



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

Case No: 1301/2020

In the application between:

KAXU SOLAR ONE (RF) (PROPRIETARY) LIMITED

Plaintiff/Applicant

and

SANTAM LIMITED

Defendant/Respondent

Date of Hearing: 18 October 2023

Date of Judgment: 1 November 2023

Coram: Holderness AJ

JUDGMENT

HOLDERNESS AJ

Introduction

[1] The applicant, the plaintiff in the main action (hereafter the 'plaintiff'), seeks an order in terms of Rule 33(4) of the Uniform Rules separating out two issues,

identified in the application papers as the 'prescription issue' and the 'time bar' issue (the 'issues for separation'), for prior determination, with the remaining issues to be postponed *sine die*.

[2] In the main action, the plaintiff's claim against the defendant is for an indemnity in the sum of R181,922,528.64, under two insurance policies, for loss caused by business interruption, arising from physical damage to two heat exchangers in the thermal energy storage system ('HEX'), a component of a 100 MW concentrated power electricity generation facility situated near Pofadder, Northern Cape Province, and known as the Kaxu Solar One Power Plant.

[3] The basis for the separation sought by the plaintiff is that the trial in the main action will involve costly and time consuming evidence, including extensive expert evidence pertaining to physical damage to the HEX, if, how and when it occurred, and the determination and quantification of the plaintiff's business interruption losses. It is estimated that the trial will endure for a minimum of two to three weeks.

[4] The plaintiff contends that a trial on the issues for separation will dramatically curtail the trial in the main action, and avoid the need for extensive expert evidence to be led. It goes without saying that if the plaintiff's claim has prescribed or become time-barred in terms of the relevant condition of the insurance policy (or policies), the matter will come to an end.

[5] In opposing the application for separation, the respondent (hereafter the 'defendant') asserts primarily that it will be necessary to lead expert evidence in

relation to the issues for separation, and that these issues are therefore interwoven with the other issues in dispute. The plaintiff's counter to this is that the defendant's opposition is based on a misreading of the pleadings.

Separation of issues - Legal principles

[6] Before setting out the parties' contentions regarding the proposed separation, it is convenient to set out the legal principles applicable to separation applications.

[7] Rule 33(4) of the Uniform Rules of Court 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 question cannot conveniently be decided separately.'

[8] The Rule is framed in peremptory language and enjoins the Court to make the necessary order *'unless it appears that the questions cannot conveniently be decided separately.'*¹

¹ *Braaf v Fedgen* 1995 (3) SA 938 (C) at 939 G - H

[9] In applying the provisions of Rule 33(4), the Court should consider whether questions of law or fact may be decided separately before others, or whether the issues sought to be separated may be conveniently separated.

[10] In considering the question of convenience, a court will have regard to its convenience, as well as the convenience of the parties and the possible prejudice either party may suffer if separation is granted. The court is obliged to order separation unless it determines that the issues cannot be conveniently separated.²

[11] Put differently, the Court is obliged to order separation except where the balance of convenience does not justify such separation.³

[12] 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.'*⁴

[13] 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.

² CC v CM 2014 (2) SA 430 (GJ) at para [25]

³ Tshwane City v Blair Atholl Homeowners Association 2019 (3) SA 398 (SCA) at 414F-G

⁴ CC v CM *supra* at para [27]

[14] In *Denel (Edms) Bpk v Vorster*⁵ 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. The Court cautioned that:

'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.'

[13] In *NK v KM*⁶ 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.*'

[14] In *Tshwane City v Blair Atholl Homeowners Association supra* the court stated as follows:⁷

'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.'

[15] In *Minister of Agriculture v Tongaat Group*⁸ the Court observed that:

⁵ 2004 (4) SA 481 (SCA) at para [3]

⁶ 2019 (3) SA 571 (GJ) at para [13]

⁷ At para [2]

⁸ 1976 (2) SA 357 (D) at p. 363

'It must be borne in mind that the grant of an application under the Rule, although it might result in the saving of many days of evidence in Court, might nevertheless cause considerable delay in the reaching of a final decision in the case because of the possibility of a lengthy, barren interregnum between the conclusion of the first hearing at which the special questions are canvassed and the commencement of the trial proper.⁹ In such a case, the advantages, in the form of curtailment of time actually spent in Court, which would result from the separate decision of the special questions might be outweighed by the disadvantages of delaying the ultimate decision of the case; it might cause great prejudice to the party who ultimately obtains a judgment in his favour and who might suffer very considerable pecuniary loss through the circumstance that he could only receive payment of what was found to be due to him very much later than he would have received it had the trial been allowed to proceed in the ordinary way.'

[16] In *Copperzone 108 (Pty) Ltd & Another v Gold Port Estates (Pty) Ltd & Another*,¹⁰ a recent decision in this division, Cloete J found that:

'It thus seems clear that, irrespective of which party bears the 'burden of persuasion' the court is nonetheless enjoined to apply its mind properly and judiciously to whether a separation should be granted. Self-evidently therefore, it is incumbent on both parties to place all relevant information before the court to enable it to exercise its discretion. If an applicant fails to do so ... it will have to accept that the court may not be in a position to properly weigh the advantages and/or disadvantages of granting a separation.'

⁹ *Netherlands Insurance Co. of S.A. Ltd. v. Simrie*, 1974 (4) SA 287 (C) at p. 289

¹⁰ (2019) JOL 41599 (WCC) at para (24)

[17] Another factor which is also relevant to the question whether there would be any real saving in time and cost of litigation relates to the problem of a possible appeal against the decision of the Court on the special questions.¹¹

[18] It is clear from these authorities that the determination of whether or not to grant a separation of issues in terms of Rule 33(4) is a delicate balancing act, and that due regard must be had not only to convenience, but to all relevant factors. The advantages which may accrue to the party seeking the separation need to be carefully weighed up against the disadvantages which may result therefrom.

The argument in favour of separation

[19] This matter is distinctive, as it is the plaintiff, who would ordinarily be intent on obtaining a final judgment in the shortest time possible and who would usually have no discernible reason to delay the finalisation of the main action, who seeks the separation of the two special defences raised by the defendant, namely the prescription defence and the time-bar defence, and who contends that the prejudice it would suffer as a result of the delay is not sufficient to outweigh the convenience and utility of the separation.

[20] The submissions on behalf of the plaintiff, in support of its application for separation, can be conveniently summarised as follows:

¹¹ *Minister of Agriculture supra* at p.363

- 20.1 Due to the manner in which the defendant has pleaded the issues for separation, at a separated hearing the Court need not determine whether the HEX were damaged, and if so, when and how such damage occurred.
- 20.2 This precludes the need to lead any evidence at all, including expert evidence.
- 20.3 As the dates alleged by the plaintiff (relating to when the HEX were damaged and went offline and when it claimed indemnification from the defendant,), which the defendant has accepted and which for the purposes of determining the issues for separation are accordingly common cause, the only issues which will need be determined is whether:

20.3.1 a debt was due on those dates (for the prescription plea);
and

20.3.2 whether the loss had incepted on those dates (for the time-bar issue)

- 20.4 Should no expert evidence be required, then the issues for separation are not interwoven with the remaining issues which fall to be determined.

20.5 There will be a significant saving in time and costs, the former being convenient for both the parties and the Court, and the latter for both parties.

20.6 If either of the defendant's special defences are upheld, that will be the end of the main action.

20.7 If the defendant's special defences are not upheld, the finalisation of the matter will be delayed. However, the testing of the veracity of the defendant's defences raised in the issues for separation, together with the substantial savings in time and costs, outweighs the prejudice which would be occasioned by such delay.

20.8 Lastly, even if the defendant were correct in its assessment of the pleaded issues, which the plaintiff disputes, the defendant has not stated what evidence it intends leading and how this will result in a duplication of the evidence to be led.

[21] The defendant in opposition to the application for separation submits that:

21.1 the Court should choose finality over a piecemeal determination of the matter;

21.2 the separation is '*neither clear cut nor obvious*';

- 21.3 the stance adopted by the defendant is that it is not for the plaintiff to tell it how to run its case, particularly as the plaintiff has been 'supine', having issued summons almost four years ago, and waiting until now to apply for a separation; and
- 21.4 the resolution of the issues for separation requires factual and expert evidence that is intertwined to the central dispute, that is evidence regarding the repair and bringing into operation of the solar plant, which significantly dilutes any convenience which may result from the separation.

The prescription issue

[22] The defendant contends that an issue which it has identified in its answering affidavit as the '*temporal issue*' influences when the plaintiff's cause of action accrued for determination of the prescription issue. It avers that this temporal issue requires the leading of both factual and expert evidence.

[23] The defendant accepts, for the purpose of this application, the characterisation by the plaintiff of the issues to be determined in the main action as follows:

- 23.1 Issue 1 which is in dispute, relates to the physical damage to the heat exchanges within the Thermal Energy Storage System ('TES');

- 23.2 Issue 2 relates to the so-called time or temporal element, namely when the damage to the heat exchangers occurred. This issue is in dispute and according to the defendant, is interwoven with the prescription plea;
- 23.3 Issue 3 relates to the cause and nature of the physical damage to the heat exchangers. In this regard the defendant alleges that the physical damage to the heat exchangers ('HEX') was due to wear and tear and / or a latent defect. The plaintiff concedes that this issue is intertwined with Issue 2;
- 23.4 Issue 4 is the contention by the defendant that the physical damage to the HE (if established) was due to faulty workmanship and material, construction, or design. The plaintiff concedes that this issue is likewise intertwined with the when the alleged damage to the HEX occurred (Issue 2) and the cause and nature of such damage (Issue 3);
- 23.5 Issues 5 to 7 relate to the quantification of the plaintiff's alleged loss and what it is entitled to claim; and
- 23.6 Issue 8 relates to whether the business interruption claimed by the plaintiff to have been caused by the physical damage to the HEX is indemnifiable under the policies. Plaintiff accepts that this is linked to *inter alia* Issue 3.

[24] The defendant's contention is that factual and expert evidence will be necessary to resolve all of the key issues in dispute between the parties.

[25] The crucial point of difference between the parties arises from the following allegations in the respondent's answering affidavit:

'18. *...the defendant has pleaded that the repair work to the HEX could have been completed and made ready for operation in advance of the date of 4 November 2017 and most probably by the end of February 2017.*

19. *This issue self-evidently will require a consideration of whether a much earlier commercial operation start date than 4 November 2017 was achievable, potentially within January 2017 or at least February 2017 and that in turn will require factual and expert evidence.'*

[26] The plaintiff states that the allegation in paragraph 18 of the answering affidavit is patently incorrect, and does not appear in the special plea or anywhere else in the defendant's pleadings. It further points out that on the pleadings the defendant does not place any reliance on the 'Period of Liability' referred to in the policy and cited in paragraph 23 of the answering affidavit. The so-called 'temporal issue' is therefore not pleaded and is raised in an relied upon by the defendant for the first time in its answering affidavit in the separation application.

[27] Relying on, and therefore accepting, the dates alleged by the plaintiff in its particulars of claim, the defendant in its special plea of prescription, pleads that the plaintiff's claim for indemnification by the defendant arose or became due on:

27.1 the date on which it alleges the HEX were physically damaged, namely 19 September 2016;

27.2 *alternatively* on the date on which the second HEX (HEX2) was taken offline, namely 12 October 2016; or

27.3 further *alternatively*, on the date on which it claimed indemnification from the defendant, namely 13 December 2016.

[28] The plaintiff instituted action on 23 January 2020. The defendant accordingly pleads that the plaintiff's debt has prescribed in terms of section 12(1) read with section 11(d) of the Prescription Act, 68 of 1969.

[29] In terms of the relevant provision of the insurance policy, the Period of Liability starts from the time of physical loss or damage of the type insured and ends when with due diligence and dispatch the building and equipment could be:

29.1 Repaired or replaced; and

29.2 Made ready for operations;

under the same or equivalent physical and operating conditions that existed prior to the damage.

[30] The defendant's argument is premised on the Period of Liability incepting when the loss or physical damage occurred, and ending when it was repaired or replaced and made ready for operations.

[31] The defendant has not pleaded in its special plea that the debt was due at the end of the contractual period of liability, nor has it pleaded in its plea on the merits that the period of liability ended at a date earlier than that which the plaintiff alleged, i.e. 4 November 2017.

[32] As the defendant has accepted and relied on the dates pleaded by the plaintiff, which is clear from the wording of its plea and special plea, these dates as specified by the plaintiff are common cause. The plaintiff contends that this has avoided the intertwining of issues.

[33] Regarding the plea of prescription, the plaintiff asserts that the debt only became due on 24 November 2017, that is the date the defendant repudiated the plaintiff's claim for indemnification in terms of the insurance policy, *alternatively* on 4 November 2017, being the end of the Period of Liability provided for in the policy. This latter date is that date on which the repair of the HEX was signed off and they were put back in operation.

[34] Crucially, the defendant has not in its plea on the merits pleaded that the Period of Liability ended on an earlier date. To the contrary, in paragraph 23 of its plea, the defendant accepts that date pleaded by the plaintiff in its particulars of claim as the date upon which the Period of Liability ended. In this regard, the defendant pleads as follows:

*'23.2.2. the plaintiff's loss is alleged to have incepted on 19 September 2016
alternatively 12 October 2016 (when HEX2 was taken off-line) further
alternatively on 4 November 2017 (being the expiry of the period
identified by the plaintiff in paragraph 27.1 of its particulars of claim'
(emphasis added)*

[35] It follows that as the pleadings stand, it is common cause that the contractual Period of Liability ended on 4 November 2017, and the parties will not be required, nor is it likely that they will be permitted, to lead evidence to the contrary in relation to such dates and events.

[36] Following from the above, the only question which need be determined in relation to the prescription plea is whether the debt became due on any of the three dates cited in paragraph 33 above. If the debt became due on any such date, and the running of prescription was not suspended whilst the parties were engaged in negotiations with each other, the claim will have prescribed.

[37] If the plaintiff's allegations regarding the date on which the debt became due, as set out in paragraph 32, are found to be correct, the claim will not have prescribed.

[38] It is clear that the time periods and dates of repair to the HEX and the sign off by the OEM (i.e. when the period of liability should have ended) are different to when the physical damage is alleged to have occurred. Therefore the evidence which will be required to be led on these issues does not appear to be intertwined.

[39] Accordingly, even if the end of the Period of Liability were to have been a relevant consideration for a determination of the special plea of prescription, there is still unlikely to be an overlap in the evidence.

The Time Bar issue

[40] In terms of clause 9 of the relevant policy:

'No suit, action or proceeding for the recovery or any claim will be sustained in any court of law or equity unless:

- 1. The insured has fully complied with all the provisions of this Policy; and*
- 2. Legal action is started within twelve months after inception of the loss.'*
(emphasis added)

[41] According to the defendant, the issue of the inception of the loss involves both an interpretive exercise, namely whether the inception of the loss in relation to a Time Element Claim is the same as the Period of Liability, and a factual enquiry, namely when the loss incepted. The defendant contends that the plaintiff's cause of action accrues '*when the Period of Liability*' is known.¹²

[42] Similarly with the special plea of prescription, on the face of the pleadings the defendant accepts the dates pleaded by the plaintiff for the purposes of its time bar defence.

[43] The defendant however appears to lose sight of the fact that on the pleadings, which define the issues for determination by the Court, it is common cause that the 'inception of the loss' (i.e. the date of damage to the HEX) occurred on either 19 September 2016 (the date of damage to the HEX), *alternatively* 12 October 2016 (when HEX2 was taken offline) or *further alternatively* 4 November 2017 (being the expiry of the period of liability).

[44] As the end of the Period of Liability is common cause on the pleadings, it is not open to the defendant to assert an earlier period of liability for the purposes of its time bar defence.

¹² See the case of *Truter and Another v Deyssel* 2006 (4) SA 168 (SCA) where the Court stated the following:

'A debt is due in the sense when the creditor acquires a complete cause of action for the recovery of the debt, that is, when the entire set of facts which the creditor must prove in order to succeed with his or her claim against the debtor is in place or, in other words, when everything has happened which would entitle the creditor to institute action and to pursue his or her claim.'

[45] Furthermore, the first condition of the clause dealing with instituting an action against the company is not a pleaded issue in dispute between the parties.

[46] It is trite that as insurer, the defendant bears the onus of proving that the plaintiff failed to comply with a condition of the insurance policy.¹³ If the defendant avers that the plaintiff failed to comply with its contractual obligation in terms of the policy or policies, this should have been expressly pleaded.

[47] In any event, the last minute reliance on this first condition, cannot assist the defendant nor be relied upon as a valid basis for its opposition to the separation.

Should a separation be granted?

[48] It appears on a conspectus of the issues and the pleadings as they currently stand that the defendant has failed to show that the issues are inextricably linked.

[49] The alleged overlapping of issues as alleged by the defendant appears to have arisen from a misreading of the pleadings.

[50] The issues, as correctly identified from the pleadings, do not significantly overlap, and it is therefore unlikely that there will be a duplication of evidence should the issues of prescription and the time bar defence be separated from the main action.

¹³ *Resisto Dairy (Pty) Ltd v Auto Protect Insurance Co Ltd* 1963 (1) SA 632 (A)

[51] Even if the defendant were correct in its assessment of the pleaded issues, it has not stated what evidence it intends leading, nor laid a factual basis to show that witnesses will testify twice and there will be an increased risk that two different Courts will hear the same evidence and arrive at conflicting findings.

[52] Whilst there are two issues which are sought to be separated out, which could mitigate against the separation, in the peculiar facts of this matter, the determination of both of the issues for separation is based upon the same common cause dates. Moreover, both issues, if determined in favour of the defendant, would be dispositive of the matter.

[53] Any prejudice occasioned by the delay resulting from two separate hearings and potential appeals, is, to my mind, outweighed by the advantages which may flow from the expeditious determination of the prescription and time bar defences, including a significant saving in costs and time, including avoiding a trial which is likely to take approximately two to three weeks, and which will involve extensive and complicated factual and expert evidence.

[54] In the circumstances I am satisfied that the separation is justified and that there is a realistic prospect that such separation will materially shorten the proceedings and will be more convenient for the Court and for both parties.

Costs

[55] The defendant's opposition of the separation application was neither vexatious nor unreasonable. Furthermore, the determination of whether a separation

should be granted is an interlocutory matter and does not involve a vindication of rights which would necessarily entitle the successful party to its costs.

[56] In my discretion it is therefore equitable and just that the costs be costs in the cause of the separated issues.

Conclusion

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

1. The issues set out in the following paragraphs of the pleadings are, in accordance with the provisions of Rule 33(4), to be decided separately from and prior to any other question or issue raised in the pleadings:

1.1 The defendant's special plea, as read with the plaintiff's replication thereto; and

1.2 Paragraph 23.2 of the defendant's plea.

2. The hearing on all remaining issues is postponed *sine die*; and

3. Costs are to be costs in the cause of the separated issues.

HOLDERNESS, AJ

APPEARANCES

For the Applicant:	Adv Bruce Berridge SC Rashad Ismail
Instructed by:	Herbert Smith Freehills South Africa LLP J Ripley-Evans
For the Respondent(s):	Anban Govender (Heads of argument prepared by Adv M Chohan SC and Anban Govender)
Instructed by:	Clyde & Co A B Hardie
<u>Date of Hearing:</u>	18 October 2023
<u>Judgment delivered on:</u>	1 November 2023