

FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Case No. : 5972/2008

In the matter between:-

IVECO SOUTH AFRICA (PTY) LTD

Plaintiff/Applicant

and

DIRK SAMUEL BOTHA

Defendant/Respondent

HEARD ON: 2 FEBRUARY 2010

JUDGMENT BY: MOOLLA, AJ

DELIVERED ON: 3 FEBRUARY 2010

[1] The matter which serves before me is an application in terms of Rule 33(4) by the plaintiff/applicant for what is commonly referred to as the separation of issues. The defendant/respondent opposed the application.

[2] Rule 33(4) reads 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 conveniently be decided separately.”

[3] The context of the application is an action instituted by the plaintiff against the defendant in this court for the following relief:

1. Payment of the sum of R1 507 147,95;
2. Interest thereon at 15,5% per annum from 18 July 2007 to date of final payment;
3. Pay costs on an attorney/client scale.
4. Further or alternate relief.

[4] The gravamen of the plaintiff's case was as follows:

Pursuant to an agreement for the sale of shares and a loan account in a company by the defendant to the plaintiff the

defendant, in essence, warranted that the company was free from liabilities save for the loan account.

- [5] In addition, the plaintiff gives certain undertakings of indemnity, for the record they read as follows:

“9. INDEMNITY

9.1 Without prejudice to the warranties and representations in the Agreement, or of the rights and legal remedies available to the Purchaser, the Seller hereby indemnifies the Purchaser against:

9.1.1 any obligation of the Company which may exist or arise in any way whatsoever before or in respect of the period before the Effective Date other than the loans;

9.1.2 all claims, obligations, damages or losses and/or shortages which may be suffered by the Purchaser and which may arise out of, result from or be caused by a breach and/or non fulfilment of any of the warranties and/or representations in this Agreement.

9.1.3 All costs, on the scale as between Attorney and own client, of any opposition in terms of Clause 9.2 against payment of such claims;

9.2 The Purchaser undertakes to advise the Seller timeously of any claim which may arise against the Purchaser in terms of paragraph and should the Seller require the Purchaser to oppose or resist such claim, to do so on condition that:

9.2.1 The Seller shall first provide the Purchaser with security to the satisfaction of the Purchaser for payment of the said claim and all costs on a scale as between attorney and own client which the Purchaser may incur or which may be ordered against the Purchaser as a result of the opposition of the Purchaser to the claim;

9.2.2 Should the Seller not require the Purchase to oppose the claim timeously then the Purchaser will be entitled to pay such claim and recover the full amount therefore together with all costs incurred on a scale as between attorney and own client from the Seller.”

- [6] It is alleged by the plaintiff/applicant that the defendant breached the agreement by failure to disclose a liability to the Innerwest Council in the sum of R330 190,48 which allegedly existed as a defect of debt of the sale. The said sum was in respect of duties and levies including penalties and interest all by Duewest (the company forming the subject matter of the sale) to the Innerwest Council in terms of a law administered by SARS.
- [7] As the defendant failed to discharge the liability the amount attracted interest and penalties totalling R1 176 957,45.
- [8] On 17 July 2007 the plaintiff discharged the outstanding liability and claims that it became entitled to recover the full amount.
- [9] The defendant raised, by way of a special plea, a defensive prescription. This was the correct procedure as a plea of prescription cannot be raised by way of exception.

[10] The plaintiff responded to the plea by way of a replication in which it takes issue with the defendant on his special plea of prescription.

[11] It is in this context that the issue of the Rule 33(4) application for separation of issues is made. Mr. Vetten, counsel for the applicant, argued that a separation of issues would favour the balance of convenience and result in the issue of prescription being dealt with summarily and the outcome thereof would give direction to the future of this matter.

LEGAL PRINCIPLES OF APPLICATION

[12] The entitlement to seek the separation of issues was created in the rules so that an alleged *lacuna* on 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. It has been held that this procedure is so important that an attorney should as soon as pleadings have closed make

a strategic assessment of the real trial needs of the case bearing in mind the duty to eliminate avoidable delays and costs.

See: RAUFF v STANDARD BANK PROPERTIES (A DIVISION OF STANDARD BANK OF SA LTD) AND ANOTHER 2002 (6) SA 693 (W) at 703 I - J.

- [13] The word “convenient” 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 is not the convenience of any one of the parties or of the court, but the convenience of all concerned that must be taken into consideration. The function of the court in an application under the subrule is to gauge to the best of its ability the nature and extent of the advantages which would flow from the granting of the order sought and of the disadvantages. If it appears that the advantages would outweigh the disadvantages, the court would normally grant the order. It should, however, not be assumed that that result is always achieved by separating the

issues. An important consideration will usually be whether or not a preliminary hearing for the separate decision of specified issues will materially shorten the proceedings, though the nature of a particular case may be such that proper consideration of overall convenience may involve factors other than those relating only to the actual duration of a hearing. The convenience must be demonstrated and sufficient information must be placed before the court to enable it to exercise its discretion in a proper and meaningful way. The relief is not a mere formality and the convenience must be demonstrated. Where grave prejudice may result for the opposing party should separation be ordered, it would be a further factor, which the court will take into account when considering a separation.

See generally: **Superior Court Practice** at pages B1-233 to B1-236.

APPLICATION OF THE AFORESAID LEGAL PRINCIPLES

[14] The applicant has argued that there needs to be a determination of the law and facts and that the balance of

convenience would result in separation and a practical and speedy disposition of the issues given that the applicant was in the hands of the municipality otherwise.

[15] Mr. Zietsman, for the respondent, argued that the application for separation was convenient only for the applicant and was in fact a proxy for an adjournment;

15.1 that, for the, an agreement had been reached in terms of Rule 37 on 15 December 2009 in terms of which it was recorded that there was no issues for separation.

He referred the court to two appeal court decisions the essence of which was that to enable a party to resile from an agreement in terms of Rule 37 will be to defeat its very purpose in the absence of special circumstances; that the issue of a separation was only raised for the first time by the applicant on 15 January 2010; lastly the difficulty that would be encountered in proving the damages.

[16] In dealing with the respective submissions of counsel the court finds as follows:-

1. The Rule 37 agreement of 15 December 2009 was essentially an affectation of a proprietary process envisaged by the provisions of Rule 37. Mr. Vetton argued that this is normally the case when counsel is not involved in the Rule 37 process. This is further enforced by the reinforcement of an attorney, Patlansky, when he avers that the issue of separation arose at the stage when counsel was involved in a matter.

Whilst it may be true that in many instances attorneys undertake a notional exercise in going through the Rule 37 motions, a court cannot anoint with legal rectitude a practice for which this Rule was never conceived. It would be manifestly incorrect for the court to do so.

2. Whilst the court has some sympathy with Mr. Zietsman's argument on the incidence of onus being difficult and can prove between the original debt and the damages

claimed, the court is of the view, nevertheless, that in the application of a proportionality test this argument is subsumed by the undoubted overall convenience that a separation would offer and a speedy resolution and finality. The court finds that this constitutes a special circumstance which would in effect permit an overriding of the Rule 37 agreement; accordingly the court is inclined to grant the relief sought in part.

[17] Turning to the issue of costs the court finds as follows:

1. The issue of prescription was raised as a special plea of 19 November 2008. The plaintiff had a significant opportunity from that date or at the latest when the pleadings had closed, to make a strategic assessment of the real trial needs of the case bearing in mind the duty to eliminate avoidable delays and costs.

See: **RAUFF v STANDARD BANK PROPERTIES**, *supra*.

[18] Having regard to the court's earlier finding in a restrict of the Rule 43 process and conduct herein and further having regard to the fact that there was a legal obligation on the applicant to make a decision on a possible Rule 33(4) application after the close of pleadings, it would be manifestly unjust and inequitable if a costs order was made as sought by the applicant.

[19] Accordingly it is ordered as follows:-

1. That the respondent's Special Plea of Prescription, involving issues of both fact and law, be heard and decided separately from and before all other issues in the matter and that all such other issues be stayed pending the determination and disposal of the respondent's Special Plea of Prescription.
2. That the costs of this application be paid by the applicant.

E.A. MOOLLA, AJ

On behalf of plaintiff/applicant:

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Instructed by:
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On behalf of defendant/respondent:

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