

REPUBLIC OF SOUTH AFRICA



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

CASE NO: 2021/16959

DELETE WHICHEVER IS NOT APPLICABLE

1.REPORTABLE: NO

2.OF INTEREST TO OTHER JUDGES: NO

3.REVISED NO

27 July 2022

Judge Dippenaar

In the matter between:

GOMETIS (PTY) LIMITED

APPLICANT

and

FOUNTAINHEAD PROPERTY TRUST

FIRST RESPONDENT

REDEFINE PROPERTIES LIMITED

SECOND RESPONDENT

GOLDSTEIN,EZRA

THIRD RESPONDENT

JUDGEMENT

Delivered: This judgement was handed down electronically by circulation to the parties' legal representatives by e-mail. The date and time for hand-down is deemed to be 10h00 on the 27th of July 2022.

DIPPENAAR J:

[1] In the present application, the applicant seeks an order in the following terms:

“ In terms of Rule 33(4) of the Rules of this Court it is ordered that, the following issue between the Applicant and the First and Second Respondents in case number 19659/2021 and the same issue between the First and Second Applicants and the Respondent in case number 01829/21 is separated from the other issues between them in the aforesaid cases and shall be heard and decided upon separately before the other said issues.

“The conduct of the Third Respondent in case number 19659/2021 on 18 March 2019 at the preliminary hearing of the Arbitration before him between the above parties, in refusing to have regard to the ratio in the case of Topaz Kitchens (Pty) Ltd v Naboom Spruit Spa (Edms) Bpk 1976(3) SA 470 at 474 that:

“There is, in my opinion, no justification for the proposition that in cases such as the present case where the Plaintiff seeks to enforce a contract, and the onus is on him to prove the terms thereof, which would involve his proving a negative, that burden is alleviated by duty imposed on the Defendant to begin and adduce some evidence in support of his statement that the additional term relied upon by him was agreed upon.”

Notwithstanding that the said ratio was expressly drawn to Third Respondent's attention by the Applicants / Respondents Counsel and he stating that he is not interested in the said case or any other case, and then unlawfully ruling that the Applicant/ Respondent had the duty to begin with its evidence is:

(1) misconduct on the part of the Third Respondent in terms of Section 3(1)(a) of the Arbitration Act 42 of 1965;

in addition / or alternatively

(2) constitutes a gross irregularity in terms of Section 33(1)(b) of the Arbitration Act 42 of 1965. resulting in the award of the Third Respondent dated 27 November 2020 being set aside in its entirety, and in terms of the relief sought by the Applicant/Respondent in paragraph 3 of its Notice of Motion dated 7 April 2021 and other disputes between the Applicant/Respondent and First and Second Respondents/Applicants are referred to another Arbitrator, and that the costs of both these applications be borne by the First and Second Respondents/ Applicants on the scale of between attorney and client

or

that the aforesaid conduct of the Third Respondent in case number 16959/2021 is a mistake of fact or law which does not result in the award of the Third Respondent being set aside in its entirety and the Application being dismissed with costs”.

[2] The main application pertains to review proceedings setting aside the award of an arbitrator based on numerous grounds of gross irregularity, together with ancillary relief. Condonation for the late launching of the application is also sought. The present application is brought under r 33(4) of the uniform rules of court. The papers in the main application exceed 1600 pages. The present application seeks to have one of these

alleged irregularities separated to be determined as a separate issue. The condonation issue does not form part of the issues sought to be separated.

[3] The applicant's case is predicated on the contention that the issue surrounding the arbitrator's decision regarding the onus and duty to begin would be dispositive of the application if determined in the applicant's favour. It was argued that the condonation issue should rather be determined as part of the main application and thus was not included in the issues to be separated.

[4] R 33(4) 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."

[5] The respondent argues that r33(4) is not applicable to application proceedings and that it is not open to the applicant to take a point *in limine* in its own proceedings.

[6] I agree with the respondent that r6(5)(d)(iii) is not available to an applicant in its own proceedings and that it is not open to an applicant to seek to have one of the issues raised in its founding affidavit determined *in limine*.

[7] Both parties placed reliance on *Louis Pasteur Holdings (Pty) Limited v Absa Bank Limited*¹ ("Pasteur Holdings") wherein it was held:

" [32] A further issue that requires comment is that the separated question was sought and granted in terms of rule 33(4) of the Uniform Rules of Court. Commenting upon this rule, D Harms Civil Procedure in the Superior Courts Part B High Court at B33.9, states the following: 'The provision does not apply to applications, but a court may deal with separate issues in applications in limine and in its inherent power apply a similar procedure to them.'

¹ 2019 (3) SA 97 (SCA) at 106C to J

In Theron & another NNO v Loubser NO & others [2013] ZASCA 195; 2014 (3) 323 (SCA) paras 10-16, Ponnann JA, after an extensive review of the relevant authorities, concluded that there was a body of authority, the correctness of which he left open, as to the circumstances in which a high court may in the exercise of its inherent jurisdiction, separate issues in application proceedings. Wallis JA, writing for the majority at para 23, expressed the view that it was undesirable to examine those cases in the high court, where this procedure had been followed, as to do so may be taken as implying an endorsement of some, or all of these cases. Wallis JA added the following at para 26:

'In general, however, the desirable course to be followed in application proceedings, where the affidavits are both the evidence and the pleadings, is for all the affidavits to be delivered and the entire application to be disposed of in a single hearing.'

[33] Accordingly, a court in exercising its inherent power in application proceedings to separate issues in limine, must do so with circumspection. In this regard, the cautionary warning in Democratic Alliance & others v Acting National Director of Public Prosecutions & others 2012 (3) SA 486 (SCA) para 49, is apposite: 'Generally courts should be slow to allow parties to engage in piecemeal litigation, with attendant delays. Put differently, courts should be intent on obviating prolonged litigation. This case has shown precisely how undesirable for the administration of justice to-ing and fro-ing between the high court and this court over a long period of time, without the merits being finally adjudicated, can be. Courts should be circumspect when suggestions are made about the procedure to be followed on the basis that it might shorten rather than lengthen litigation.' The present appeal is a clear reminder of the consequences that flow from insufficient circumspection being exercised by a court of first instance in separating an issue, in limine, in application proceedings."

[8] Important to the present case is the circumspection with which a court must consider whether to exercise its inherent discretion to allow an issue to be separated *in limine* in application proceedings and the general principle enunciated by Wallis JA in *Theron*.

[9] The test to be applied in a r 33(4) application is that of convenience and the facilitation of the convenient and expeditious disposal of litigation. It also encompasses the notions of appropriateness and fairness. Convenience includes the convenience not only of the applicant but also the convenience of the respondent and the court. As explained by the Supreme Court of Appeal in *City of Tshwane v Blair Atholl Homeowners Association*²:

"[47] At the outset of proceedings before us, we enquired of counsel whether an order in terms of rule 33(4) had been made at the commencement of proceedings in the court below. We also enquired whether the order was at the instance of the court or the parties. There was nothing in the record before us which answered either of those questions. Counsel informed the court that no such order was made by the court below at the commencement of proceedings but that there had been agreement between counsel, that the issue identified in the order made by the court below at the time of the delivery of the judgment, be adjudicated separately. This did not appear from the

² [2018] ZASCA 176 (SCA)

record. Counsel informed us that there was a pre-trial minute which recorded that fact. The record did not contain the pre-trial minute nor could counsel produce it. Strikingly, as shown in the preceding paragraph, the court below made an order, purportedly in terms of rule 33(4), for the first time when the judgment was delivered.

[48] Rule 33(4) reads 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.'

[49] In *D E van Loggerenberg Erasmus Superior Court Practice (2016) 2 ed at D1- 436*, the author states the following:

'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.' (Footnote omitted.)

[50] At D1-436 op cit the following is stated:

'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.' (Footnotes omitted.)

[51] This court has repeatedly warned that, when a decision is called for in terms of rule 33(4), it should be a carefully considered one. In *Denel (Edms) Bpk v Vorster 2004 (4) SA 481 (SCA)*, para 3, the following was said:

'Before turning to the substance of the appeal, it is appropriate to make a few remarks about separating issues. Rule 33(4) of the Uniform Rules – which entitles a Court to try issues separately in appropriate circumstances – is aimed as facilitating the convenient and expeditious disposal of litigation. It should not be assumed that that result is always achieved by separating the issues. In many cases, once properly considered, the issues will be found to be inextricably linked even though, at first sight, they might appear to be discrete. And even where the issues are discrete, the expeditious disposal of the litigation is often best served by ventilating all the issues at one hearing, particularly where there is more than one issue that might be readily dispositive of the matter. It is only after careful thought has been given to the anticipated course of the litigation as a whole that it will be possible properly to determine whether it is convenient to try an issue separately.'

[52] In *Consolidated News Agencies (Pty) Ltd (In Liquidation) v Mobile Telephone Networks (Pty) Ltd & another [2009] ZASCA 130; 2010 (3) SA 382 (SCA)* paras 90- 91, the court said the following:

'This court has warned that in many cases, once properly considered, issues initially thought to be discrete are found to be inextricably linked. And even where the issues are discrete, the expeditious disposal of the litigation is often best served by ventilating all the issues at one hearing. A trial court must be satisfied that it is convenient and proper to try an issue separately. In the present case counsel for both parties informed us that notwithstanding a decision in this matter a number of issues would still be outstanding. Not all of the remaining issues were identified, nor do they appear to have occupied the mind of the court below.' As will appear from the conclusions reached by us and what is stated later, the circumstances set out in para 91 of *Consolidated News Agencies*, pertains to the present case.

[53] From what follows later in this judgment it is clear that insufficient thought by counsel and the court below was given to whether rule 33(4) should be resorted to and applied. Piecemeal litigation which defeats the object of rule 33(4) and consequent piecemeal appeals are equally to be eschewed."

[10] Considering the contents of the applicant's founding affidavit in the main application, I agree with the respondent that the issue sought to be separated by the applicant may well not be dispositive of the application, specifically as the condonation issue is not included as a separated issue and as there are numerous other irregularities complained of by the applicant. The proposed separation may well result in a piecemeal hearing of the review application.

[11] I am further not persuaded that it would be convenient to separate the issue as it has not been established that it would be convenient to the court or to the respondent. The facts rather indicate that such a separation may well be prejudicial to the respondent and result in additional legal proceedings if the separated issue is determined against the applicant. It was not strenuously disputed that the applicant has ceased trading and has no assets, thus rendering any adverse costs order against the applicant effectively nugatory. The applicant has further not illustrated that it would be convenient to the court to separate the issue or that it would not require the papers in the main application to be read and traversed in any event, considering that the issues pertaining to the alleged irregularities appear interrelated.

[12] Moreover, after hearing argument from both parties, I am not persuaded that this is a case where a court's inherent jurisdiction to allow the issue to be determined *in limine* should be invoked, albeit that this was not the basis on which the application was brought.

[13] For these reasons I am not persuaded that the applicant has made out a proper case for the relief sought and the application must fail. There is no reason to deviate from the normal principle that costs follow the result.

[14] I grant the following order:

The application for separation is dismissed with costs.

**EF DIPPENAAR
JUDGE OF THE HIGH COURT
JOHANNESBURG**

APPEARANCES

DATE OF HEARING	: 26 July 2022
DATE OF JUDGMENT	: 27 July 2022
APPLICANTS COUNSEL	: Adv. R. Stevenson
APPLICANTS ATTORNEYS	: Eiser and Kantor Attorneys
RESPONDENTS COUNSEL	: Adv. SS Cohen
RESPONDENTS ATTORNEYS	: Jan Bezuidenhout Attorneys