



**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: 2908/2016

In the matter between:

HYGIENE OUTRIGHT (PTY) LTD

Plaintiff

and

SGR MEDICAL SUPPLIES CC

Defendant

CORAM: NICHOLSON, AJ

HEARD ON: 16 MARCH 2017

JUDGMENT BY: NICHOLSON, AJ

DELIVERED ON: 16 MARCH 2017

- [1] This is an application for separation of issues in terms of Rule 33(4) of the Uniform Rules of Court. Plaintiff seeks separation of

the jurisdiction issue and its determination prior to determination of the remainder of the issues raised in the Particulars of Claim.

- [2] Before dealing with this application, the Court must first deal with the Applicant's application to strike out paragraphs 20.2.2; 24; 30; 32 and 40 of the Respondent's answering affidavit as containing hearsay evidence. This application was brought in terms of rule 6(5) read together with 6(11) and 6(15) of the Uniform Rules of Court.

After hearing argument from both parties, the court grants the application to strike out with costs.

- [3] The court now turns to the application for separation.

The Plaintiff instituted action against the Defendant in this matter for payment of R 301 644.00 together with interest and costs. The Defendant then entered a plea incorporating a special plea regarding jurisdiction. It was Plaintiff's contention in replication that the parties entered into an oral agreement of sale, which agreement was cancelled by a second oral agreement in terms of which the Respondent would refund certain monies paid, which performance would take place entirely within the jurisdiction of this Court. It also contends that neither agreement is disputed by the defendant and that the only real dispute is when the money was to be repaid. Plaintiff asserts that, irrespective of the date on which performance in terms of the second contract would have taken place, it was clear that the payment would be made into the Plaintiff's bank account. Thus they argue, the only real question

for determination in relation to the special plea would be the location of such bank account as it would found jurisdiction as the place of performance in terms of the second contract plaintiff purports the parties concluded.

[4] Plaintiff asserted that separation offers the following advantages:

Restricting evidence to what is relevant to the special plea will avoid unnecessary testimony; avoid duplication of evidence and prejudice from pre-viewing witnesses, versions, cross-examination and arguments; the costs of a full-blown trial can be avoided; costs, delay and disadvantages of starting de novo in a new court can be avoided if the Special Plea succeeds.

[5] For these reasons, the Plaintiff has brought application for the separation of the issue raised in the special plea from the rest of the proceedings and to have it adjudicated first.

[6] The Defendant contests this application on the basis that the special plea and the merits are intertwined and cannot conveniently be separated. The Defendant denies the existence of the two oral agreements upon which Plaintiff relies and contends that the parties in fact purported to enter into a partly oral, partly written agreement in terms of which agreement, it argues that its' registered office and primary place of business, the place of conclusion of the purported contract of sale and all

the performances in terms of this agreement were to have taken place outside of this court's jurisdiction.

- [7] The defendant asserts that it would be neither convenient nor appropriate for the court to separate the jurisdiction issue in this case and to postpone the determination of the balance of the issues *sine die* as the core of the dispute between the parties relates to their contractual relationship.
- [8] The Plaintiff asserts that the parties entered into an oral agreement of sale in respect of thermostats and that, upon discovery that the information they had acted upon in entering into the agreement was fraudulent, a subsequent oral agreement cancelling the first agreement and agreeing to the repayment of the deposit already paid, came into existence. They base their action on this second agreement, alternatively in the event the court does not find that the second oral agreement existed, on the basis of restitution. Hence, the Plaintiff's claim for this court's jurisdiction rests entirely on the existence of the second oral agreement. The decision around the jurisdiction cannot be made without making a decision regarding whether or not the second contract existed. For this reason, it is not possible to separate the legal issue of jurisdiction from the merits of the case.
- [9] The purpose of rule 33 (4) is to facilitate the convenient and expeditious disposal of litigation. In making a determination the

court must consider whether the separation will curtail proceedings and dispose of the matter expeditiously.

- [10] The court must assess the convenience to itself and to the parties as well as any potential prejudice either party may suffer if the separation is granted. (See *CC v CM* (2014 (2) SA 430 (GJ)) per Mokgoathheng J at par [25]. See too par [27] where he states that the purpose of the rule is to “determine the fate of a plaintiff’s claim (or one of the claims) without the costs of a full trial”. This he quotes from *Rauff v Standard Bank Properties (A Division of Standard Bank of SA Ltd.) and Another* (2002 (6) SA 693 (w) per Flemming DJP par [22.1]).
- [11] As Harms AJ pointed out in *Consolidated News Agencies (Pty) Ltd (In liquidation) v Mobile Telephone Networks (Pty) Ltd and Another* (2010 (3) SA 382 (SCA) at par [90]), often what initially may appear discrete may later prove to be intertwined and, even if it is indeed not intertwined, may best be more expeditiously disposed of during a single hearing during which all issues are fully ventilated. (See too *Denel (Edms) Bpk v Vorster* 2004 (4) SA 481 (SCA) at par [3].)
- [12] The onus of showing that the matters cannot be dealt with conveniently if separated falls on the defendant in this matter who has opposed the application. (*Braf v Fedgen Insurance Ltd* (1995 (3) SA 938 (C)). In *Consolidated News*, however, a clear warning is issued that courts should avoid piecemeal litigation

[13] Immediate determination of the jurisdiction issue in this matter will not be determinative of the claim. It will not be convenient either for the court or for the parties. It cannot be separated from the case on the merits as the existence of the contract upon which the plaintiff relies to found jurisdiction is in dispute.

[14] Indeed, the Court must weigh the advantages of granting separation against the disadvantages. It is the Court's view that in the present case, the expeditious conclusion of this matter will best be served by the ventilation of all issues at one hearing. There is no clear demonstration that separation will be convenient or that it will result in a substantial curtailment in the duration of the proceedings, whilst the potential inconvenience is patent. The matters would be considered piecemeal, the court would engage with the matter on more than one occasion and, the underlying dispute between the parties would not be finally disposed of by the separation. Jurisdiction and the merits in this case are so clearly intertwined that there would of necessity, be a duplication of evidence with associated inconvenience to the witnesses and their legal represent.

[15] The Plaintiff seeks costs of the postponement due to late filing of notice of intention to oppose on the basis these costs were unnecessarily wasted.

After consideration of the papers, the arguments presented and the relevant authorities, the Court makes the following order:

1. The application to strike out is granted with costs.
2. The Application for separation of issues is dismissed.
3. The Respondent to pay the wasted costs of the postponement.
4. The Applicant to pay the costs of this application.

C. NICHOLSON, AJ

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