

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA,
GAUTENG DIVISION, JOHANNESBURG

CASE NO:

- (1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED: NO

16 August 2021

In the matter between:

BRIAN KAHN INC

Applicant

and

PETER WAYNE ROBERTS

Respondent

In re:

BRIAN KAHN INC

Plaintiff

PETER WILLIAM ROBERTS N.O

PETER WAYNE ROBERTS N.O

MAUREEN VERONICA ROBERTS N.O

**(in their capacity as trustees of the Hyde Park Trust
With Master's reference No. IT9319/96)**

First defendant

LOFTUS LAW

Second defendant

PETER WILLIAM ROBERTS

Third defendant

JUDGMENT

Mdalana-Mayisela J

1. This is an interlocutory application by the applicant in terms of Rule 33(4) of the Uniform Rules of Court to separate issues in the trial. The application is opposed by the fourth defendant in the main action. For convenience and ease of reference the parties will be referred to as the applicant and respondent respectively.
2. The applicant in the notice of motion seeks the separation of issues in terms of which the court will hear evidence, argument and grant judgment initially on the issues that arise from paragraphs 4, 5 and 6 of the respondent's counterclaim as read with paragraphs 2, 3 and 4 of the plea thereto, *alternatively*, paragraphs 4, 5 and 6 of the respondent's counterclaim as read with paragraphs 2, 3 and 4 of the plea thereto and paragraphs 2, 3, 4.1, 4.2, 5, 6.2 and 7.2 of the replication. The determination of the remainder of issues to be postponed until the aforementioned issues have been finalised. The parties to make discovery only in regard to the aforementioned issues until finalisation thereof. The applicant seeks the costs of this application.

Background

3. The applicant has instituted an action against the trustees of the Hyde Trust ("first defendant"), Loftus Law ("second defendant") and Peter William Roberts ("third defendant") for an order securing an amount held in trust by the second defendant as security for the balance of fees and disbursement due and owing to the applicant in amount of R608 904.84.
4. The respondent was granted leave by the court to intervene as the fourth defendant in the main action. The respondent filed a plea to the applicant's particulars of claim as well as a counterclaim against the applicant, which were both subsequently amended. In the counterclaim the respondent seeks payment of the sum of R20 588 844.14 together with interest thereon from 17 December 2015 to date of payment. The sum of R20 588 844.14 represents

the total of sums paid to the applicant by the respondent over the period 26 January 2015 to 11 December 2015.

5. The applicant's claim and respondent's counterclaim are founded on the following common cause facts. On 31 December 2014 an oral mandate was concluded in Mauritius, *alternatively*, Johannesburg between the respondent (acting personally) and the applicant (represented by Brian Kahn) in terms of which the applicant was engaged to represent the respondent arising out of the death of his girlfriend and his interests/potential exposure/risk profile flowing therefrom and was entitled to charge fees and disbursements.
6. On or about 17 December 2015, while the respondent was still in custody and prior to the commencement of his criminal trial, the applicant, represented by Brian Rodney Kahn, unilaterally renounced and terminated the oral mandate relating to the criminal matter.

Grounds for separation of issues

7. The applicant avers that regardless of the outcome of the applicant's claim against the third defendant for the balance of the amount due to it, the respondent's counterclaim is required to be determined, unless the respondent abandons it.
8. Should the respondent's counterclaim against the applicant be successful, it will necessarily mean that the plaintiff's claim against the first to third defendants must fail in its entirety.
9. Since the respondent has not abandoned his counterclaim and intends pursuing it, the determination thereof should take place before the determination of the applicant's claim, if it succeeds, it will dispense with the need to proceed with the applicant's claim at all.
10. The applicant's claim and the counterclaim can be conveniently decided separately. The separation will shorten the trial and lead to savings in costs.

Discussion

11. Rule 33(4) provides as follows:
'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.'
12. The purpose of Rule 33(4) is set out in *Rauff v Standard Bank Properties 2014 (2) SA 430 (GJ)* at 42, where Flemming DJP stated as follows:
'The entitlement to seek separation of issues was created in the Court Rules so that an alleged lacuna in the plaintiff's case or an answer to a 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 a parcel of evidence. The purpose is to determine the fact of the plaintiff's claim (or one of the claims) without the costs and delays of a full trial.'
13. The court has a discretion to grant or refuse an application in terms of Rule 33(4). The overriding consideration in such applications is convenience, in a wide sense, that is to say, the separation must not only be convenient to the person applying for such separation, but must also be convenient to all the parties in the matter inclusive of the court. The determination of such an application requires of the court to make a value judgment in weighing up the advantages and disadvantages in granting separation. If the advantages outweigh the disadvantages, invariably, the court should grant the application for separation. The notion of appropriateness and fairness to the parties also comes into the equation (in this regard see *De Wet and Others v Memor (Pty) Ltd (2009/44153) (2011) ZAGPJHC 188 (29 April 2011) para [6]*).
14. The issue to be determined by this court is whether it is convenient to grant the application for separation of issues. The respondent contends that he has

raised the special pleas of taxation and prescription in his plea to the applicant's claim in convention, and therefore, the special pleas take precedence over the matters as a whole. I disagree, regardless of the outcome of the special pleas against the applicant's claim in convention, the respondent's counterclaim is required to be determined, unless he abandons it.

15. Furthermore, the special pleas may be relevant to the claim in convention but are not relevant to the respondent's counterclaim. The counterclaim does not concern the correctness or otherwise of fees and disbursements charged by the applicant for the criminal mandate or any of the other mandates alleged by the applicant. It is common cause that the applicant received the sum of R20 588 844.14 from the respondent. The respondent is claiming the repayment of the full amount. The issues that need to be proved by the respondent in the counterclaim are that the aforementioned sum was paid in respect of one mandate only namely, the criminal charge, and that no work whatsoever was done nor were any of the aforementioned sum used for the purpose of the criminal mandate.
16. The respondent further contends that the applicant in this application, in essence seeks to create a negative onus on the respondent to prove that no work was done and no disbursements were made, when the applicant is *dominus litis* and bears the onus to prove that it did allegedly do so, to claim the balance of the amount due. This contention has no merit because the applicant in the main action simply seeks a preservation order against the other defendants and not the respondent, pending the institution of a claim against the respondent. The claim for payment of the outstanding amount against the respondent has not been instituted by the applicant.
17. He further contends that if the separation is granted, it will create a '*nuisance*' for the court having to deal with a part-heard matter, an additional burden in arranging a roll and allocating Judges, the proceedings will be prolonged and will exponentially increase the costs. The respondent's counterclaim is a self-

contained claim. The issues in the counterclaim are narrow. I find no reason why it will become part-heard or be prolonged.

18. The applicant has submitted that if the respondent is successful or substantially successful in his counterclaim, it will not proceed with its claim in convention and the claim intended to be instituted against the respondent, because there will be no basis to do so.

Conclusion

19. I have considered the legal principles applicable in the application of this nature and the submissions made by Counsel on behalf of the parties. In my view it is convenient to all the parties and the court to grant the separation application. The counterclaim is between the applicant and the respondent, it does not involve the first to third defendants in the main action. Therefore, if the counterclaim is heard separately, the first to third defendants will be excused and will not incur unnecessary costs. If the counterclaim is successful, the proceedings will be shortened because the applicant will not proceed with the main action. There is no prejudice to be suffered by any party, if this application is granted.
20. Regarding the issue of costs, I find no reason why costs should not follow the event.

Order

21. In the premises, the following order is made:
 - (1) A separation of issues is ordered under Rule 33(4) of the Uniform Rules of Court in terms of which the court first determines issues that arise from paragraphs 4, 5 and 6 of the fourth defendant's counterclaim as read with paragraphs 2, 3 and 4 of the plea thereto; *alternatively*, paragraphs 4, 5 and 6

of the fourth defendant's counterclaim as read with paragraphs 2, 3 and 4 of the plea thereto and paragraphs 2, 3, 4.1, 4.2, 5, 6.2 and 7.2 of the replication.

(2) The determination of the remainder of the issues is postponed pending adjudication of the issues in paragraph (1) of this order.

(3) Any discovery by the parties should be confined to the issues that fall for determination in paragraph (1) of this order.

(4) The respondent is ordered to pay the costs of this application.

**MMP Mdalana-Mayisela J
Judge of the High Court
Gauteng Division**

(Digitally submitted by uploading on Caselines and emailing to the parties)

Date of delivery: 16 August 2021

Appearances:

On behalf of the Applicant: Adv P Strathern SC
Instructed by: Brian Kahn Inc

On behalf of the Respondent: Adv R J Bouwer
Instructed by: Martini-Patlansky Attorneys