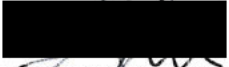


REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA,
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 2020/22874

(1)	REPORTABLE: YES
(2)	OF INTEREST TO OTHER JUDGES: YES
(3)	REVISED
4 October 2024	
DATE	SIGNATURE

In the matter between:

**ALTERAM MUNICIPAL
SOLUTIONS (PTY) LIMITED**

Applicant

And

EOH MTHOMBO (PTY) LIMITED

Respondent

In Re

**ALTERAM MUNICIPAL
SOLUTIONS (PTY) LIMITED**

Plaintiff

And

EOH MTHOMBO (PTY) LIMITED

Defendant

JUDGMENT

MIA J:

[1] This is an interlocutory application wherein the applicant seeks to separate the issues in the main action. The application for separation involves novel questions of evidential and procedural law where the court must determine the appropriateness and convenience of determining the defendant's defences on the merits of a claim against it where the plaintiff has not closed its case on the merits. If a separation is granted, the matter is determined based on a factual assumption, not on agreed-upon facts. This request for separation in terms of Rule 33(4) seeks to deal with the amended plea of the respondent, and the applicant contends dealing with the issues separately will bring finality to the matter. Alternately, it will reduce the time required for the trial.

[2] It is appropriate to consider the background of the matter. EOH appointed AMS as a subcontractor in April 2018, when it concluded a contract with the Department of Water and Sanitation (DWS) to provide IT services for five years. The parties agree that a term of the sub-contract was that, in the first year, AMS would invoice EOH monthly in the amount of R908,930.64.11. The parties did not agree on the terms of the agreement. AMS believed that the subcontract would endure for the period that the primary contract lasted, and the applicant could not be replaced without consulting with the principal, i.e. DWS. EOH believes that each party has the right to terminate on reasonable notice. Furthermore, each party enjoys the right to reputation and protection, and each party has the right to the other party's integrity, honesty and faith in their dealings with each other. The parties could not reduce an agreement to writing. Given the disagreement around the five-year fixed-term contract duration and in line with its view, EOH terminated the contract on one month's

notice on 31 January 2020. AMS considered this a repudiation of the agreement and issued a summons against EOH for breach of the agreement.

[3] The trial commenced after the parties had determined the issues in dispute. The matter was adjourned during the trial while the applicant's first witness was under cross-examination. When the matter commenced six months later, EOH amended its plea and introduced a new defence relying upon 287 invoices that it says were fraudulent invoices submitted for payment to EOH by a director of AMS. EOH relies on these invoices introduced in the amended plea, which it maintains are fraudulent, to terminate the agreement between the parties. In this context, the applicant seeks to separate the issue raised in the amended plea.

[4] The rules make provision for an issue to be separately determined. Rule 33(4) provides:

"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."

[5] The purpose of the rule is to allow the determination of an aspect of a claim without the full costs of a trial. In the present matter, the trial will be

extended with the introduction of the 287 invoices and the amended plea that has been introduced.

[6] Counsel for the applicant argued that it might result in the examination of 287 invoices in mini-trials, which could unduly extend the proceedings. On this basis, counsel submitted that it would be expedient to proceed to determine the merits of the amended plea as a separate issue as a proposed stated case. This would entail addressing the respondent's defence separately and upfront, so the matter will be concluded sooner. AMS thus seeks an order for the issues raised in the amended plea to be dealt with separately by assuming that the scheme alleged in paragraphs 52-56 is correct; the court is required to determine whether this scheme can be ascribed to the respondent as a result of knowledge on the part of its directors and whether it can be ascribed to the applicant as a result of the conduct of a director of the applicant as pleaded in paragraph 60. Furthermore, the respondent relies on there being a tacit agreement which permitted cancellation, which formed part of the subcontract between EOH and AMS, and if this is so, this court is to determine what their terms were with regard to the evidence.

[7] In support of separation, counsel for AMS raised the challenge presented by EOH's newly amended plea, which introduces 287 invoices. In practical terms, separating the issue on AMS's submission requires the court to accept for the sake of the preliminary proceeding that the scheme pleaded in paragraphs 52 to 56 is proven. It is also necessary that evidence is led and legal submissions on the averments in paragraph 60 and its sub-paragraphs to prove EOH's plea that the CEO of AMS's conduct is attributed to AMS and that the knowledge of the officials of EOH should not be ascribed to EOH. Counsel for AMS envisaged that the evidence *inter alia* on the composition of the various

boards and argument on the applicability to the facts proven of the doctrine of attribution and the rules of ascription of knowledge would be presented.

[8] Counsel contends it will have to deal with these invoices upon resumption of the trial unless they can be conveniently dealt with separately. He proposes that it be dealt with by way of a stated case where the attribution aspect will require EOH to provide the composition of the board of each EOH entity over the period in question. EOH shall provide whatever documentary evidence it considers pertinent to the question of attribution concerning each period and invoice. It may also lead evidence, and AMS may cross-examine those witnesses. This evidence AMS contends will enable the court to decide whether knowledge of the deceptive conduct can be attributed to AMS through its CEO and whether the knowledge of the officials of EOH is to be attributed to the various EOH entities. AMS will be permitted to do the same with the CEO of AMS. The advantage, as submitted by the applicant, is that a protracted trial involving the extensive examination of 287 invoices can be avoided. Counsel, therefore, submitted that the application to deal with EOH's amended plea separately, including the invoices introduced, would shorten the proceedings, thereby saving time and costs for the parties.

[9] In addition, it would also be necessary to consider the EOH's reliance on terminating the sub-contract, by either party on reasonable notice to the other party. The basis is that each party enjoyed the right to reputation and the protection thereof; each party had a right to the other party's integrity, honesty and good faith in their dealings. AMS denies that the tacit terms formed part of the sub-contract. It was submitted that to the extent that EOH relies on the tacit terms to terminate the contract, this is a discrete issue which could easily be determined through the leading of evidence over the course of a few days.

[10] In *Denel (Edms) Bpk v Vorster*,¹ the court cautioned against the assumption that separating issues would necessarily achieve convenience. The Court held that even though issues could appear to be discrete at first blush, they could ultimately be found to be inextricably interlinked. In such circumstances, the expeditious disposal of litigation is best served by ventilating all the issues at one hearing where there is more than one issue that may be disposed of.

[11] In *Consolidated News Agencies (in Liquidation) v Mobile Telephone Networks (Pty) Ltd*², the Court said

“Before concluding, we are constrained to make the comments that follow. Piecemeal litigation is not to be encouraged. Sometimes it is desirable to have a single issue decided separately, either by way of a stated case or otherwise. If a decision on a discrete issue disposes of a major part of a case, or will in some way lead to expedition it might well be desirable to have that issue decided first.”

[12] The Court goes on to caution prior to ordering separation as follows³:

“This Court has warned that in many cases, once properly considered, issues initially thought to be discrete are found to be inextricably linked. And even where the issues are discrete, the expeditious disposal of the 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”

¹ *Denel (Edms) Bpk v Vorster* 2004 (4) SA 481 (SCA) para [3]

² *Consolidated News Agencies (in Liquidation) v Mobile Telephone Networks (Pty) Ltd* [2010] 2 All SA 9 SCA at para 89

³ *Consolidated News Agency* above at para 90; see also *Denel (Edms) Bpk v Vorster* 2004 (4) SA 481 (SCA)

[13] Counsel for the respondent argued that it was contrary to the usual procedure that the respondent's defence is put to trial whilst the applicant had not made out a prima facie case relating to the unlawfulness of the termination of the contract. Moreover, the respondent was prejudiced by being forced to adduce evidence regarding the separated issues or risk judgment being given against it. This would result in prejudice to the respondent and was a sufficient reason for refusing the grant of separation.⁴

[14] The convenience of separation to all parties informs the granting of an application for separation. Counsel for both parties alluded to this and accept this. The convenience is informed by the appropriateness of the separation and the fairness to all the parties and the court. Whilst it is contended that the 287 invoices would require factual witnesses and mini-trials of their own, this is disputed by the respondents. It may be that the trial could be curtailed if the proceedings were conducted as proposed by the applicant on the basis of a proposed stated case. There is no agreement that the matter proceed on the basis of a stated case proposed by the applicant. The matter will not run strictly on the basis of a stated case as there is provision for the calling of witnesses. These witnesses may be required later during the trial and may result in duplication of time and witnesses. Having considered both counsels' propositions, I am of the view that the matter may be best dealt with by ventilating all the issues in one hearing. This will avoid a duplication of witnesses and evidence and avoid an assumption of facts.

[15] Regarding costs, both parties employed senior and junior counsel in the separation application. The application was launched on 11 April 2024, and the work was completed after 12 April 2024, according to counsel. I was referred

⁴ In *Internatio Pty Ltd v Lovemore Brothers Transport* CC 2000(2) SA 408 (SE)

to the decision in *Mashava v Enaex Africa (Pty) Ltd*⁵, where the court indicated the scale applicable to similar applications launched before 12 April 2024 and concluded after. Counsel submitted that the value of the claim for damages in the amount of R 34, 599, 983, 03 was relevant to the determination of costs. So to was the substantive separation application which involved questions of evidential and procedural law relating to the appropriateness and convenience of separately determining a defendant's defences on the merits of a claim against it in circumstances where the plaintiff's case on the merits is not yet closed; and the convenience of deciding separated issues on factual assumptions rather than on agreed facts or evidence. I am satisfied that the costs requested are appropriate.

[16] Accordingly, the following order is granted:

1. The application in terms of Rule 33(4) is dismissed with costs on Scale C.
2. The costs in paragraph 1 above shall include the cost of two counsel, including one senior counsel and one junior counsel.



S C MIA
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

⁵ 2022-18404) [2024] ZAGPJHC 387 (22 April 2024).

Appearances:

On behalf of the applicant : Advv MR Hellens SC and JJ Meiring
Instructed by : Stein Scop Attorneys Inc

On behalf of the respondent: Advv J Blou SC and AL Roeloffze
Instructed by : Werksmans Attorneys

Date of hearing : 27 May 2024
Date of judgment : 4 October 2024