



**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

Case No: 5855/2020

In the matter between:

MG PARKIN	First Plaintiff/ Respondent
EXPANSE CC	Second Plaintiff/ Respondent
ANTON WILLIE DU PLESSIS	Third Plaintiff/ Respondent
ANITA DU PLESSIS	Fourth Plaintiff/ Respondent
GERA KAREN VOSLOO	Fifth Plaintiff/ Respondent
WALLACE LOCKWOOD VOSLOO	Sixth Plaintiff/ Respondent
FREDERICK RYK LUDOLF EKSTEEN	Seventh Plaintiff/ Respondent
ADANNA EKSTEEN	Eighth Plaintiff/ Respondent
DANIEL FRANCOIS ANTONIE MYBURGH	Ninth Plaintiff/ Respondent
RICHARD GEYER	Tenth Plaintiff/ Respondent
ALWYN JOHANNES PAULUS LUBBE	Eleventh Plaintiff/ Respondent

SUSANNA JOHANNA MAGRIETA LUBBE

Twelfth Plaintiff/ Respondent

TERENCE ATTERBURY

Thirteenth Plaintiff/ Respondent

LEON BARNARD

Respondent

Fourteenth Plaintiff/

JAN CHRISTIAN BARNARD

Fifteenth Plaintiff/ Respondent

HANNO SMIT

Sixteenth Plaintiff/ Respondent

CHAUNCEY HARALD REID

Seventeenth Plaintiff/ Respondent

BRIDGIT HODGES

Eighteenth Plaintiff/ Respondent

CRAIG HARTUNG

Respondent

Nineteenth Plaintiff/

FRANCOIS HENRICO BARNARD

Twentieth Plaintiff/ Respondent

and

KNYSNA LOCAL MUNICIPALITY

Defendant/ Applicant

**GUARD RISK INSURANCE
COMPANY LIMITED**

Third Party/ Twenty-First Respondent

Date of hearing: 28 January 2025

Date of judgment: 29 April 2025

JUDGMENT

HOLDERNESS J

Introduction

[1] The Knysna Local Municipality, the applicant in this application and the defendant in the main action (the defendant), is seeking an order for the separation of issues arising from the two special pleas which it has raised, relating to non-joinder and misjoinder (collectively referred to as the Special Plea). The order is sought in terms of Rule 33(4) of the Uniform Rules of Court.

[2] In the main action the plaintiffs claim damages from the defendant in the amount of R17,231,184, arising from the alleged failure by it to control a fire which broke out in the Elandskraal area during June 2017. The fire subsequently spread to the plaintiffs' properties, causing extensive damage (the action).

[3] The questions to be determined in the Special Plea are:

- 3.1 Firstly, whether the Eden District Municipality (Eden Municipality) has a direct and substantial interest in the matter and ought to be joined as a defendant in the action (the non-joinder plea).
- 3.2 Secondly, whether the defendant bears a statutory or other responsibility for fire-fighting services in general or in respect of fires that are the subject of the plaintiffs' claim. If not, the defendant pleads that it has been misjoined in the action (the misjoinder plea).

[4] The defendant contends that the separate determination of these legal issues will result in the convenient and expeditious disposal of the litigation. It accordingly seeks a separation of the issues to be decided in respect of the Special Plea, and an order staying all other issues until the Special Plea has been disposed of. The application for a separation of issues is opposed by the plaintiffs.

The pleadings

[5] In terms of the amended particulars of claim the plaintiffs allege *inter alia* that:

- 5.1 On 7 June 2017 the Elandskraal fire (the fire) reignited under dry and windy conditions, spreading from a farm, known as MyForest Farm, to other properties, including plaintiffs' immovable and movable property (the properties), causing extensive damage.
- 5.2 The prolonged uncontrolled burning of the fire on MyForest Farm, and the spread of the fire to the properties, were caused by the wrongful breach by the defendant and/or its employees acting within the course and scope of their employment, of its legal and statutory duties.
- 5.3 A reasonable person or entity in the position of the defendant and under the given circumstances would have anticipated or foreseen that their conduct could cause damage to the properties, and would have implemented appropriate measures to guard against such an occurrence.
- 5.4 The defendant failed to take any, alternatively adequate, or reasonable steps to take control of the fire, and acted with gross negligence, alternatively negligently, alternatively negligently failed to act.
- 5.5 The fire which spread to the plaintiffs' properties caused extensive damage thereto, causing the plaintiffs to suffer damages in the total amount of R17,231,184.

[6] The plaintiffs' claim is founded on the alleged wrongful and negligent breach of a legal duty that the defendant allegedly owed to them, resulting in the damages suffered by the plaintiffs.

The Special Plea

[7] The defendant's plea of non-joinder arises from the plaintiffs' failure to join Eden Municipality.

[8] The defendant avers that, by virtue of s 84(1)(j) read with s 84(2) of the Local Government Municipal Structures Act, No 117 of 1998 (the Structures Act), Eden Municipality, the municipality in whose district the plaintiffs' properties are situated, has a direct and substantial interest in the matter.

[9] The defendant contends that as it does not bear any statutory or other obligation in terms of the provisions of s 84(1)(j) read with s 84(2) of the Structures Act to provide fire-fighting services in response to the fires that are the subject of the plaintiffs' claim, it has been misjoined in the action.

[10] Ms Pillay SC, who appeared on behalf of the defendant, together with Ms Sarkas, contended that these are discrete questions of law that are readily capable of separate determination with reference to the legislative framework governing the provision of fire-fighting services.

The Structures Act

[11] In terms of section 83(1) of the Structures Act, a municipality possesses the functions and powers assigned to it in terms of sections 156 and 229 of the Constitution of the Republic of South Africa, 1996 (the Constitution).

[12] Section 84 of the Structures Act delineates the division and distribution of functions and powers between district and local municipalities. In terms of s 84(j), a district municipality's functions and powers include:

- 12.1 Fire-fighting services serving the area of the district municipality as a whole, which includes-
 - (i) planning, co-ordination and regulation of fire services.
 - (ii) specialised fire-fighting services such as mountain, veld and chemical fire services.

- (iii) co-ordination of the standardisation of infrastructure, vehicles, equipment and procedures.
- (iv) training of fire officers.

[13] Section 84(2) of the Structures Act specifically provides that a local municipality possesses the functions and powers referred to in section 83(1), excluding those functions and powers vested in terms of subsection (1) of this section in the district municipality in whose area it falls.

[14] The defendant emphasised that fire-fighting services fall under the purview of local government, which shares concurrent legislative authority at the provincial and national levels as outlined in Schedule 4 Part B of the Constitution. Furthermore, the Structures Act provides for the division of powers between Category C (District Municipalities) and Category B (Local Municipalities) on fire services matters. The defendant asserts that their obligations should be understood within the framework of the two-tier local government system.

[15] The defendant, on the other hand contends that as evidence in respect of the special pleas would be limited only to issues of legal and constitutional competence, such evidence may be adduced by affidavit.

[16] The plaintiffs contend that extensive *viva voce* evidence will need to be led on:

- 16.1 Witnesses' historical dealings with the Knysna Fire Brigade and the fighting of veldfires in the Elandskraal Area.
- 16.2 Witnesses' dealings with the respective fire chiefs of the Knysna and Sedgefield fire stations during April, May and June of 2017.
- 16.3 The Fire Services Mutual Aid Memorandum of Agreement (the Mutual Aid Agreement).

[17] On the merits, the defendant pleaded *inter alia* as follows:

- 17.1. That the fire did not fall within its area of jurisdiction and the defendant therefore did not bear any obligation to provide fire-fighting services in respect thereof.
- 17.2. That the defendant had neither the capacity nor the resources to provide fire-fighting services on the scale required for the fire.
- 17.3. That as Eden Municipality bore the duty to provide fire-fighting services, the defendant informed Eden Municipality of the fire and requested that it respond to the fire.
- 17.4. That notwithstanding the absence of a legal obligation to respond to the fire and the lack of capacity to do so, the defendant:
 - 17.4.1 Responded to the calls that were made to it in the period between April 2017 to June 2017 about the existence of an uncontrolled fire in the MyForest Farm area.
 - 17.4.2 Reported the fires to Eden Municipality.
 - 17.4.3 Reported the fires to the Western Cape Provincial Government which declared it a Type 1 incident.
 - 17.4.4 Put in place a Type 1 incident teams to provide assistance.
 - 17.4.5 Reported the fires to Eden Municipality to assist in providing fire-fighting services.
 - 17.4.5 Advised those persons reporting the fire to report same to the Southern Cape Fire Protection Association (SCFPA) and provided contact details in respect thereof and informed them to make a fire break around the property.

Grounds upon which a separation order is sought

[18] The defendant, in support of its argument that a separation of issues will ensure a fair, just, convenient and expeditious resolution of the action, contends as follows:

- 18.1 Firstly, that the plaintiffs' allegations of wrongfulness, negligence, breach, the existence of a legal duty, causation and damages have all been placed in dispute.
- 18.2 Secondly, the pleaded case of the plaintiffs, in terms of which it alleges that by virtue of various statutes, by-laws, and regulations, the defendant was *inter alia* responsible for the co-ordinating and managing of local disasters, including fires in that area, the rendering firefighting services within the municipal area under its jurisdiction, and the protection of all sectors of the community against fire. This gives rise to a distinct question of law regarding which organ of state, specifically which municipality bears the specific legal duties contended for in the particulars of claim.
- 18.3 Thirdly, the factual matrix of the matter encompasses not only the defendant's legal and statutory duties, which the defendant claims are clearly separable, but also the origin, cause and spread of the fire, the fire-fighting efforts that were undertaken, the extent of the damages suffered and the cause thereof. The evidence regarding the merits will likely involve the testimony of numerous witnesses, including experts in the field.
- 18.4 Fourthly, all of the issues in respect of the merits of the claim may ultimately prove to be irrelevant if the defendant succeeds on the special pleas, as it will be dispositive of the plaintiffs' claim against the defendant.

The plaintiffs' grounds of opposition

[19] Mr Baguley, who appeared on behalf of the plaintiffs, highlighted at the outset that whereas pleas of non-joinder and misjoinder are ordinarily dilatory pleas, in this matter, due to the issue of prescription in respect of the party not joined, namely Eden Municipality, the Special Plea, if upheld, will be final in effect.

[20] Whilst this may be correct in the circumstances of this case, in respect only of the non-joinder plea (as misjoinder is not a dilatory plea) it is not a factor which in my view falls to be considered in determining whether the Special Plea should be separated. The ordinary principles applicable to the determination of whether an issue should be adjudicated separately fall to be applied, irrespective of whether due to prescription such determination may be final in effect.

[21] The plaintiffs' stance is that the determination of the Special Plea will not bring the litigation against the defendant to an end, nor will it facilitate the expeditious disposal of the litigation.

[22] The plaintiffs contend that their case is not solely reliant upon the relevant provisions of the Structures Act, but on other statutory and common law duties which the defendant bore at the relevant time, and which the plaintiffs allege it wrongfully and negligently breached. Arising from the foregoing, the plaintiffs aver that the misjoinder plea constitutes final relief, which cannot be decided on motion.

[23] The plaintiffs additionally contend that legal and factual questions in the Special Plea overlap and are interwoven with the issues to be determined and resolved in the action. Consequently, the issues arising in the Special Plea cannot be conveniently decided separately without extensive evidence being led in the action, which will result in the bulk of the evidence in the proposed separated hearing needing to be repeated at the hearing in the action.

[24] Mr Baguley further contended that the Special Plea has no prospect of succeeding, as a non-joinder plea may and can only be raised when the joinder of a party is essential, and not merely permissible, at the instance of the plaintiff.

[25] The plaintiffs aver that the defendant ought to have joined Eden Municipality as a third party. They contend that the general rule is that an individual is a necessary party and should be joined only if such person has a direct and substantial interest in any order a court might make, or if such order cannot be sustained or carried into effect without prejudicing that party.¹

[26] It is not necessary to set out all of the facts relied upon by the plaintiffs. It should suffice to highlight the following:

- 26.1 The defendant served as the initial and primary government entity responsible with delivering firefighting services throughout its municipal area, which encompassed the plaintiffs' properties and MyForest Farm.
- 26.2 Local authorities typically refrained from taking actions or neglecting to act or fail to take actions which could allow a fire which had been burning in its municipal area to burn or to re-ignite or spread during dry conditions.
- 26.3 The defendant acted wrongfully by failing to take any or adequate steps to control and / or extinguish the fire when they were able to do so.
- 26.4 The defendant failed to seek timely assistance from other entities, including Eden Municipality, the National Government or aerial firefighting resources, or did so too late.
- 26.5. A reasonable person or entity in the circumstances and in the defendant's position would have foreseen that the described conduct could cause damage to the properties and would have taken reasonable measures to guard against such occurrence.

[27] The plaintiffs delivered a replication to the defendant's plea, which included allegations pertaining to events that transpired in the vicinity where the fire spread

¹ Erasmus, *Superior Court Practice*, Volume 2, Second Ed, pages D1, Rule 10-2 to D1 Rule 10-6 and the cases referred to.

during the period from April to June 2017. This included calls made by concerned residents and additional facts arising from which the plaintiffs contend that the defendant by its word and / or conduct unequivocally represented to the plaintiffs that it was the authority responsible for firefighting in the Elandskraal area.

[28] The plaintiffs allege that, acting on the belief of the correctness of these representations, they were persuaded to their detriment not to report the fire to or engage with the Eden Municipality (the estoppel defence).

[29] According to the defendant, by raising the doctrine of estoppel in their replication, the plaintiffs have impermissibly sought to introduce an entirely new cause of action almost six years after the incident giving rise to the claim. The defendant contends that reliance on estoppel is not permitted where its effect would be to give indirect validity to conduct by an organ of state which is beyond the body's power to perform.

[30] Put differently, the defendant contends that estoppel cannot serve as a basis for imposing a duty on an organ of state, which is not vested with such duty under the law. The plaintiffs' counter to this is that none of the actions which the plaintiffs pleaded the defendant should have taken in terms of the aforementioned statutes and regulations would have resulted in an illegality or illegal act on the part of the defendant.

[31] The plaintiffs' stance is that:

31.1 It is trite that wrongfulness can manifest itself in different ways, not only by the breach of a specific statutory duty. In this case, the defendant alleges that it did not bear with reference to the Structures Act only, but also in relation to common law right, other statutory duties beyond those imposed by the Structures Act, and a duty of care.²

² In this regard the plaintiffs refer to Amler's Precedents of Pleading, 7th ed, p 258.

- 31.2 A duty of care may indeed arise from the unique relationship between the parties, the provisions of the Bill of Rights, or other relevant legislation.
- 31.3 The defendant's obligation to provide such services arose not solely in terms of the Structures Act, but also *inter alia* in terms of sections 152 and 156 of the Constitution of the Republic of South Africa, the relevant Knysna Municipality By-laws, the Disaster Management Act, No 57 of 2002, the Fire Brigade Services Act 99 of 1987 (the FBSA) and the National Veld and Forest Fire Act, 101 of 1998.
- 31.4 The defendant as a member of the SCFPA was obliged to abide by the Rules, Code of Conduct and Management Plan which *inter alia* entailed that it was obliged to report sighted fires and adhere to the fire reporting structure and actions as prescribed.
- 31.5 In view of the above and given the circumstances, there is no basis for the defendant to contend that it did not owe a legal duty of care to the plaintiffs in respect of firefighting and prevention 'simply because of its reliance on the Structures Act.'

Legislative framework

[32] Section 152 and 156 of the Constitution provide as follows:

'152 Objects of local government

(1) The objects of local government are-

- (a) to provide democratic and accountable government for local communities;
- (b) to ensure the provision of services to communities in a sustainable manner;
- (c) to promote social and economic development;
- (d) to promote a safe and healthy environment; and

(e) to encourage the involvement of communities and community organisations in the matters of local government.

(2) A municipality must strive, within its financial and administrative capacity, to achieve the objects set out in subsection (1).

156 Powers and functions of municipalities

(1) A municipality has executive authority in respect of, and has the right to administer-

- (a) the local government matters listed in Part B of Schedule 4 and Part B of Schedule 5; and
- (b) any other matter assigned to it by national or provincial legislation.

(2) A municipality may make and administer by-laws for the effective administration of the matters which it has the right to administer.

(3) Subject to section 151 (4), a by-law that conflicts with national or provincial legislation is invalid. If there is a conflict between a by-law and national or provincial legislation that is inoperative because of a conflict referred to in section 149, the by-law must be regarded as valid for as long as that legislation is inoperative.

(4) The national government and provincial governments must assign to a municipality, by agreement and subject to any conditions, the administration of a matter listed in Part A of Schedule 4 or Part A of Schedule 5 which necessarily relates to local government, if-

- (a) that matter would most effectively be administered locally; and
- (b) the municipality has the capacity to administer it.

(5) A municipality has the right to exercise any power concerning a matter reasonably necessary for, or incidental to, the effective performance of its functions.'

Separation of issues - Legal principles

[33] Rule 33(4) of the Uniform Rules of Court which provides for the separation of issues 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 question cannot conveniently be decided separately.'

[34] The purpose of Rule 33(4) is to determine the fate of a plaintiff's claim (or one of the claims) without the costs of a full trial:

'An important consideration will be whether or not a preliminary hearing for the separation decision of specified issues will materially shorten the proceedings. 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.'³

[35] A court granting a separation order must direct the disposal or resolution of that issue which it decides can conveniently be decided separately, in a manner it deems appropriate, and is enjoined to issue a corresponding order to stay further issues until the separated issue has been decided or resolved.⁴

[36] In considering whether to grant a separation order, a court will have regard and take into account its convenience, as well as the convenience of the parties and the potential prejudice that either party may experience if separation is granted. The court

³ *CC v CM 2014 (2) SA 430 (GJ)* at para [27].

⁴ *First National Bank LTD v Clear Creek Trading 12 (Pty) Ltd and Another 2018 (5) SA 300 (SCA)* at para 8.

is obliged to order separation unless it determines that the issues cannot be conveniently separated.⁵

[37] Nugent JA in *Denel v Vorster*⁶ (*Denel*) described the process to be undertaken when faced with a separation application, as follows:

‘Rule 33(4) of the Uniform Rules – which entitles a court to try issues separately in appropriate circumstances – is aimed at facilitating the convenient and expeditious disposal of litigation. It should not be assumed that that result is always achieved by separating the issues. In many cases, once properly considered, the issues will be found to be inextricably linked even though at first sight they might appear to be discrete. 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, particularly where there is more than one issue that might be readily dispositive of the matter. It is only after careful thought has been given to the anticipated course of the litigation as a whole that it will be possible properly to determine whether it is convenient to try an issue separately. But where the trial court is satisfied that it is proper to make such an order – and in all cases it must be so satisfied before it does so – it is the duty of that court to ensure that the issues to be tried are clearly circumscribed in its order so as to avoid confusion. The ambit of terms like the ‘merits’ and the ‘quantum’ is often thought by all the parties to be self-evident at the outset of a trial but in my experience, it is only in the simplest of cases that the initial consensus survives. Both when making rulings in terms of Rule 33(4) and when issuing its orders a trial court should ensure that the issues are circumscribed with clarity and precision.’

[38] It is therefore incumbent on this court at the outset to determine not only whether a separation is convenient for the court and the parties involved, but also whether issues which appear *ex facie* to be distinct are, in fact, significantly interwoven. Furthermore, it must be considered whether it is preferable to address all disputes in a single hearing, even if some appear to be separate.

⁵ *CC v CM supra* at para [25]

⁶ 2004(4) SA 481 (SCA) at para 3.

[39] The duty imposed upon the court hearing a separation application was described as follows by the Supreme Court of Appeal in *Molotlegi and Another v Mokwalase*⁷:

‘A court hearing an application for a separation of issues in terms of rule 33(4) has a duty to satisfy itself that the issues to be tried are clearly circumscribed to avoid any confusion. It follows that a court seized with such an application has a duty to carefully consider the application to determine whether it will facilitate the proper, convenient and expeditious disposal of litigation. The notion of convenience is much broader than mere facility or ease or expedience. Such a court should also take due cognisance of whether separation is appropriate and fair to all the parties. In addition, the court considering an application for separation is also obliged, in the interests of fairness, to consider the advantages and disadvantages which might flow from such separation. Where there is a likelihood that such separation might cause the other party some prejudice, the court may, in the exercise of its discretion, refuse to order separation. Crucially in deciding whether to grant the order or not the court has a discretion which must be exercised judiciously.’

[40] In exercising my discretion regarding whether or not to grant the separation, I therefore need to consider not only whether it is convenient and will facilitate the expeditious disposal of the pending litigation, but also whether it is fair to both parties, and the possibility of prejudice to the plaintiffs, who oppose such an order.

[41] It is trite that a court should try and avoid a duplication of evidence by pre-empting that witnesses testify twice in the same proceedings because of the ever-present risk of different courts arriving at different and conflicting findings of fact and credibility.

⁷ [2010] 4 All SA 258 (SCA) at para 20.

[42] In *NK v KM*⁸ the Supreme Court of Appeal cautioned against the assumption that the '*convenient and expeditious disposal of litigation*' would always be achieved by a separation of issues:

'Even though at a glance it may appear that the issues are discrete, they may ultimately be found to be inextricably linked. The Court found that the expeditious disposal of litigation is best [achieved] by ventilating all the issues at one hearing.'

[43] In *NK v KM*⁹ the Court observed that in determining whether there should be a separation, the Court should bear in mind that the '*expeditious disposal of issues cannot outweigh the principle of fairness. The principle of fairness requires the balancing of the interest of both parties.*'

[44] A cautionary note was sounded by the court in *Tshwane City v Blair Atholl Homeowners Association supra*, where it stated as follows:¹⁰

'Careful thought should be given to a separation of issues and the issues to be tried separately have to be clearly circumscribed in order to avoid confusion. A decision on a separate issue should be dispositive of a portion of the relief claimed and essentially should serve expedition rather than cause delay in the resolution of the principal issue.'

[45] In *Hollard Insurance Company Ltd v Coetzee and Others*¹¹ the court summarised the factors one may have regard to in determining whether a separation is convenient, which included the following:

'15.1. Whether the hearing on the separated issues will materially shorten the proceedings: if not, this obviously militates against a separation.'

⁸ 2019 (3) SA 571 (GJ) para 12

⁹ *NK v KM* *ibid* para [13].

¹⁰ 2019 (3) SA 398 (SCA) para [2].

¹¹ (24120/2011) [2015] ZAWCHC 212 (6 May 2015) at para 15, and the authorities there cited.

- 15.2. Whether the separation may result in a significant delay in the ultimate finalisation of the matter: such a delay is a strong indication that the separation ought to be refused.
- 15.3. Whether there are prospects of an appeal on the separated issues, particularly if the issue sought to be separated out, is highly controversial and appears to be one of importance: if so, an appeal will only exacerbate any delay and negate the rationale for a separation.
- 15.4. Whether the number of court days saved by the separation weighs up favourably against the delay that may arise between the finalisation of the separated issues and the continuation and the remainder of the proceedings: if as a result of a separation, the delay of the separation may render the saving in court time less significant, the separation will not likely be granted.
- 15.5. Whether the evidence required to prove any of the separated issues on the merits may also be required to be led when it comes to proving the non-separated issues (i.e. witnesses leading evidence twice on the same facts: if so, a court will not grant a separation because it will result in the lengthening of the trial, the wasting of costs, potential conflicting findings on facts and on credibility of witnesses, and it will also hinder the opposing party in cross-examination.’

[46] In determining whether or not to grant a separation, I am accordingly enjoined to carefully weigh the advantages which may accrue to the party seeking the separation against the disadvantages which may result therefrom.

Analysis

[47] Non-joinder is a dilatory plea. It cannot dispose of an action, but rather merely stays it pending the joinder of necessary additional party. As a general (and trite) principle, non-joinder is an issue that should be determined before the merits are entered into because the court should not make an order affecting a necessary party's legal interests without notice to the affected party that enables it to participate in the proceedings if it wishes.

[48] Misjoinder, on the other hand, is not a dilatory plea. It is a finally determinative matter between the plaintiff and the misjoined party.

[49] In the current matter it would appear that non-joinder is being raised by the Knysna Municipality in the alternative to its plea of misjoinder, for if it was misjoined that is the end of its interest in the matter.

[50] It is uncontentionous that the issues which the defendant wishes to separate in this matter are issues which arise from the pleadings.

[51] The trial on the merits will include the determination of issues of wrongfulness, negligence, the existence and breach of legal and statutory duties, all of which are issues which have been placed in dispute.

[52] Extensive evidence will have to be led on the merits of the matter, for the determination not only of the legal and statutory duties of the defendant (and of Eden Municipality if it is joined as a defendant), but also the origin, cause and spread of the fire, the firefighting efforts undertaken and the cause and extent of the damages suffered by the plaintiffs.

[53] A central issue which bears relevance to both the non-joinder and the misjoinder pleas, is which organ of state, and more particularly which specific municipality, bears the legal duties relied upon by the plaintiffs.

[54] I agree with counsel for the defendant that this is an issue which is plainly separable from the other issues which the court will be called upon to determine. If the defendant is ultimately successful with its plea of misjoinder, this will be dispositive of the plaintiffs' claim against it.

[55] The issue of whether Eden Municipality should properly have been joined as a defendant should be determined before the matter proceeds on the merits.

Conclusion

[56] In the circumstances I am satisfied that the issues raised in the special plea are not inextricably intermingled with the remaining issues for determination, a proper case has been made out for a separation adjudication of the discrete issues raised special plea of non-joinder and misjoinder, and that it would be both fair and convenient for these issues to be decided first and at a separated hearing.

[57] The defendant was successful in its application and is entitled to its costs. Counsel for both parties agreed that costs on Scale C in terms of Rule 67A(3) would be appropriate.

[58] The following order shall issue:

1. The Defendant's First Special Plea and Second Special Plea shall be determined first and separately from any other questions for decision in this action.
2. All other questions for decision in this action shall be stayed until the Defendant's First and Second Special Pleas have been disposed of.
3. The costs of this application shall be paid by the defendants/respondents, jointly and severally, on Scale C, the one paying the other/s to be absolved.

HOLDERNESS J
JUDGE OF THE HIGH COURT
WESTERN CAPE DIVISION

APPEARANCES

For the Applicant:	Adv D Baguley
Instructed by:	Cliffe Dekker Hofmeyer Inc

For the Respondent(s): Adv K Pillay

Instructed by: Klagsbrun Edelstein Bosman Du Plessis Inc

Date of Hearing: 28 January 2025

Judgment delivered on: 29 April 2025