



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

JUDGMENT

**Not Reportable
Case No. 3644/22**

In the matter between:

LIFESTYLE HOSPITALITY CC

Applicant

and

VESPERDENE MEWS BODY CORPORATE

Respondent

Heard: 23 April 2025

Delivered: 5 August 2025

JUDGMENT DELIVERED ELECTRONICALLY ON 5 AUGUST 2025

BOSCH, AJ

Introduction

[1] The relevant issues in dispute between the parties are as follows:

- 1.1. Claim A: whether the renovations undertaken by the applicant (the defendant in the main action), together with certain roots that were planted at the time, caused (and continue to cause) the respondent (the plaintiff in the main action) damage (“the nuisance”). In particular, it is claimed that the nuisance has caused significant water damage to units [...] and [...]2 of the respondent’s corporate body and if left unabated will likely cause further damage to these units and the outer wall of the property;
- 1.2. Whether the respondent’s claim/s has prescribed (first special plea);
- 1.3. Whether the respondent’s claim/s was previously settled between the parties in 2019 (second special plea);
- 1.4. Whether the respondent has standing to institute the claim/s on the basis that the walls complained of are not common property but individually owned (third special plea);
- 1.5. Claim B: is an action for the damages caused by the nuisance. The material issue in dispute is whether the respondent has suffered loss as alleged and as a consequence of the applicant’s nuisance.

[2] The applicant seeks to have the first and second special pleas separated from the main action in terms of Uniform Rule 33(4) of the Rules of Court.

Grounds on which the separation is sought

[3] The applicant alleges that the order of separation should be granted for the following reasons:

- 3.1. The two special pleas are decisive of the main action and will require very limited evidence to be led and can conveniently be separated from the issues arising in the main action;
- 3.2. The evidence relating to the issues of prescription and settlement is distinct from the evidence required to determine the merits. The former concerns evidence

relating to when the alleged nuisance arose and whether the dispute was settled, whereas the latter involves extensive technical evidence concerning the position of boundaries, the cause and source of the alleged damp and the engineering possibilities for its resolution;

- 3.3. The evidence relating to the settlement will entail two or three factual witnesses whose evidence will be extremely narrow and limited. The dispute was allegedly settled on the basis that the applicant would contribute an amount of money for the problem identified by the respondent on the applicant's property to be repaired by the respondent's appointed contractor. That contractor would provide the respondent with the necessary guidance. The applicant allegedly complied with the terms of the settlement agreement in full;
- 3.4. If the special pleas are upheld, the main action will fall away at an early and comparatively inexpensive stage without the need for an inspection *in loco* on the first day of the trial (as agreed to by the parties in the pretrial minute), calling three expert witnesses and leading expert testimony in relation to the wide ranging issues in the main action;
- 3.5. The separation would be convenient because it would allow the parties to concentrate their efforts on the issues raised by the special pleas and would avoid using up valuable court time for matters that would otherwise be dealt with at an early stage of the main action;
- 3.6. Even if the special pleas are dismissed, the main action would proceed with the issues in the action having been narrowed considerably by the issues canvassed and decided in the separated hearing. That would save time and costs.'

Grounds of opposition

[4] The respondent opposes the application for separation as follows:

- 4.1. The issues that will be canvassed in the special plea proceedings will overlap considerably with those to be canvassed in relation to the merits if the special

pleas do not succeed. The separation may result in the need to recall witnesses, particularly the respondent's expert which will lead to a waste of costs, potential conflicting findings of fact (and credibility of witnesses). The evidence regarding the alleged settlement and the claim of prescription will be largely identical to evidence at the trial;

- 4.2. The issue of prescription is clearly appealable and there would be a considerable delay in reaching a final decision due to an interim appeal against a separation finding and a consequent finding that prescription is dispositive of the main action;
- 4.3. Even if the special plea of prescription is upheld in respect of the claim for payment of damages, the respondent's core complaint concerns a live and ongoing nuisance which cannot prescribe;
- 4.4. The so-called settlement discussions related to a narrow concern regarding fixtures affixed to the wall and the respondent expressly reserved its right to take further action against the applicant. Resolving the settlement issue will require extensive evidence detailing efforts to resolve the respondent's concerns regarding the damp caused to units 5 and 6. This evidence is central to the merits of the action and it therefore makes no sense to separate it out;
- 4.5. The disadvantages of a separation outweigh any of the advantages claimed by the applicant;
- 4.6. This is a case where the issues may *prima facie* seem to be discrete, but upon proper consideration may be found to be inextricably linked;
- 4.7. Even if the issues raised by the special pleas can be said to be discrete, the expeditious disposal of the litigation will best be served by ventilating all the issues at one hearing, particularly because there is more than one issue that might readily dispose of the matter;
- 4.8. The applicant has not abandoned its third special plea which will still have to be determined even if the first and second special pleas are dismissed. This will result in piecemeal litigation which will be stretched over an extended period of time.

Separation of issues: the legal principles

[5] Rule 33(4) provides that:

“Special cases and adjudication upon points of law. —

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.”

[6] The purpose of this rule is to determine the plaintiff’s claim without the costs of delays of a trial and it facilitates convenient and expeditious disposal of litigation.¹ Against this background, the Supreme Court of Appeal has warned on many occasions that a decision under Rule 33(4) must be considered carefully.² The issue(s) which are to be decided separately must be clearly defined. This is because in many cases, at first sight, there might appear to be discrete issues that may be considered separately. However, when properly considered, the issues will be found to be inextricably linked with the rest of the issues that arise in a particular case.³

[7] Further:

“even where the issues are discrete the expeditious disposal of the litigation is often 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

¹ *Denel (Pty) Ltd v Vorster* 2004 (4) SA 481 (SCA) at para 3

² *Molotlegi and Another v Mokwalase* [2010] 4 All SA 258 (SCA) at para 20; *The City of Tshwane Metropolitan Municipality v Blair Atholl Homeowners Association* [2019] 1 All SA 291 (SCA) at para 51

³ *Denel (Pty) Ltd v Vorster* (*supra*) at para 3

will be possible properly to determine whether it is convenient to try the issue separately’.”⁴

[8] In *Copperzone 108 (Pty) Ltd and Another v Gold Port Estates (Pty) Ltd and Another*⁵ this court described the principles guiding the application of Rule 33(4) as follows:

“25.1 Whether the hearing on the separated issues will materially shorten the proceedings: if not, this militates against a separation. In *Braaf (supra)* it was said that despite the wording of the subrule, it remains axiomatic that the interests of expedition and finality are better served by disposal of the whole matter in one hearing;

25.2 Whether the separation may result in a significant delay in the ultimate finalisation of the matter: such a delay is a strong indication that separation ought to be refused. The granting of the application, although it may result in the saving of many days of evidence in court, may nevertheless cause considerable delay in reaching a final decision in the case because of the possibility of a lengthy interval between the first hearing at which the special questions are canvassed and the commencement of the trial proper;

26.3 Whether there are prospects of an appeal on the separated issues, particularly if the issues sought to be separated are controversial and appear to be of importance: if so, an appeal will only exacerbate any delay and negate the rationale for a separation;

25.4 Whether the issues in respect of which a separation is sought are discrete, or inextricably linked to the remaining issues: if after careful consideration of the pleadings, the relevant issues are found to be linked, even though at first sight they might appear to be discrete, it would be undesirable to order a separation; and

25.5 Whether the evidence required to prove any of the issues in respect of which a separation is sought will overlap with the evidence required to prove any

⁴ Ibid

⁵ (7234/2013) [2019] ZAWCHC 34 (27 March 2019) at para 25

of the remaining issues: a court will not grant a separation where it is apparent that such an overlap will occur. Such a situation will result in witnesses having to be recalled to cover issues which they had already testified about. Where there is such a duplication of evidence, a court will not grant a separation because it will result in the lengthening of the trial, the wasting of costs, potential conflicting findings of fact and credibility of witnesses, and it will also hinder the opposing party in cross-examination.” (footnotes omitted)

Analysis

[9] Applying the aforementioned principles to the matter before me, I am not persuaded that it would be appropriate to order that the two special pleas be heard separately.

[10] The applicant argued that the evidence necessary to dispose of the special pleas could be heard over two days. This allegation is not made in its founding papers. It also argued that the trial on the merits will run over two weeks. That allegation is also not made in the papers. Nor is it consistent with the pre-trial minute annexed to the founding affidavit in which the parties agree that the trial will run for approximately four to five days.

[11] It is not clear whether it is envisaged that those four to five days incorporates the evidence that would be led in support of the issues covered by the special pleas. If so, even if the special pleas were heard separately and were successful that would not amount to a significant saving of court time or costs. But even if they do not, the saving is relatively limited. That must also be weighed with the potential delay in the commencement of the trial should the special pleas fail. And, while the applicant submitted that this is irrelevant, it must be a valid consideration that the matter is trial ready but for the submission of the applicant’s expert reports.

[12] The respondent contends that the consequences of the alleged wrong are ongoing effect. If so, additional delay will further exacerbate whatever harm the respondent suffers.

[13] The special plea of prescription relates to the entire claim. The respondent points out that its core complaint concerns a live and ongoing nuisance which, it says, cannot prescribe.

[14] In dealing with that issue in separated proceedings, over and above needing to persuade a court that, in law, an ongoing nuisance cannot prescribe, the respondent would have to prove that the wrong has been and is ongoing. That may require evidence of the circumstances prevailing over a long period leading up to the trial which may very well overlap with evidence required to determine the merits. That raises the risks of a duplication of evidence with witnesses having to be recalled to cover issues which they had already testified about, the wasting of costs and potential conflicting findings of fact and credibility of witnesses.

[15] It may be that the issues relating to the payment of damages are discrete and that there would be little overlap between the evidence required to establish when prescription started running in respect of that claim and that required for the merits. However, the respondent has signaled its intention to call its expert witness, Mr Kelly, to give evidence on the methodology of his investigations and at what stage of the investigations he could confirm his findings. In order to deal with this, the deponent to the founding affidavit applicant indicates that

“[for] the sake of advancing the matter, the Applicant is prepared to accept that the Respondent’s expert observed what he did, on the dates mentioned in the summary of evidence, but with the understanding that the Applicant does not concede that the opinion is correct, which may still be challenged at the trial (if the need arises). I submit that this should completely obviate the need to call Mr Kelly.”

[16] In light of this, it might have been unnecessary to call Mr Kelly in separated proceedings or his evidence could be confined to simple factual points, but it is not for this court to direct the evidence to be led in respect of the separated issues.⁶

[17] As I have indicated above, the authorities indicate that the court should consider whether there are prospects of an appeal.⁷ The applicant contends that the argument that a finding on a special plea might be subject to an appeal is not persuasive since that is the case with any and every separation of issues. A party cannot be permitted to prevent the separation of issues merely by threatening to appeal the findings on separated issues. However, in this case the issue of whether an ongoing nuisance can prescribe and whether any nuisance was ongoing is obviously a contentious issue between the parties and, because it is not simple legally and factually and clear cut, could form the subject of an appeal. That would exacerbate any delay and thus negate the rationale for separation.

[18] As far as the special plea relating to settlement is concerned, it does not seem that this issue would require a great deal of additional evidence at a trial on the merits. The applicant alleges that two or three factual witnesses would be required, whose evidence would be extremely narrow and limited. This would not significantly lengthen a trial if separation is refused.

[19] The settlement plea also raises the spectre of evidence detailing efforts to resolve the respondent's concerns regarding the damp caused to units 5 and 6. This evidence goes to the merits of the action and it therefore makes no sense to separate it out.

Conclusion

⁶ *Van der Burgh v Guardian National Insurance Co Ltd* 1997 (2) SA 187 (E) at 189J.

⁷ See also *Hollard Insurance Company Ltd v Coetzee* [2015] ZAWCHC 212 (6 May 2015) at para 15

[20] In the circumstances, in exercising my discretion regarding whether to grant the separation, I consider that such would not be convenient and would not facilitate the expeditious disposal of the pending litigation.

[21] The court therefore makes the following order:

21.1. The application is dismissed.

21.2. The costs in this application shall be costs in the cause

BOSCH AJ
ACTING JUDGE OF THE HIGH COURT
WESTERN CAPE DIVISION

APPEARANCES

For the Applicant:	Adv A Brown
Instructed by:	Smith Tabata Buchanan Boyes Inc
For the Respondent:	Adv G Solik
Instructed by:	Slabbert Venter Yanoutsos Inc