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

Case No.: **23633/2024**

In the matter between:

ENGEN PETROLEUM (PTY) LTD	Applicant
and	
KEPU TRADING (PTY) LTD	First Respondent
MICHELLE IMELDA LOUW	Second Respondent
ANTHONY BRYN RUSSELL	Third Respondent
FAKU FAMILY ENTERPRISES (PTY) LTD	Fourth Respondent

Coram: Montzinger AJ

Heard: 23 March 2026

Delivered: 25 March 2026

Summary: Application to separate issues in terms of Uniform Rule 33(4) and to stay further litigation – Whether a separation is competent in motion proceedings or limited to action proceedings - Consideration of authorities that shed light on whether separation is competent in motion proceedings – Separation refused – Stay of further litigation pending determination of separated issue not granted – principles when court will grant separation.

ORDER

1. The application for separation of issues and the ancillary relief for a stay of the main application is dismissed.

2. The costs of this interlocutory application shall be costs in the cause in the main application.

JUDGMENT

Montzinger AJ

Introduction

[1] This is an opposed application brought by Faku Family Enterprises (Pty) Ltd for the separation of an issue it contends is discrete from the main application instituted by Engen Petroleum (Pty) Ltd ("Engen"). In the main application, Engen is the applicant, Kepu Trading (Pty) Ltd (in liquidation) ("Kepu Trading") is the first respondent while Michelle Imelda Louw ("Louw"), Anthony Bryn Russell ("Russel") and Faku Family Enterprises (Pty) Ltd ("Faku Enterprises") are cited as second to fourth respondents respectively.

[2] In the separation application Faku Enterprises is the applicant, and Engen the first respondent. Kepu Trading, Louw and Russell are cited as second, third and fourth respondents, respectively. For convenience, and to avoid confusion, I prefer the heading of the main application and refer to the parties in this judgment by their identified names.

[3] Engen instituted the main application in October 2024 seeking payment arising from the supply of petroleum products and to hold Louw, Russell and Faku Enterprises liable as sureties and co-principal debtors for Kepu Trading's alleged indebtedness. As against Faku Enterprises, Engen relies on a written deed of suretyship said to have been executed on or about 11 July 2019 in Cape Town.

[4] In opposition to the main application a comprehensive answering affidavit was filed, and various disputes of fact were raised. One of those disputes involved a defence by Faku Enterprises with regard to the alleged conclusion of the surety agreement. Faku Enterprises disputes that the suretyship is valid and binding upon it. It does so on three grounds. First Mr Mkhuseli Richman Faku, the representative of the company, denies that he signed the document on behalf of Faku Enterprises. Secondly, that in any event the conclusion and execution of the surety agreement was not authorised by Faku Enterprises. Thirdly, that the alleged signature on the document does not comply with the General Law Amendment Act 50 of 1956 and/or the Electronic Communications and Transactions Act 25 of 2002.

[5] During the period August to September 2025, the attorneys exchanged correspondence in which Faku Enterprises proposed that the suretyship-validity issue be separated and determined first before the issues in the main application. Engen declined the proposal. Its attorneys raised concerns of a possible appeal and an unnecessary delay and proposed instead that the suretyship issue be argued at the outset of the hearing of the main application, similar to a point *in limine*.

[6] Not satisfied with Engen's response Faku Enterprises launched the separation application in October 2025 in terms of Rule 33(4) of the Uniform Rules of Court. It sought separation of the suretyship-validity issue and a stay of the main

application pending determination of the surety issue. Louw and Russell filed a notice to abide the outcome of the separation application and did not participate in the hearing of this part of the matter.

[7] Faku Enterprises seeks, before me, an order separating for independent determination, the issue of: *"Whether the written suretyship allegedly executed on behalf of Faku Enterprises constitutes a valid and binding suretyship"*[1]. In addition it also seeks an order staying all further proceedings in the main application pending determination of the separated issue. Faku Enterprises also wants the costs of the separation application if successful, while Engen seeks a dismissal of the application with costs.

The consent order of 26 February 2026

[8] Before delving into the merits the order by agreement between the parties issued by the Judge President Mabindla-Boqwana on 26 February 2026 is in my view an important procedural aspect of this litigation and has influenced the conclusion I reached at the end of this judgment.

[9] The salient features of the Judge President's order may be summarised as follows (duly paraphrased):

[9.1] If the separation application is granted the separate issue, as defined by the parties, would be heard on 20 April 2026.

[1] This is a paraphrased version of how the parties framed the separated issue, by agreement, in the order of Mabindla-Bowana dated 26 February 2026.

[9.2] If the separation application is not granted, Engen's interlocutory application in the main proceedings (concerning the consolidation of the main application with the *Nguni*[2] matter and referral to oral evidence of issues relating to the *quantum* of Engen's claim in the main application) would also be heard on 20 April 2026.

[9.3] Pursuant to a finding that the suretyship issue is valid and binding (if determined as a separate issue), Engen may thereafter enrol its consolidation and / or referral to oral evidence interlocutory applications on a date to be determined by the Registrar.

[9.4] Faku Enterprises agreed that it would not appeal against a decision that the suretyship is valid and binding until the merits in the main application have been determined.

[9.5] That if Engen's consolidation and / or referral to oral evidence interlocutory applications is granted, the Court may appoint a judicial case manager and the matter may proceed to oral evidence subject to directions, including the identification of issues, witnesses, subpoenas, discovery, exchange of witness statements, and pre-trials.

[10] The Judge President's order plainly conveys that the parties envisaged procedural clarity and certainty flowing from the anticipated proceedings on 20 April 2026.

[2] This is an application against Nguni Fuel (Pty) Ltd (in liquidation), Louw and Russell under case number: 23104/2024. In that application Engen seeks payment for the supply of petroleum products. That application has also been set down for hearing on 20 April 2025.

The competing contentions

[11] Faku Enterprises' case is that the issue of the validity of the suretyship is an issue that is discrete from the issues and merits of the main application. The proposition is that if the proposed separated issue is determined in its favour, Engen's claim against it falls away entirely. It is further the case for Faku Enterprises that without a separation of the surety validity issue it will remain embroiled in extensive and potentially protracted proceedings involving disputes between Engen and the other parties.

[12] Engen in turn takes the position that a Rule 33(4) separation is not competent in motion proceedings and applies only to actions. Furthermore, even if separation is competent, whether under Rule 33(4) or by virtue of the Court's inherent jurisdiction to regulate its own proceedings, it would not be prudent to order a separation. Engen's preferred alternative is that the suretyship validity issue be argued similar to an *in-limine* point at the hearing of the main application.

The legal framework: Separation of issues

[13] Rule 33(4)[3] provides in the main that if in *"any pending action"* there is a question of law or fact which may conveniently be decided separately, the Court may order the disposal of such question separately. Recently in *Harold Gie*[4] the Supreme

[3] **The rule 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.

[4] *Herold Gie and Broadhead Inc v Harris N O and Others* [2024] 4 All SA 333 (SCA); 2025 (2) SA 144 (SCA)

Court of Appeal restated the purpose of this rule and what it aims to facilitate. The SCA found that the rule's purpose is to determine the plaintiff's claim without the costs of delays of a trial[5]. The SCA has also confirmed that the rule facilitates convenient and expeditious disposal of litigation[6].

[14] Ultimately, it is clear from the rules and the authorities that a court asked to order a separation exercise a discretion[7]. The starting point is therefore that the discretion to order separation must be exercised judicially and with due regard to convenience in the wide sense, including fairness and appropriateness to all parties. Separation should not be ordered as a matter of course and must be aimed at facilitating the convenient and expeditious disposal of litigation[8].

[15] The SCA has warned on many occasions that a decision under Rule 33(4) must be considered carefully, that 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 could be considered separately but when properly considered, the issues will be found to be inextricably linked with the rest of the issues that arise in a particular case[9]. Also, where it appears that separation of issues will not result in a convenient and prompt finalisation of litigation the court must refuse to order separate adjudication[10]. Lastly, it is not the convenience of

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[5] para 18

[6] *Denel (Edms) Bpk v Vorster* 2004 (4) SA 481 (SCA); 25 ILJ 659; [2005] 4BLLR 313 para 3.

[7] *The City of Tshwane Metropolitan Municipality v Blair Atholl Homeowners Association* [2019] 1 All SA 291 (SCA); 2019 (3) SA 398 (SCA) para 15; *Denel (Edms) Bpk v Vorster* 2004 (4) SA 481 (SCA); 25 ILJ 659; [2005] 4BLLR 313

[8] *Herold Gie and Broadhead Inc v Harris N O and Others* [2024] 4 All SA 333 (SCA); 2025 (2) SA 144 (SCA) paras 18 -19

[9] *The City of Tshwane Metropolitan Municipality v Blair Atholl Homeowners Association* [2018] ZASCA 176; [2019] 1 All SA 291 (SCA); 2019 (3) SA 398 (SCA) para 15.

[10] *Denel supra*

any one of the parties or even the court, but the convenience of all concerned that must be taken into consideration[11].

[16] However, in this matter there is a legal point to consider. Since the main application commenced by way of motion, the question arises whether a separation of issue of the kind sought by Faku Enterprises may be entertained in motion proceedings.

[17] As stated, Engen's position is that various authorities endorse a conclusion that the legal position is that Rule 33(4) only applies to actions and not to applications. The relatively recent judgment of *Theron*[12] seems to have started this line of argument. Ponnan JA who wrote for the unanimous court concluded that there may be circumstances in which a high court may in the exercise of its inherent jurisdiction, separate issues in application proceedings. Wallis JA disagreed with Ponnan JA that the issue of separation was actually before that court. In my view *Theron* is not persuasive authority for a definitive finding that a rule 34 separation cannot be ordered in motion proceedings.

[18] Engen's reliance on the judgment of *Louis Pasteur*[13] for the proposition that a separation is not allowed in motion proceedings, is not much clearer. In that judgment the court placed reliance on a remark by the learned author *Harms*[14] where he stated that rule 33(4) does not apply to applications, but that a court may separate issues *in limine* and in its inherent power apply a similar procedure to

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[11] *The City of Tshwane Metropolitan Municipality v Blair Atholl Homeowners Association* [2019] 1 All SA 291 (SCA); 2019 (3) SA 398 (SCA) par 50 with reference to D E van Loggerenberg *Erasmus Superior Court Practice* (2016) 2 ed at D1-43

[12] *Theron N.O and Another v Loubser N.O and Others, InRe; Theron N.O and Another v Loubser and Others [2014] 1 All SA 460 (SCA); 2014 (3) SA 323 (SCA)*

[13] *Louis Pasteur Holdings (Pty) Ltd and Others v Absa Bank Limited and Others* (1119/2017; 1120/2017) [2018] ZASCA 163; 2019 (3) SA 97 (SCA) (29 November 2018)

[14] D Harms *Civil Procedure in the Superior Courts* Part B High Court at B33.9

them. The court in *Louis Pasteur* then concludes that a court in exercising its inherent power in application proceedings to separate issues *in limine*, must do so with circumspection[15], and with due regard to the warning in *Democratic Alliance*[16] that courts should be slow to allow parties to engage in piecemeal litigation and be intent on obviating prolonged litigation. So it seems as if the court in *Louis Pasteur* did not issue a definitive finding on the issue but rather warned against piecemeal litigation.

[19] Then came the Constitutional Court judgment of *Ascendis*[17] in which Khampepe J remarked that Rule 33(4) applies to action proceedings, not application proceedings. Engen also referred to *Koch*[18] where the Court passed over the question whether separation is permissible in motion proceedings but made reference in a footnote with reference to the Kampepe J's remark in *Ascendis* that rule 33(4) only applies to actions.

[20] On behalf of Faku Enterprises, on the other hand, reliance was placed on the judgment of Binns-Ward J in *Economic Freedom Fighters*[19] that apparently recognised that courts have in appropriate circumstances separated issues in motion proceedings. However, the judgment relied on by Faku Enterprises did not involve a rule 33(4) separation application but rather dealt with discouraging litigants from piecemeal litigation. In fact, the learned judge made it clear that the separation of issues is unusual in motion proceedings and if it is done it must be

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[15] Para 33

[16] *Democratic Alliance & others v Acting National Director of Public Prosecutions & others* 2012 (3) SA 486 (SCA) para 49

[17] *Ascendis Animal Health (Pty) Limited v Merck Sharpe Dohme Corporation and Others 2020 (1) SA 327 (CC) ; 2020 (1) BCLR 1 (CC); 2019 BIP 34 (CC) par 77*

[18] *Koch & Kruger Brokers CC and Another v Financial Sector Conduct Authority and Others 2023 (11) BCLR 1329 (CC) fn 14*

[19] *Economic Freedom Fighters and Others v Speaker of the National Assembly and Others [2016] 1 All SA 520 (WCC) (8 December 2015)*

done with circumspection. What is said is that if a court is asked to order a separation of issues it should be informed by the principles that apply in rule 33(4) in respect of actions[20]. So, *Economic Freedom Fighters* is at best notional support for Engen's proposition that a separation is preferred or reserved in action proceedings.

[21] On consideration of the case law I do not intend, and I also find that it is not necessary, to pronounce definitively whether Rule 33(4) applies to motion proceedings or not. Even assuming in Faku Enterprises' favour that a court may, in a proper case, direct the prior determination of a discrete issue in proceedings on motion, whether by analogy to Rule 33(4)[21] or under the court's inherent power to regulate its own processes, the decisive enquiry remains whether it is convenient, in the broad sense, to do so, considering all the parties, including the court.

[22] My understanding of the case law and therefore the legal position is that a court must assess, on the facts of the particular case, regardless of whether the matter proceeds by way of motion or action proceedings, whether a separate determination of a discrete issue will assist with the convenient and expeditious resolution of the litigation, or whether it will fragment proceedings, duplicate evidence, or otherwise produce inefficiency. This is done with the underlying conviction that a court should be circumspect to allow for piecemeal litigation. The aforementioned approach or formulation does not require a definitive legal

[20] para 20
[21] *As suggested by Binns-Ward J in Economic Freedom Fighters*

conclusion on whether a separation can be ordered in terms of Rule 33(4) in motion proceedings or only actions.

Application of the law to the facts

[23] I deal broadly with whether the issue of the validity of the surety is discreet and anterior, whether its determination would be dispositive or narrow the disputes further, and if it is convenient in the context of this matter to grant a separation.

[24] The separated issue as identified by the parties is objectively fairly narrow and easily identifiable. It concerns the adjudication of whether the suretyship agreement allegedly executed on 11 July 2019 on behalf of Faku Enterprises in favour of Engen is valid and binding on Faku Enterprises. The bases on which the validity of the surety is disputed by Faku Enterprises are likewise confined. Mr Faku denies signing it on behalf of the company and further that Faku Enterprises did not authorise him to conclude the surety, also that in any event the signature does not comply with the requirements of the various applicable statutes.

[25] It is apparent that the issue concerning the validity and enforceability of the suretyship as the cause of action for Engen's claim against Faku Enterprises do not require the Court to determine, at the same time, the issues in the main application. In the main application there are issues concerning accounting disputes about alleged rebates, a debatement of account, and the quantification of Kepu Trading's actual indebtedness to Engen. Those disputes may later become relevant if Faku Enterprises is found to be bound as a surety.

[26] I am therefore satisfied and accept that the suretyship validity issue is to a large degree anterior to the question whether Faku Enterprises is liable at all and may potentially be dispositive as against the company.

[27] However, separation is not ordered merely because an issue is discrete, or because it may be dispositive. I must examine the anticipated course of the litigation as a whole and determine whether a formal separation order will, in reality, advance the expeditious and fair disposal of the matter.

[28] In my assessment of the situation the order the parties agreed to on 26 February 2026 materially changes the context within which the convenience of a separation must be assessed. In that order the parties have agreed upon a process that will result on 20 April 2026 in either the suretyship issue be heard, if I grant separation of that issue in this application. If separation is not granted by this court the determination of the surety issue is still open to that court to determine. Engen's interlocutory applications for the consolidation of the *Nguni* application and / or referral to oral evidence of various issues in the main application could also be heard. The parties have also agreed to further steps that may follow depending on the outcome of those proceedings.

[29] In practical terms, therefore, the litigation will in some manner converge on 20 April 2026 where that judge, hearing the matter, could potentially determine all the *in limine* and interlocutory issues and the further conduct of the main application and the related matters. That being the case, the question is not simply whether Faku Enterprises' suretyship issue is a distinct issue viable for separation. It is whether I should now grant a formal separation order which will, almost inevitably, increase the risk that the litigation will be handled in parts by a

succession of different judges, an outcome which the authorities warn may be inimical to judicial economy, especially in motion proceedings. The potential of a piecemeal adjudication here is not only possible appeals it is the reality of multiple judges dealing with fragments of the same case.

[30] Engen initially emphasised the risk of piecemeal appeals. However, the February 2026 order substantially mitigates that risk, because Faku Enterprises has undertaken not to appeal an adverse decision on the suretyship issue until the merits of the main application are determined.

[31] If a formal separation order were to be granted now, the separation application would have been decided by one judge. Then the separated issue would be heard by a second judge on 20 April 2026 and hopefully the consolidation application of the *Nguni* matter and / or the referral to oral evidence application may thereafter be heard by the same judge also on the aforementioned date. That means it is possible that a third or fourth judge will have to decide either the remaining interlocutory applications and/or be concerned with the case management process.

[32] It seems therefore that Engen's alternative proposal, that the suretyship issue be argued at the outset of the main hearing, is in the circumstances, having regard to the consent order, a sensible middle ground. It permits the judge seized with the matter on 20 April 2026 (i) to determine whether the suretyship issue can be decided on the papers as they stand, or whether any further directions are required; (ii) to hear and decide that issue first (*in limine*), if appropriate; (iii) if judgment on that issue is reserved, to allow that situation to have the practical effect of a stay of the remainder of proceedings as they concern Faku Enterprises; and thereafter, with the benefit of being seized of the broader matter, to hear counsel

on what should happen next, including managing the hearing of the consolidation / and referral to oral evidence applications and thereafter issue directions regarding the further conduct of the matter.

[33] In my view this approach addresses Faku Enterprises' legitimate concern that its liability issue should not be submerged in the broader disputes in the main application. It also addresses Engen's concern that the litigation should not be fragmented.

Prejudice to Faku

[34] Faku's prejudice argument is that it should not be compelled to "tag along" in a matter involving rebates, debatement and quantum disputes in which it has no interest. The concern is understandable. But the manner in which the main application has been pleaded indicates that Faku Enterprises' principal (and seemingly sole) dispute with Engen is the suretyship issue. In those circumstances, the approach to argue the suretyship issue *in limine* materially reduces the potential litigation burden on Faku Enterprises.

[35] If it later transpires that Faku Enterprises was nevertheless unnecessarily put to the cost or inconvenience by reason of procedural decisions made in the broader litigation, that can be addressed by an appropriate costs order at the relevant stage to cater to the realities that unfolded.

[36] Since I am not persuaded that a formal separation order should be made now, the stay sought by Faku Enterprises cannot be granted. However, this does not mean that the proceedings cannot be managed so that Faku Enterprises is not burdened

pending the determination of the suretyship issue. It means only that having regard to how a judge who will ultimately be seized with the discreet issue of Faku Enterprises' liability in terms of the suretyship may decide to deal with the matter it may mean that a stay in the main application, as far as it concerns Faku Enterprises, may in any event be obtained indirectly. A stay order by this Court would therefore not be prudent.

Conclusion and order

[37] The application for separation and the stay of the main application is therefore refused.

[38] Although Faku Enterprises is unsuccessful with the application, it would not be prudent to grant a costs order against it at this stage. This approach is justified by the fact that a trial court, or in this case the court seized with the main application, would in any event be entitled to reconsider a separation order[22] or decide to determine the issue *in limine*. Therefore, it may be that one court is satisfied that it is convenient for a separation to be ordered or for an issue to be determined *in limine*, while circumstances may change during the course of litigation that at a later stage a separation may no longer be convenient. This means to grant a cost order refusing the separation may be revisited by the next judge who may approach the matter that separation or a *in limine* determination is in fact convenient. It is therefore prudent for the issue of costs of this separation application to be determined with the main application.

[22] *NCS Resins (Pty) Ltd v Allan and Others* (2708/2016) [2022] ZAECQBHC 25 (30 August 2022)

[39] In the result, the following order is made:

1. The application for separation of issues and the ancillary relief for a stay of the main application is dismissed.

2. The costs of this interlocutory application shall be costs in the cause in the main application.

[redacted]

A MONTZINGER

Acting Judge of the High Court

Appearances:

Attorneys for Faku Enterprises:	C A Friedlander Attorneys
	Mr G A Meinking
Counsel for Faku Enterprises:	Mr P Tredoux
Attorneys for Engen:	Mathopo Moshimane Inc.
	Mr S. P. Mathebula
Counsel for Engen:	Mr A Coetzee