

**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

Case number: 14048/2022

Date of hearing: 29 April 2025

Date delivered: 7 May 2025

(1) REPORTABLE: YES/NO

(2) OF INTEREST TO OTHERS JUDGES: YES/NO

(3) REVISED

DATE

SIGNATURE

In the application between:

HAN, FANG

Applicant

and

**FIRST NATIONAL BANK LTD
and 59 others**

First Respondent

and

NATIONAL SECURITY & FIRE (PTY) LTD

Third Party

JUDGMENT

SWANEPOEL J:

[1] The applicant is the twenty second plaintiff in an action for damages against the first respondent in which there were originally sixty plaintiffs. The action arises from a burglary at the first respondent's Randburg branch on 16 December 2016 when thieves broke into the premises and gained access to the plaintiffs' safety deposit boxes. Allegedly goods of the applicant to the value of R 38 million were stolen.

[2] The applicant seeks an order in terms of Uniform Rule 10 (5), that her action be separated from the action brought under the above case number. Initially all of the plaintiffs were represented by Trudie Broekman Attorneys. In the interim a number of plaintiffs have appointed other attorneys. The claims of four plaintiffs were separated previously by default. There are now four attorneys on record for the plaintiffs. Three plaintiffs are not represented.

[3] The applicant says that the matter has been delayed due to the lack of coordination and cooperation between the various attorneys. The applicant says that a pre-trial conference was held in May 2024. Weinstein & Associates, who represents forty three plaintiffs did not participate in the meeting, and have done nothing since to bring the matter to a resolution. It is clear that there has been a substantial delay in the matter, and the fact that the plaintiffs are now represented by multiple attorneys will inevitably delay the matter even further, says the applicant.

[4] The applicant alleges that the issues between her and the first respondent are distinguishable from the issues between the first respondent and the other plaintiffs. Analyses of the applicant's amended particulars of claim reveals the following:

[4.1] The applicant alleges that she entered into a partly written, partly oral agreement of depositum with the first respondent. One of the oral/tacit terms that the applicant alleges is that the safety deposit box would be safeguarded at the first respondent's Fourways branch, and would not be moved from there. Alternatively, if the box were to be moved, it would be moved to a facility as secure as the Fourways branch.

[4.2] It is evident that the applicant would be required to testify as to the alleged oral, possibly tacit terms of the agreement.

[4.3] The applicant also alleges that clause 2 of the written part of the agreement, a non-liability clause, is contrary to the provisions of the Consumer Protection Act, 68 of 2008 ("the CPA"), and specifically that it contravenes section 48 (2) (a), section 49 section 51 (1) (b), section 51 (1) (c) (i) and (ii). The applicant alleges that clause 2 stands to be severed from the agreement.

[4.4] In a further alternative, the applicant claims that clause 2 is unfair, unjust and contrary to public policy.

[5] The applicant claims, firstly, that the first respondent breached the agreement by moving the safety security box to its Randburg branch. Secondly, the applicant claims that first respondent breached the agreement by failing to mitigate or prevent the possibility of theft. Thirdly, the applicant alleges that the first respondent owed the applicant a duty of care, which it has breached.

[6] The first respondent denies that there were any terms agreed upon other than those reflected in the written portion of the agreement. That means that the applicant will have to testify in order to prove her case.

[7] The remaining plaintiffs have pleaded that that they all entered into written agreements with the first respondent. There are, apparently, two different contracts pleaded, one of which contained clause 2, the non-liability clause. The remaining plaintiffs also plead that those agreements that contain clause 2 contravene section 51 (1) (c) (i) and (ii) of the CPA. The remaining plaintiffs also rely upon misleading or deceptive representations concerning the level of security offered by it. In respect of the latter issue, each plaintiff would have to testify.

[8] The applicant does not rely on misleading or deceptive misrepresentations. On this point the applicant's case diverges from the remaining plaintiffs. She would, therefore, be obliged to appoint a legal team who would have to sit through the viva voce evidence of some fifty five plaintiffs. Even if each witness' evidence took half-a-day to complete, which is a conservative estimate, that would mean that the applicant would have to commit to funding some 27 days' litigation on an issue which has no bearing on her case.

[9] The remaining plaintiffs also rely on the allegation that the plaintiffs were supplied with unsafe goods or products, or products that contained a failure, defect or hazard. The applicant does not rely on this averment, and would be required to commit a legal team to participating in the trial on evidence that has no relevance to her claim.

[10] Finally, each plaintiff would have to lead evidence relating to the items that they stored in their safety box and the value thereof. That could, result in evidence being led, potentially at length, on aspects relating to one plaintiff, in which the other plaintiffs have no interest, but are forced to be represented at court.

[11] The first respondent opposes the application on the basis that a separation would result in a multiplicity of trials. Different cases would require different judges to hear the matters, with the resulting strain on scarce judicial resources. The applicant argues that whether one judge is committed to a months' long trial, or different judges are committed to shorter trials is irrelevant. In my view there is some merit to this argument.

[12] The first respondent also says that multiple trials would result in additional legal costs being incurred. That may be so, but it is an unfortunate consequence of multiple plaintiffs seeking damages against it.

[13] The first respondent also contends that multiple trials ran the risk of different findings being made on the issues. As far as factual findings are concerned, each case will be decided on its own facts. As far as the legal issues relating to the CPA is concerned, if a finding is made by a court, that finding would be taken into consideration by a court hearing a later matter. It is unlikely that multiple contradictory judgments would result.

[14] In *De Polo v Dreyer* 1990 (2) SA 290 (W) the court set out a number of factors that may be considered in a separation application, although, it seems to me, each case must be decided on its own merits. The court said, at 295 H:

“The factors relevant to the exercise of a discretion must, in my view, vary from case to case and depend in large measure, if not entirely, on the circumstances of the case and the matter in respect of which a discretion is to be judicially exercised. In the present case, there being no guidance in regard to rule 10 (5), I would suggest, not necessarily in order of importance, that the following are the relevant factors:

(1) prejudice to the opposite party if a separation of trials is ordered;

- (2) the interests of the applicant in seeking to enforce his remedy;
- (3) the question of possible lengthy delay if the separation is refused, as compared with the probable minimal delay if a separation is ordered;
- (4) question of costs, including, particularly, the salvage of costs already incurred in the matter;
- (5) additional costs, if any, which will be occasioned by a separation of trials;
- (6) the bona fides of the applicant;
- (7) the circumstances that have given rise to the application, including any fault on the part of [the applicant] or any other conduct or omission which has led to the necessity for an application;
- (8) the balance of convenience, although this may well be covered by items in the preceding catalogue.”

[15] In my view, the factors that weigh heavily in favour of the applicant are the following:

[15.1] The case of the applicant is somewhat distinguishable from the cases of the other plaintiffs.

[15.2] If the plaintiffs were to remain consolidated in one trial it would have the result that at different stages of the trial the court would be concerned with evidence relating to one plaintiff, whilst the remaining plaintiffs are forced to participate in the trial.

[15.3] The trial has already been delayed for some years, and it seems at present that there is little interest of the attorneys representing the majority of the plaintiffs to bring the case to trial. It is all good and well to argue that there are court procedures available to force a party to trial, but there can be no doubt that if a party is recalcitrant it would inevitably lead to long delays.

[15.4] The first respondent has the resources to fund extensive litigation. In contrast, the applicant is a private person who may not be able to fund months' long litigation.

[16] In my view, whilst I attempt to balance the interests of both the applicant and the first respondent, I find that it would be in the interests of justice to grant the order.

[17] Both parties were represented by senior and junior counsel. In my view a separation application is not complicated, and does not warrant the attention of two counsel. This application, especially, although no doubt of importance to both parties, was not especially voluminous. I have been asked to grant a costs order on Scale C, which is what I will do, but only in respect of one counsel.

[18] I make the following order:

[18.1] The applicant's action under case number 33511/2018 is separated from the action of the first to eighth, tenth to thirty-eighth, fortieth to forty-seventh, forty-ninth, fiftieth and fifty-second to sixtieth plaintiffs, under a new case number to be issued by the Registrar.

[18.2] The first respondent shall pay the costs of the application on Scale C.

SWANEPOEL J
JUDGE OF THE HIGH COURT
GAUTENG DIVISION PRETORIA

Counsel for the applicant:

Adv. A Rafik Bhana SC
Adv S Sephton

Instructed by:

Knowles Husain Lindsay Inc.

Counsel for the first respondent:

Adv A.E. Bham SC
Adv L Sisilana
Adv. L Makhabela

Instructed by:

Edward Nathan Sonnenburg

Heard on:

29 April 2025

Judgment on:

7 May 2025

