be that notwithstanding the wide powers conferred on a Court under Rule 33(4) of the Uniform Rules of Court it is ordinarily desirable, in the interests of expedition and finality of litigation, to have one hearing only at which all issues are canvassed so that the Court, at the conclusion of the case, may dispose of the entire matter. Minister of Agriculture v Tongaat Group Ltd 1976 (2) SA 357 (D) at 362G – H, and Denel (Edms) Bpk v Vorster 2004 (4) SA 481 (SCA) (2004) 25 ILJ 659) at 485B – C have reference. In some instances, however, the interests of the parties and the ends of justice are better served by disposing of a particular issue or issues before considering other issues which, depending on the result of the issue singled out, may fall away. (Minister of Agriculture (supra) at 362H)”.

[21] The general principles gleaned from the above cited cases may briefly be summarised as follows. The Court has a 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 the parties in the matter inclusive of the Court.

⁷ 2008 (6) SA 46 (D) at 51B-D

The determination of such an application requires of the Court to make 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.

- [22] Having briefly set out the general principles to be adopted in an application for separation of issues in terms of Rule 33(4), the question to be answered in this matter is the following: is it convenient for this Court to grant the application for separation? To answer this question it is essential to establish the issues as defined in the pleadings and the factual matrix of this case.

Whether Separation is appropriate

- [23] The Second Defendant came up with a strong argument that if either of the two special pleas is upheld, then that would be the end of the involvement of the Second Defendant in any claim against it by the Plaintiff. That might be so, but this is not the test or the only consideration. The authorities outlined or dealt with above are clear that there are other considerations to be taken into account when ordering a separation of issues in terms of Rule 33(4).

- [24] It is evident from the analysis of the pleadings in the main action that the issues between the three parties cannot be resolved properly in different forums without fully ventilating those issues simultaneously in one forum. There is presently a pending dispute resolution process / arbitration between Plaintiff and Second Defendant to the exclusion of the First Defendant. What the Second Defendant now desires is a total separate Court action against the First Defendant only in another forum whilst the Plaintiff and Second Defendant proceed in a separate Court action after the separation sought in this application. At the end of the day we have three different processes arising from the parties' contractual relationship. It is undesirable in my view, to have such duplication of actions arising from the same cause of action.
- [25] From the factual matrix of this case it is clear that the two Defendants are blaming each other for the alleged damages suffered by the Plaintiff and that is why the main action was instituted against both Defendants despite the dispute resolution stipulations in the GCC. In any event the stipulations in the GCC do not govern the contractual relationship between the Plaintiff and the First Defendant.
- [26] In view of the Plea filed by the First Defendant, it is foreseen that if the Second Defendant now falls out of the litigation by virtue of success with the raising of any of its two special pleas, it will probably be joined back in the action

proceedings by the First Defendant, who clearly according to its Plea blames the Second Defendant for the defective alignment of the road by providing incorrect designs and instructions to the Second Defendant to construct the road with.

[27] It is trite law that in general, where arbitration could lead to a multiplicity of proceedings due to all the parties not being covered by the arbitration agreement (like in the present case) a Court may refuse to stay proceedings. Where there are several matters in dispute and some only fall within the ambit of an arbitration agreement, and the dispute cannot conveniently be dealt with independently, a Court should refuse to stay proceedings⁸.

In **Universiteit van Stellenbosch v J A Louw (Edms) Bpk**⁹ it was held that where on analysis of the disputes between various parties raised on the pleadings, it appears that there were grave conflicts of fact which have been raised, and if these had to be adjudicated upon in different tribunals, namely the Court and by an arbitrator, there was a real danger that tribunals might come to different conclusions. Accordingly, the cumulative effect of the multiplicity of proceedings led to the Court refusing the matter to be referred to arbitration.

⁸ Valkin v Valkin 1953 (4) SA 510 (W)

PA Ramsden: McKenzie's Law of Building and Engineering Contracts and Arbitration at page 243

⁹ 1983 (4) SA 321 (A)

[28] 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 Plaintiff, First Defendant and Second Defendant are interwoven. The facts of the disputes are substantially similar and depend upon the determination of substantially the same questions 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 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 particular for which part of the damages suffered by Plaintiff the First Defendant is liable and for which part the Second Defendant is liable.
- 28.4. First Defendant is not contractually obliged to participate in any of the dispute resolution processes between Plaintiff and 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 First Defendant. The two sets of proceedings will escalate the costs and duplicate the cost of adjudicators or 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 second 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 Plaintiffs rights in terms of the construction agreement, undertook not to institute action against Second Defendant.

[30] Whether the contents of the said email constitutes waiver/*pactum de non petendo* 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.

[31] Ms Mangena in her opposing affidavit has set out in great detail that all the negotiations between her and Orelowitz attorneys (for Second Defendant) were in her mind always "without prejudice" and she refers in her opposing affidavit in great detail all the letters which were written with the heading 'without prejudice'. It is obvious that the Second Defendant's attorney also regarded the letters as "without prejudice" and not as a *pactum de non petendo*. In an email subsequent to the email of Ms Mangena the attorney for Second Defendant stated:

"2. *Please note that should your client nevertheless decide to institute legal proceeding against our client, service of such process is to be effected at our offices, our client having duly authorised us to accept service on its behalf.*"

It is clear from the above that the Second Defendant and its attorneys expected legal action to be taken against Second Defendant.

Conclusion

[32] On the basis of the legal principles considered in this judgment and taking into consideration the pleadings and factual matrix in this case, I make a finding that the Second Defendant did not make out a case for separation of issues in terms of Rule 33(4).

A separation of the two special pleas now, and the separate adjudication thereof, will not make an end to the litigation between Plaintiff and Second Defendant and will result only in dealing with the case in a further piecemeal fashion, by different forums. It will also entail a duplication of evidence to be led by Plaintiff, first during the separated hearing and later again during the hearing of the main action.

[33] In the result, the Second Defendant's application for a separation of issues in terms of Rule 33(4) is dismissed with costs.



E M MAKGOBA
JUDGE PRESIDENT OF THE
HIGH COURT, LIMPOPO
DIVISION, POLOKWANE

APPEARANCES

Heard on	: 26 August 2020
Judgment delivered on	: 31 August 2020
For the Applicant (Second Respondent)	: Adv. S Tshikila
Instructed by	: Orelowitz Incorporated Pratt Luyt & De Lange Attorneys
For the Respondent (Plaintiff)	: Adv. D Mills SC
Instructed by	: Machaba Incorporated
For First Defendant	: Mr N Bosman
Instructed by	: Clyde & Co Attorneys c/o Bosman Attorneys