REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

Case No: 2

(1) REPORTABLE: ~~YES /~~ NO
(2) OF INTEREST TO OTHER JUDGES: ~~YES/~~NO
(3) REVISED.

..... **.....**

SIGNATURE **DATE**

In the matter between:

CHARTIS SOUTH AFRICA LIMITED

APPLICANT/DEFENDANT

and

SUPER GROUP TRADING PTY LTD

RESPONDENT/PLAINTIFF

JUDGMENT

WINDELL, J:

INTRODUCTION

[1] This is an application by the defendant (“Chartis”) in terms of Rule 33(4) for the separation of issues in the action instituted by the plaintiff (“Super Group”).

[2] The action was instituted in September 2010. The protracted history of the litigation proceedings is set out in the affidavits and the heads of argument. Despite being *dominus litis*, Super Group has failed to progress the matter to trial.

CAUSE OF ACTION

[3] Super Group claims an indemnity in an amount of R31,000,000.00 from Chartis under the Corporate Armour Crime Policy ("the policy") in respect of financial loss it is alleged to have suffered. The policy and its terms are common cause between the parties.

[4] Super Group avers that:

> *“10. During the period from at least March 2006 until the end of May 2008 the plaintiff sustained financial loss as a result of the theft from the plaintiff's possessions of the fast-moving consumer goods of the plaintiff's clients.*
>
> *11. The said financial loss was occasioned by reason of and directly caused by* ***a series of dishonest and fraudulent acts of a multiplicity of employees of the plaintiff, acting in collusion.”*** Emphasis added.

[5] The particulars of claim do not indicate how many occurrences of thefts there were, when such thefts occurred, which employees were responsible for the theft, how many employees were involved or what loss was suffered by the plaintiff on each occasion of theft.

[6] The relevant operative insuring clause of the policy provides that:

> *"……, cover is provided in respect of Insuring clauses A and B for financial loss sustained by the Insured, or a third party to whom the insured may become legally liable, on or subsequent to the retroactive date and prior to termination of the Policy and discovered by the Insured during the period of the Policy, or within 12 months of termination of the Policy.*
>
> *INSURING CLAUSES.*
>
> *A. Employee Dishonesty*
>
> *By reason of and directly caused by one or more dishonest or fraudulent acts of any of the Employees of the Insured, wherever committed and whether committed alone or in collusion with others, including loss of property through any such acts of any such Employees."*

[7] Insuring clause A is qualified by proviso 2 (at page 6 of 17 of the policy) in the following terms: *"provided that……. All acts committed by any one person or in which such person is involved or implicated will be considered one occurrence."* ("proviso 2")

[8] Super Group's reliance upon, *inter alia,* insuring clause A read with proviso 2, appears from what has been pleaded in paragraphs 7.2 and 7.3 of the particulars of claim:

> *"7.2 The financial loss, in respect of which cover was provided by the defendant to the plaintiff was loss by reason of, and directly caused by, one or more dishonest or fraudulent acts of any of the employees of the plaintiff*

wherever committed and whether committed alone or in collusion with others, including loss of property through any such acts of any such employees.

7.3 All acts committed by any one person or in which any such person was involved or implicated was to be considered one occurrence."

[9] Super Group claims that it suffered a financial loss of R38,741,104.28 as a result of "the theftuous activities of the employees acting in collusion". The limit of indemnity in respect of insuring clause A is R30 000 000,00 for each and every occurrence and in the annual aggregate. The policy also provides for a self-insured deductible of R750 000,00 in respect of each and every occurrence. Chartis' plea was delivered on 21 October 2010. The application of the deductible clause was pertinently pleaded in paragraph 12 of the plea.

[10] By virtue of the application of the deductible of R750 000,00 Chartis' obligation to indemnify Super Group under the policy only arises in respect of any particular occurrence of theft causing financial loss once Super Group can demonstrate that it has, in respect of such occurrence, suffered a loss exceeding R750 000,00. Hence, the crux of the dispute between the parties is whether the thefts from Super Group's warehouse — alleged to have occurred over the period March 2006 until the end of May 2008 —constitute numerous individual thefts, each subject to its own deductible of R750 000,00, or one occurrence to which one deductible should be applied.

EVENTS AFTER CLOSE OF PLEADINGS

[11] On 30 October 2013, after close of pleadings, the plaintiff delivered a request for particulars for trial. Chartis, not satisfied with the response, brought a compelling application, as well as an application for the separation of the merits and quantum. Super Group counter-applied for a differently formulated separation, also aimed at

separating merits and quantum. On 27 November 2014, Acting Judge Gaibie refused both applications for separation, finding, *inter alia*, that the issues of merits and quantum appear to be inextricably linked.[1] The compelling application was, however, upheld. Super Group then delivered further and better particulars.

[12] Having regard to Super Group's replies, it was clear that Super Group is not able to,(a) identify, individually and separately, any particular act of or occasion of theft; (b) is not able to identify, individually and separately, each dishonest and fraudulent act and is unable to state how many dishonest and fraudulent acts were committed; (c) is not able to identify, individually and separately, each dishonest and fraudulent act constituting such occurrence; (d) is not able to designate the specific employees responsible for such thefts; (e) is not able to identify the employee involved or implicated in each such theft; and, (f) is unable to quantify the individual amounts of each such loss.

[13] Super Group also replied that:

> 1. It identified the acts of theft by comparisons, from time to time, of the inventory physically present in the plaintiff's warehouse and the inventory that ought to have been physically present which reflected deficiencies.
> 2. There was at least one, but not more than eleven occurrences of financial loss.
> 3.To the extent that there might have been more than one syndicate operating independently of each other, in each of the acts that can be attributed to any syndicate there was at least one employee involved or implicated in all such acts.

[1] Paragraph 29 of the judgment of Acting Judge Gaibie dated 27 November 2014.

[14] In August 2015, Chartis launched an application to obtain leave to deliver an exception in addition to, and after the delivery of, its plea. The application was enrolled for hearing on 4 November 2015. On 22 October 2015, Super Group delivered its answering affidavit together with an application for condonation. The answering affidavit raised a number of factual allegations for the first time in the proceedings, including, that Super Group sought to rely on clause 11 of the Conditions of the policy, (the unidentifiable employees' clause), which provides:

> *"If a loss is alleged to have been caused by the fraud or dishonesty of any of the Employees and the Insured shall be unable to designate the specific Employee or Employees causing the loss, the Insured's claim in respect of such loss shall not be invalidated by their inability so to do, provided the Insured is able to furnish evidence to prove to the reasonable satisfaction of the Insurer that the loss was in fact by reason of and directly caused by one or more dishonest or fraudulent acts of one (or more than one acting in collusion) of the Employees of the Insured wherever committed."*

[15] Super Group also averred that it is able to designate certain employees as being significant role players in the syndicate, and that it will argue on the probabilities that there existed one sophisticated syndicate that operated throughout the period under the ultimate control of one kingpin who may have been Samson Ntsala.

[16] After receipt of the answering affidavit on 22 October 2015, Chartis took the view that, in light of the new allegations and the extensive evidentiary material referred to in the answering affidavit, it was not feasible to determine the issues identified in the defendant's application by way of exception. The exception was

removed from the opposed motion roll of 4 November 2015, with a reservation of Chartis' rights.

[17] Chartis submits that it was anticipated that Super Group would then progress the matter to trial and adduce the evidence set out in the answering affidavit, but it did not happen. It is submitted that beyond attending judicial pre-trial conferences, Super Group proved itself incapable of progressing the matter to trial from October 2015 to the present time. It is further contended that Super Group has demonstrated that it is incapable of dealing with the issues of liability and quantum together and despite being cognisant of its difficulties in relation to proving the quantum of its claim, it failed to respond to Chartis' proposals to deal with the extensive stock records which it intends to prove at the hearing. The result is a deadlock which is manifestly prejudicial and unfair to Chartis: it cannot force Super Group to trial on both issues and it cannot reduce the ambit of what Super Group would need to prove at trial by way of a separation.

[18] As a result, so it is argued, Chartis is patently prejudiced by the plaintiff's failure to progress the matter. Chartis has had to retain a reserve for Super Group's in its books of account pending finalisation of the claim since 2010, and the inordinate and unexplained delay has compromised the ability of both parties to secure witnesses who have knowledge of the events which occurred during 2006 to 2008. It is argued that it is in the interests of the public and in the interests of the judicial system itself that litigation does not drag on interminably. Thus, unless the scope of the issues is narrowed by way of the separation, Super Group will not progress the matter to trial, and Chartis will continue to be prejudiced by Super Group's inability to meaningfully progress the matter to trial.

THE PRESENT APLICATION

[19] Chartis launched the current application for separation in July 2019. Super Group's answering affidavit asserts four main grounds of opposition: firstly, the parties previously agreed that the issues of merits and quantum ought not to be separated and "nothing has changed"; secondly, the court per Gaibie AJ determined in November 2014 that the issues of liability and quantum were inextricably linked; thirdly, the separation application is purely a strategic manoeuvre on the part of Chartis; and fourthly, the proposed separation would be prejudicial to Super Group as the issues are inextricably interwoven.

[20] In my view, there is no merit in the first three grounds raised by Super Group. Firstly, a period of five years has elapsed since the answering affidavit of 22 October 2015, with no progress towards trial. Super Group has made no attempt to put before court the evidence alluded to in the affidavit. Secondly, Super Group failed to fully set out the qualification in Gaibie AJ's judgment. She specifically stated that the position with regard to a determination as to convenience may change once the further particulars are furnished by Super Group. Thirdly, the history of this matter is not disputed by Super Group. The events demonstrate tardiness and perennial delay on the part of Super Group. It has offered no explanation for its inordinate delay and inability to progress the matter to trial on both the issues of liability and quantum. More particularly, no explanation is offered which might lead one to believe that Super Group will be more effective in the future than it has been in the past.

[21] This brings me to the fourth ground raised, namely that the issues of liability and quantum are inextricably linked. Chartis seeks an order in terms of Rule 33(4) that

the following issues are to be determined, separately from and prior to the other issues in the action:

1.1.1. the issues raised in paragraph 5 of the particulars of claim as read with paragraph 2 of the defendant's plea;

1.1.2. the issues raised in paragraphs 6 and 7 of the particulars of claim read with paragraph 3.3 of the defendant's plea;

1.1.3. the issues raised in paragraph 10 of the particulars of claim read with paragraph 5 of the defendant's plea;

1.1.4. the issues raised in paragraph 11 of the particulars of claim read with paragraph 5 of the defendant's plea;

1.1.5. the issues raised in paragraph 12 of the particulars of claim read with paragraph 6 of the defendant's plea;

1.1.6. such issues raised in paragraph 15 of the particulars of claim read with paragraph 8 of the defendant's plea;

1.1.7. the issues raised in paragraph 12 and 13 of the defendant's plea.

[22] Super Group contends that the separation of issues proposed by Chartis are ill-considered and inconvenient. It is contended that, by excluding paragraph 14 of the particulars of claim, which sets out the quantum of the claim in the amount of R38 741 104,28,[2] Chartis seeks to exclude proof of the extent of Super Group's loss at the first stage of the trial, even though it is inextricably interwoven with the issue of what caused the loss. It is contended that given the nature of the loss, there is no obvious line between evidence proving that a loss occurred and evidence proving the extent of that loss. It is further submitted that the issues raised in paragraph 12.2 and 12.3 of the plea (12.2 Each incident of theft constitutes an “occurrence" as that

[2] Colgate: R14 766 602,82; Kimberly-Clarke: R16 659 392,59; Unilever: R11 169 488, 49; SUB-TOTAL: R42 595 463,90; LESS RECOVERIES: R 3 854 379 62; TOTAL: R38 741 104, 28.

term is used in the policy. 12.3 Each incident of theft resulted in financial loss of no more than R750 000,00 to the plaintiff) are conditional on proof of the allegations in paragraph 14 of the particulars of claim, and as a result, these paragraphs cannot logically be decided while the allegations in paragraph 14 remain undecided.

[23] Chartis holds the view that the policy does not respond until such time as Super Group proves that particular occurrences of theft over the period March 2006 to May 2008 caused, in each case, a financial loss in excess of R750 000,00. If a court ultimately accepts that each incident of theft constituted an occurrence for the purposes of the policy, then the deductible of R750 000,00 per indemnifiable occurrence would extinguish the plaintiff's claim.

[24] As a result, one of the issues that the trial court would have to determine is what should be considered an occurrence under the policy. In relation to insurance contracts it has been said that a loss is not the same as an occurrence because one occurrence may embrace multiple losses. [3] The circumstances of the losses would therefore have to be scrutinised to determine whether they involve such a degree of unity as to justify their being described as arising out of one occurrence. In assessing the degree of unity, regard must be had to such factors as cause, locality, time and the intentions of the human agents involved.[4]

[25] Both Chartis and Super Group approach this issue ("the occurrence issue") on the basis that the relevant category of unifying factor to be considered is cause of loss. Chartis adopts the view that the aggregate financial loss was caused by numerous discrete thefts, each unconnected to any other. Super Group, on the other

[3] In relation to insurance contracts it has been said that a loss is not the same as an occurrence because one occurrence may embrace multiple losses. See *Kuwait Airways Corporation and the Minister of Finance for the State of Kuwait v Kuwait insurance Co. SAK and Others* [1996] 1 Lloyd's Rep at 686.
[4] Ibid.

hand, contends that each individual theft formed part of a series of happenings with the same originating cause — the existence and direction of a syndicate (a multiplicity of employees acting in collusion to cause loss by a series of dishonest and fraudulent acts.)

[26] One then has to consider what evidence Super Group might present to bring itself within the four corners of the policy. Firstly, Super Group does not intend to prove the number of thefts which occurred over the period March 2006 to May 2008. Instead, Super Group intends on proving, by way of inference, that the **extent** of the loss supports Super Group's allegation that the loss was caused by a multiplicity of employees acting in collusion. In other words, the extent of its loss has probative value in relation to the determination of the manner in which the loss occurred.

[27] Secondly, Super Group contends that it will not be necessary to designate the specific employee or employees causing the loss. In this regard, Super Group intends to prove that the loss could not have been caused by discrete separate acts of theft carried out on an uncoordinated basis by employees acting independently, but, on the probabilities, was caused by the co-ordinated activities of a syndicate. Although Super Group intends to present direct evidence on these aspects, it also relies on a process of inferential reasoning flowing from the extent of its loss. Super Group has explained this evidence in its answering affidavit in a previous interlocutory application as follows: The daily average rand value of loss attributable to stock theft during the claim period is R69 148.51. Throughout the claim period Super Group had 400 employees (including administrative and management staff) in the warehouse plus 120 drivers. To reach a daily loss of R69 148. 51, each employee in the warehouse would have had to steal two cases of goods and one

unit of goods each and every working day throughout the claim period and each driver would have had to steal three cases of goods each and every working day throughout the claim period. It will be argued that it was impossible for each member of staff to walk or drive out of Super Park, undetected with two cases of stock and one unit of stock each and every day. It is also impossible for a driver acting alone to steal three cases of stock each and every working day, because this would be immediately detected and would result in the generation of between 120 and 360 credit notes per day throughout the claim period, which did not occur.

[28] The conclusion that Super Group will argue for on the basis of this evidence is that a loss of this magnitude could only have occurred if a number of employees working in different parts of the warehouse had co-ordinated their efforts to beat the security checks and balances built into the Super Group business process. It is contended that this evidence will disprove the allegation by Chartis that the loss was caused by discrete individual acts of theft.

[29] On this basis alone, evidence of the full extent of the plaintiff's loss would be admissible in any trial where the issues raised in paragraphs 10 and 11 of the particulars of claim and paragraphs 12.2 and 12.3 of the plea are to be decided. The facts regarding the full extent of Super Group's loss forms part of the *facta probanda* in relation to the issue raised in paragraph 14 of the particulars of claim, but are also part of the *facta probantia* in relation to the allegations in paragraphs 10 and 11 of the particulars of claim. Super Group is therefore entitled to and intends to prove the full quantum of its loss in the course of proving its case regarding the cause of the loss.

[30] Upon establishing this, Super Group would have proved a financial loss caused by dishonest and fraudulent acts of many employees acting in collusion. It is contended that Super Group's task would be made easier if the trial court finds, on balance of probabilities, that at least one employee participated in the syndicate's activities throughout the period, because in that case proviso 2(b) applies. It is, however, submitted that Super Group does not have to rely on proviso 2(b) to prove a single occurrence of financial loss totalling R38 741 104. 28. To prove its pleaded case it must prove that a syndicate caused the loss, whether or not proviso 2(b) applies. If it proves that a syndicate caused the loss, then the trial court may very well find that at least one employee was a member of the syndicate throughout the identified period. It is therefore argued that Super Group can prove the existence and operation of a syndicate (and the likelihood that at least one member of the syndicate was involved the identified period) by inference from secondary facts. The size of the loss is however a relevant secondary fact in relation to this enquiry.

[31] On that account, because the evidence of the extent of the loss is relevant to establishing the cause of the loss these two issues are inextricably interwoven. They are inextricably interwoven because the same evidence would be relevant to a determination of both the extent and the cause of the loss, and the determination of the one issue has a material effect on how the other issue should be decided. The court would not be able to reliably determine the one issue without simultaneously determining the other.

[32] The Supreme Court of Appeal has emphasised that 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. See *Denel (Pty) Ltd v Vorster* 2004 (4)

SA 481 (SCA).[5] This is such a case. The court hearing the first part of a trial separated as Chartis proposes, would not be able to evaluate Super Group's arguments regarding the inferences to be drawn from the extent of its loss without first deciding whether it indeed suffered losses of that magnitude.

CONCLUSION

[33] This court must be satisfied that it is convenient to try an issue separately before granting a separation order. In doing so the court must weigh up the advantages and disadvantages that are likely to flow from each alternative course of action.

[34] It is not convenient to separate issues that are inextricably interwoven. Even if Chartis accepts and agree that there was a loss, the occurrence of loss, causation and extent of loss are inextricably interwoven.

[35] It is also inherently inconvenient and undesirable to separate issues where the same evidence is relevant to a determination of both of them. This is wasteful of costs and judicial resources. On the other hand, the status of evidence led at the first part of a divided trial as *facta probantia* is unclear. The separation order will give rise to unnecessary procedural arguments over what evidence is admissible at the first part of the trial, and may not result in any shortening of the first part of the trial at all.

[36] Although Super Group has not taken active steps to progress the matter to trial since March 2017, a separation in terms of Rule 33(4) is not a punishment for procedural non-compliance or delay. The wording of Rule 33(4) makes it clear that the sole test for separation of issues is convenience, and the decided cases establish that this requires an assessment of what is appropriate and fair to all

[5] At paragraph 3. See also *Consolidated News Agencies (Pty) Ltd (in liquidation) v Mobile Telephone Networks (Pty) Ltd and Another* 2010 (3) SA 382 (SCA) at paragraph 90.

parties and the court. A defendant in Chartis' position has a number of procedural remedies available to it to force progress or, failing such progress, to bring the litigation to an end. In the interim, the matter has also been allocated to a judge to case manage the matter. Super Group contends that although it has not yet filed its witness statements, there is detailed evidence contained in numerous reports submitted to Chartis during the claims administration process. These reports have been discovered and the millions of pages of supporting documentation are available for inspection.

[37] In the result the following order is made:

1. The application is dismissed with costs.

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L. WINDELL
JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION, JOHANNESBURG

(*Electronically submitted therefore unsigned)*

Delivered: This judgement was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the Parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 12 July 2022.

APPEARANCES

Attorney for the applicant/defendant:	Clyde & Co Inc.
Counsel for the applicant/defendant:	Adv. C. Loxton SC
	Adv. G. Goedhart SC
Attorney for the respondent/plaintiff:	Gary G. Mazaham Attorneys

Counsel for the respondent/plaintiff:	Adv. A. Lamplough SC
Date of hearing:	13 April 2022
Date of judgment:	12 July 2022