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

**JUDGMENT**

**Not Reportable**

Case No: 10790/2017

**In the matter between:**

**DURIDEV (PTY) LTD** **Plaintiff**

**and**

**ARUN LIFESTYLE (PTY) LTD** **First Defendant**

**ARUN LIFE (PTY) LTD** **Second Defendant**

**OLD MUTUAL RETIREMENT ACCOMMODATION FUND (PTY) LTD** **Third Defendant**

**Coram: Cooke, AJ**

**Heard:** **14 April 2026**

**Delivered:** **17 April 2026**

**Summary:** **Separation of issues –** first and second defendants sought the separation of the ‘substitution issue’ – plaintiff submitted that this issue is inextricably linked to the ‘rectification issue’ – Court found that it would be convenient to separate both issues – costs reserved

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**ORDER**

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1. The following issues are to be decided in a preliminary trial, separately from the remaining issues arising from the pleadings:

    1.1. Whether the written agreement (‘the agreement’), a copy of which is annexure DD1 to the plaintiff’s amended particulars of claim (‘the POC’), is to be rectified as sought in paragraphs 1.1 and 1.2 of the prayers in the POC, on the grounds set out in paragraphs 5.2, 5.3, 7, 8, 9(a), 10 and 11(a)-(b) of the POC, and pleaded to in paragraphs 3, 5, 6 and 7 of the defendants’ plea (‘the plea’), read with paragraph 4 of the plaintiff’s replication (‘the replication’) and the first defendant’s rejoinder (‘the rejoinder’).

1.2. Whether the first defendant became bound to the agreement in the second defendant's stead, as a result of:

1.2.1. the transfer of the second defendant's rights, obligations, assets and liabilities, as alleged in paragraphs 12 to 14 of the POC and pleaded to in paragraph 8 of the plea, and in the first defendant's special plea, as amended, read with the denial in paragraphs 1 and 2 of the replication; alternatively

1.2.2. estoppel, as alleged in paragraph 4 of the replication, and more particularly paragraphs 4.18 to 4.20 thereof, and pleaded to in the rejoinder, more particularly in paragraphs 19 to 21 thereof; alternatively

1.2.3. piercing of the corporate veil, as alleged in paragraphs 4.22 to 4.25 of the replication and pleaded to in paragraphs 22 to 24 of the rejoinder.

2. The remaining issues are stayed until the issues described above have been disposed of.

3. The costs shall be reserved for determination by the court which hears the preliminary trial, or, if such court should see fit so to order, for the decision of the court which hears the main trial.

# JUDGMENT

**COOKE AJ**

[1] This is an application brought in terms of uniform rule 33(4) for the separation of issues. The first and second defendants (collectively referred to as ‘the Arun companies’) seek an order directing that the question whether the first defendant (‘Arun Lifestyle’) became bound to the written agreement attached to the particulars of claim, in the place of the second defendant (‘Arun Life’), be decided separately in a preliminary trial.

[2] The main action concerns a claim by the plaintiff (‘Duridev’) arising out of an agreement concluded on or about 29 July 2013 between it and Arun Life in respect of a contemplated residential development to be known as “De Plattekloof” (‘the agreement’). In terms of the agreement, Duridev was, amongst other things, to secure finance for the funding required for the proposed development. The agreement was purportedly cancelled by Arun Life on 26 June 2014, and now Duridev claims about R127 million. This relief is sought not against Arun Life, but against Arun Lifestyle. To this end, Duridev avers in its particulars of claim that there was a transfer of rights and obligations under the agreement from Arun Life to Arun Lifestyle. Duridev also pleads that the agreement must be rectified to, amongst other things, insert the words “*or its successor in title*” after Arun Life’s name.

[3] Arun Lifestyle delivered a special plea in which it contends that there was no transfer of rights and obligations to it, and it did not otherwise become a party to the agreement. Arun Lifestyle concludes that Arun Life remained one of the two parties to the agreement and Duridev has no cause of action against Arun Lifestyle. I shall refer to this issue as 'the substitution issue'. For the purposes of the adjudication of the special plea, the Arun companies accept the rectification pleaded by Duridev.

[4] The plea delivered by the Arun companies includes averments that Arun Lifestyle was formed on 16 February 2015, after the cancellation of the agreement, and that Arun Lifestyle was then used by a joint venture between Old Mutual and Arun Holdings to develop the property in question. The Arun companies also deny the rectification claim (I shall refer to this as 'the rectification issue').

[5] In its replication, Duridev alleges that Arun Lifestyle is estopped from denying liability to Duridev, alternatively and in any event, the separate juristic personalities were abused and fall to be disregarded by the Court (referred to below as the 'estoppel issue' and the 'abuse issue'). These allegations are denied by the Arun companies in a rejoinder.

**The separation application**

[6] In the founding affidavit in the separation application, the Arun companies make the following main points in favour of a separation:

(a) Resolving the substitution issue will require only their evidence to demonstrate the absence of the alleged transfer, entailing the limited evidence of a director of either of the Arun companies and possibly one witness from Old Mutual.

(b) The alternative defences raised in the replication, namely, the estoppel and abuse issues, can be decided as a matter of legal argument.

(c) Duridev's prospects of discharging its onus to prove the alleged transfer are particularly weak.

(d) The question of substitution is a threshold issue. If Duridev fails on the substitution issue, the claims against Arun Lifestyle will likewise fail. In this event, there will be no need to consider the myriad other issues in dispute (referred to as 'the contractual issues').

(e) On Duridev's analysis, the contractual issues include fifteen issues that are listed in its statement of issues (in fact, it is about ten issues).

(f) Duridev has made discovery of 203 pages of documents of which virtually all relate to the contractual issues. For its part, the Arun companies have made discovery of 109 documents of which only some ten documents relate to the post-cancellation period.

(g) It is evident from the pleadings and discovery that a single trial on both the substitution issue and all the contractual issues will involve numerous witnesses testifying over several days.

(h) A preliminary finding on the substitution issue could thus materially shorten the proceedings and preparation, and will thus save significant legal costs, time and court resources, as well as spare witnesses from the typical ordeal of oral testimony and cross examination.

(i) Even if the Arun companies are unsuccessful with the substitution issue, the evidence to be led at a subsequent hearing on the contractual issues would not overlap with the evidence led at the preliminary trial.

(j) The Arun companies have already cooperated with Duridev to obtain an early trial date and will do so again in the event of a further trial date being required for a hearing on the contractual issues.

[7] Duridev delivered an answering affidavit in which it made the following principal submissions in opposition to a separation:

(a) The issues in the matter are inextricably linked.

(b) It would not be possible for Duridev's witnesses to give evidence about the substitution issue (described in the affidavit as the liability issue) without discussing quantum and other facts.

(c) The interests of justice do not justify the granting of the separation, as such a separation would violate the *audi alteram partem* rule in that Duridev would not be afforded an opportunity to present its complete case through its witnesses.

(d) Conducting the trial in the manner suggested by Duridev would not only secure its right to be heard but would also save all the parties' costs and the court's resources.

(e) Duridev has a '*wealth of evidence*', to present on the substitution issue (although Duridev did not identify this evidence).

[8] Duridev also raised certain complaints regarding the timing of the separation application. These complaints were not, however, mentioned in written and oral argument. Save to state that I do not consider the complaints to be convincing, it is not necessary to address them any further.

**Legal principles**

[9] Rule 33(4) 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 questions cannot conveniently be decided separately*.'

[10] The relevant principles relating to separation applications are not controversial. They may be summarised as follows:

(a) The entitlement to seek the separation of issues was created in the rules so that an alleged lacuna in the plaintiff's case can be tested or simply so that a factual issue can be determined which can give direction to the rest of the case and, in particular, to obviate the leading of evidence. The purpose is to determine the plaintiff's claim without the costs and delays of a full trial.[1]

(b) The procedure is aimed at facilitating the convenient and expeditious disposal of litigation. The word convenient within the context of the subrule conveys not only the notion of facility or ease or expedience, but also the notion of appropriateness and fairness. It is not the convenience of any one of the parties or of the court, but the convenience of all concerned that must be taken into consideration.[2]

(c) Rule 33(4) was amended in 1992. It has been held that the amendment reflects the rule-maker's encouragement to litigators to separate issues.[3]

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[1] *Tshwane City v Blair Atholl Homeowners Association* 2019 (3) SA 398 (SCA) para 49.
[2] *Tshwane City* para 50.
[3] *Lappeman Diamond Cutting Works (Pty) Ltd v MIB Group (Pty) Ltd (No2)* 1997 (4) SA 921 (W) at 929E.

(d) According to Van Reenen J in *Berman & Fialkov*,[4] an application for separation must be granted unless it appears that such issues cannot conveniently be decided separately, and it is incumbent on the party who opposes such an application (in this case Duridev) to satisfy the Court that a separation order should not be granted.[5]

(e) That being said, it should not be assumed that the convenient and expeditious disposal of litigation is always achieved by separating issues, and careful thought must be given to the anticipated course of the litigation as a whole to determine whether it is convenient to try an issue separately.[6]

**Analysis**

[11] In its heads of argument, Duridev's objection narrowed to one point, namely that the substitution issue is inextricably linked to the rectification issue and these issues cannot be decided separately.

[12] I agree that these two issues are linked. This is demonstrated, for example, by paragraph 4 of the plaintiff's replication which, while responding to allegations in the plea that concern rectification, includes allegations that relate to the substitution issue. It seems to me that the question of whether the parties contemplated the succession of Arun Life by another company (ie the rectification issue) will be an important component

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[4] *Berman & Fialkov v Lumb* 2003 (2) SA 674 (C) para 17.
[5] See also *Braaf v Fedgen Insurance Ltd* 1995 (3) SA 938 (C) at 939G-H.
[6] *Denel (Edms) Bpk v Vorster* 2004 (4) SA 481 (SCA) para 3. See more recently: *Herold Gie & Broadhead Inc v Harris NO and Others* 2025 (2) SA 144 (SCA) para 18.

of Duridev's case that rights and obligations were transferred from Arun Life to Arun Lifestyle (ie the substitution issue).

[13] As noted above, in the special plea, Arun Lifestyle asked that the substitution issue be determined based on the rectification pleaded by Duridev. On this premise, the special plea could be determined without having to consider the rectification issue. However, the question of rectification remains in issue on the other pleadings. As pointed out by Duridev's counsel, the Arun companies have not sought a separation of only the special plea, but rather the separation of the substitution issue. This includes the issues arising from the pleadings other than the special plea that relate to the substitution issue. In these circumstances, it is difficult to see how the Court called upon to determine the substitution issue may do so without also deciding the rectification issue.

[14] In oral argument, and in a supplementary note handed up at the hearing, counsel for the Arun companies submitted that in the event of the substitution issue being resolved in favour of Duridev at a preliminary trial, the rectification issue would become moot at the main trial as the rectification order will have no direct practical effect.[7] It seems to me that logically, the rectification issue is anterior to the substitution issue and should be determined in the same proceedings as the substitution issue. I do not consider that it is desirable to hold the rectification issue in abeyance on the basis that it could become moot, in circumstances where it remains (a) an issue on the pleadings and (b) a relevant consideration in relation to the substitution issue.

[7] Reliance was placed on *AB and Another v Pridwin Preparatory School and Others* 2020 (5) SA 327 (CC) para 50.

[15] I therefore agree with Duridev's counsel that the substitution and rectification issues are inextricably linked. I do not agree, however, that the solution is to dismiss the application. In my view the preferable course is to expand the ambit of the separation to include the rectification issue.

[16] To my mind, the parties will not be prejudiced if the separation includes the rectification issue. I have taken into consideration the fact that Arun Lifestyle pleaded that, for the purposes of the special plea, the Arun companies accept the rectification. This even though the rectification is denied in the main plea. This acceptance does introduce a complication for the joint determination of the substitution and rectification issues, but it is a complication that also exists if there is no separation. It remains open to the Arun companies to amend their pleadings to admit the rectification, if so minded. Absent such an admission, however, it is necessary that the rectification issue be determined by the Court, and this should be done at the preliminary trial.

[17] If the rectification issue is separated together with the substitution issue, as I propose, then the primary argument raised by Duridev, namely the inextricable link between these issues, will fall away. Counsel for Duridev accepted that there would not be any overlapping evidence between the issues so separated, and the contractual issues. He submitted, however, that an expanded separation will result in the preliminary trial not being '*crisp and cheap*'.

[18] I concur that the relative length of the envisaged trials is a relevant factor.[8] However, even though it was incumbent on Duridev to satisfy the Court that a separation order should not be granted, Duridev failed to adduce evidence of the time it anticipated would be consumed by the various issues, did not take the Court into its confidence regarding the evidence to be led by it on the issues,[9] and did not dispute the allegations made by the Arun companies in this regard. This in circumstances where Duridev is the plaintiff and thus *dominus litis* in the main action, and it is also Duridev that introduced the estoppel and abuse issues. Duridev has therefore not established a factual basis for a finding that the two trials would be equal in length, or that half the issues would be decided in the preliminary trial, and half in the main trial, as suggested by Duridev's counsel.

[19] As to the anticipated length of the preliminary trial, I do not agree with the Arun companies that the estoppel and abuse issues can be decided as a matter of legal argument. The Arun companies elected not to deliver an exception in relation to these issues, and it will therefore probably be necessary for the Court to hear evidence on the factual averments relating to these issues. In the circumstances, there is some uncertainty regarding the likely duration of the preliminary trial. I suspect that it will not be as brief as suggested by the Arun companies, but, on the other hand, Duridev has not put up any evidence to counter their case regarding the likely duration.

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[8] In *Pieters NO v Absa Bank Limited* [2017] ZAGPJHC 18 Van der Linde J observed at para 16 that the quintessential separable issue is a narrow but discrete point, involving little documentary or viva voce evidence, which finally decides the case one way or the other.

[9] Compare *Kaxu Solar One (RF) (Pty) Ltd v Santam Ltd* [2023] ZAWCHC 268 para 51.

[20] Having regard to the evidential uncertainty in respect of the probable length of a preliminary trial, I do not think that much weight can be attached to this consideration. In any event, I do not consider that this aspect is decisive. Even if the preliminary trial is not brief, that is not fatal to the application. It is but one factor to be considered.[10]

[21] As to the further arguments raised by Duridev in its answering affidavit, I am not persuaded that it would not be possible for Duridev's witnesses to give evidence about the substitution issue (or the rectification issue) without discussing quantum and other facts. Duridev has not identified the witnesses who will testify on its behalf in relation to the substitution issue, nor has it indicated what evidence it has at its disposal on this issue. But even if Duridev did call a witness on the separated issues, I doubt that such evidence will overlap materially with the evidence relevant to the contractual issues. I also do not agree with the suggestion that a separation would violate the *audi alteram partem* rule. Plainly, Duridev's right to be heard will not be negated by the separation. Duridev has therefore not satisfied me that a separation order should not be granted.

[22] As noted above, the Arun companies submitted that Duridev's prospects of discharging its onus to prove the alleged transfer are particularly weak. I agree that the prospects of success on the envisaged separated issues is a material factor.[11] The greater the prospects for the Arun companies, the less likely it is that there will need to be a subsequent trial,

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[10] *Minister of Agriculture v Tongaat Group Ltd* 1976 (2) SA 357 (D) at 363C.
[11] *Netherlands Insurance Co of SA Ltd v Simrie* 1974 (4) SA 287 (C) at 288H; see also *S v Malinde and Others* 1990 (1) SA 57 (AD) at 68D-E and *Lappeman Diamond Cutting Works (Pty) Ltd v MIB Group (Pty) Ltd (No2)* 1997 (4) SA 921 (W) at 927J-928E.

and therefore the greater likelihood that the separation will produce a saving of time and costs. Put differently, if there are strong indications that Duridev's claim in relation to the separated issues may be doubtful, then the Court should not easily order the full trial to proceed with extensive costs being incurred on all issues. Naturally, it is not appropriate to express a firm view in this interlocutory proceeding regarding the prospects in the main action, and my observations below should be read in this context.

[23] Based on the material available to me, it seems that Duridev will have significant hurdles to surmount in proving that Arun Lifestyle was a party to the agreement. For instance:

(a) The Arun companies put up a CIPC report showing that Arun Lifestyle was only registered on 16 February 2015, after the agreement had been purportedly cancelled by Arun Life. It appears then that any transfer of rights and obligations to Arun Lifestyle could only have taken place after this date. Why, it may be asked, would the Arun companies perform a transfer of rights and obligations in respect of an agreement that they believe has already been cancelled?

(b) Duridev's conduct up until at least 2017 indicated that it considered that its contractual counterparty was Arun Life (not Arun Lifestyle). It issued an invoice on 4 April 2017 addressed to Arun Life, and it is not disputed that two weeks later, on 19 April 2017, it described the cancellation as an unlawful repudiation by Arun Life.

(c) In its particulars of claim, Duridev relies upon a Deed of Sale template dated 2017 that describes Arun Lifestyle as the seller. This document, however, is equally consistent with the version pleaded by the Arun companies, namely that Arun Lifestyle was jointly owned and managed by Old Mutual and Arun Holdings and was used by this joint venture to act as the developer.

(d) It appears that Duridev is not privy to evidence regarding the mechanism by which Arun Lifestyle was supposedly substituted for Arun Life. It is also not suggested that notice of substitution was given by the Arun companies. The transfer is pleaded in uncertain terms, the relevant paragraph stating: '*(t)o the best of the Plaintiff's knowledge, and on dates unknown to the Plaintiff but known to the First and Second Defendants by virtue of the entities' controlling mind, Mr Hilton Campbell's knowledge of the succession of Companies under his control, the Second Defendant was succeeded by, inter alia, the First Defendant, either as a result of a name change or as a result of a cession or sale of the Second Defendant's rights and obligations, assets and liabilities, none of which are within the Plaintiff's knowledge…*' Proof of any substitution would therefore appear to fall peculiarly within the knowledge of the Arun companies. In its answering affidavit, Duridev refers in vague language to the '*numerous facts'* which are relevant to the substitution issue and the '*wealth of evidence'* it has to present on the transfer. But no details whatsoever are provided. It is therefore not clear how Duridev will prove that there was a substitution.

[24] Duridev may provide an answer to these difficulties at trial. Nevertheless, on a preliminary consideration of the defence raised by the Arun companies regarding to the substitution issue, it seems to me that their defence is cogent and bears reasonable prospects of success. This weighs in favour of the separation.

**Conclusion**

[25] Having given careful thought to the anticipated course of the litigation, I consider that a separation of the rectification and substitution issues would be convenient. This will allow the alleged lacuna in Duridev's case, namely that it has sued the wrong party, to be tested. If successful, this will obviate the leading of evidence on the contractual issues and Duridev's claim may thus be determined without the inevitable costs and delays of a full trial. Significantly, it is common cause that such a separation will not give rise to overlapping evidence. Furthermore, it seems to me that the substitution issue is analogous to a dispute regarding locus standi (standing). Generally, such disputes are susceptible to separation.[12] Moreover, on the evidence to hand, I am satisfied that the Arun companies have reasonable prospects of success on the separated issues. A separation would thus promote the convenient and expeditious disposal of the action. This, notwithstanding the risk that the preliminary trial may require a few days of evidence. Irrespective of the duration of the preliminary trial, I am satisfied that a separation would materially shorten the overall length of the proceedings. Having regard to all these considerations, the advantages of a

[12] See for example *Pieters NO v Absa Bank Limited* [2017] ZAGPJHC 18 para 16.

separation, for the parties and the Court, significantly outweigh any disadvantages.

[26] The rectification issue is arguably a sub-issue within the substitution issue, and to this extent is already encompassed by the relief sought in the notice of application. In any event, rule 33(4) authorises a Court to grant a separation order *mero motu* (of its own accord), and in the circumstances, I am not constrained to make an order within the parameters of the relief pleaded by the Arun companies. It is therefore open to me to expand the separated issues by including the rectification issue.

[27] After oral argument, I requested counsel for the Arun companies to submit a draft order that includes the rectification issue, as well as all other matters relating to the substitution issue, such as the estoppel and abuse issues. In addition, in my view, it would avoid possible uncertainty if the separated issues are delineated with reference to specific paragraphs in the pleadings,[13] and I therefore requested that the draft order be formulated with this in mind.

[28] The order set out above is based on the draft submitted by counsel for the Arun companies, although it has been revised by me in several respects. Counsel for Duridev was invited to comment on the draft order although, given his client's stance, it was made clear that he was not obliged to do so. In the result, he did not comment on the draft order, save in respect of costs, in which respect he submitted that if I were to grant a separation order that is

[13] As stated by Strydom J in *Eskom Holding SOC Limited v Santam Limited and Another* [2025] ZAGPJHC 725 para 11, the issues to be separated must be capable of being ring-fenced or delineated with precision so as to avoid uncertainty as to which issues were separated and decided. See also *Road Accident Fund v Krawa* 2012 (2) SA 346 (ECG) para 27.

more expansive than that requested in the notice of application, I should not grant a costs order in favour of the Arun companies.

[29] In assessing the question of costs, I have considered the fact that even though the relief has been expanded, the Arun companies have nonetheless obtained a measure of success. It is also relevant that the point belatedly advanced in argument by Duridev's counsel was not pertinently made in the pre-trial conferences,[14] or in Duridev's answering affidavit. Nonetheless, the relief ultimately granted is materially different to that sought in the notice of application. It is also so that courts frequently reserve the costs of a successful separation application,[15] or make them costs in the cause,[16] although there are also instances of costs being awarded to the applicant.[17] On balance, I incline to the view that the costs should be reserved for determination by the court hearing the separated issues, or failing that court, the court hearing the main trial. The costs order follows the formulation in the *Tongaat* case.

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[14] Duridev's initial stance was that the issues of fact and law raised in the special plea are of such a nature that they must be heard at the trial. In later conferences, Duridev's position was that these issues are so intertwined with the issues in the trial that they should be adjudicated at the trial. The narrow objection based on the link between the substitution and rectification issues was apparently not raised by Duridev in the conferences.

[15] See for example *Minister of Agriculture v Tongaat Group Ltd* 1976 (2) SA 357 (D) at 370A; *Lappeman Diamond Cutting Works (Pty) Ltd v MIB Group (Pty) Ltd (No2)* 1997 (4) SA 921 (W) at 930C; *Ebersohn v Golden Dividend 35 (Pty) Ltd* 2019 JDR 2421 (GP) para 25; *KPMG Incorporated v Public Investment Corporation (SOC) Ltd* 2024 JDR 2751 (GJ) para 30.

[16] See *Kaxu Solar One (RF) (Pty) Ltd v Santam Ltd* [2023] ZAWCHC 268 paras 55-56.

[17] For example, *Santam Versekeringsmaatskappy Bpk v Ntshona* 1974 (4) SA 290 (C); *Fourie v Campbell NO.* 2021 JDR 0742 (FB) paras 37-39; *Eskom Holdings SOC Limited v Santam Limited and Another* 2025 JDR 3267 (GJ) para 33.

[30] For all these reasons, I grant the order set out above.

**DJ COOKE**

**ACTING JUDGE OF THE HIGH COURT**

Appearances

| | | |
|---|---|---|
| For plaintiff | : | Mr A Newton |
| Instructing Attorney | : | Bouwer Cardona Inc. |
| | | c/o Lamprecht Attorneys |
| For first and second defendants: | | Mr H du Toit |
| Instructing Attorney | : | VanderSpuy Cape Town Inc. |