IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

(1) Reportable: No
(2) Of interest to other Judges: No
(3) Revised: No

Date: 19/09/2022

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A Maier-Frawley

CASE NO: 2018/41666
2018/44041
2018/44043
2018/44359

In the matter between:

TRANSNET SOC LIMITED Applicant

and

REGIMENTS CAPITAL (PTY) LIMITED First Respondent
TRILLIAN ASSET MANAGEMENT (PTY) LTD Second Respondent
TRILLIAN CAPITAL PARTNERS (PTY) LTD Third Respondent
TRILLIAN FINANCIAL ADVISORY (PTY) LTD Fourth Respondent
MOLEFE, BRIAN Fifth Respondent
SINGH, ANOJ Sixth Respondent
GAMA, SIYABONGA Seventh Respondent
PITA, GARY Eighth Respondent
RAMOSEBUDI, PHETOLE ROBERT Ninth Respondent

In *Re:*

Case no. 2018/41666

In the matter between:
TRANSNET SOC LIMITED Plaintiff
and
REGIMENTS CAPITAL (PTY) LTD First Defendant
ANOJ SINGH Second Defendant
SIYABONGA GAMA Third Defendant
PHETOLE ROBERT RAMOSEBUDI Fourth Defendant
GARY PITA Fifth Defendant

In *Re:*

Case No. 44041/2018

In the matter between:

TRANSNET SOC LIMITED	Plaintiff
and	
TRILLIAN ASSET MANAGEMENT (PTY) LTD	First Defendant
GAMA, SIYABONGA	Second Defendant
PITA, GARY	Third Defendant
RAMOSEBUDI, PHETOLE ROBERT	Fourth Defendant
REGIMENTS CAPITAL (PTY) LTD	Fifth Defendant

In *Re:*

Case No. 44043/2018

In the matter between:

TRANSNET SOC LIMITED	Plaintiff
and	
TRILLIAN CAPITAL PARTNERS (PTY) LTD	First Defendant
TRILLIAN FINANCIAL ADVISORY (PTY) LTD	Second Defendant
ANOJ SINGH	Third Defendant
GAMA, SIYABONGA	FourthDefendant
PITA, GARY	Fifth Defendant

In *Re:*

Case No. 44359/2018

In the matter between:

TRANSNET SOC LIMITED	Plaintiff
and	
REGIMENTS CAPITAL (PTY) LTD	First Defendant
MOLEFE, BRIAN	Second Defendant
ANOJ SINGH	Third Defendant

J U D G M E N T

MAIER-FRAWLEY J:

Introductory background

1. This matter concerns two applications, namely, (i) an application in terms of rule 33(4) to separate from the other issues, the special pleas of prescription that have been raised by one or another defendant (being one or another of the respondents cited in these proceedings) in four separate actions instituted by Transnet Soc Limited ('Transnet') against the cited defendants in each respective action;[1] and (ii) an application in terms of rule 11 to consolidate the hearing of the special pleas so that the issue of prescription may be determined at one consolidated hearing in the event that a separation of issues[2] in each action is ordered. In other words, the consolidation sought by the applicant (plaintiff in the individual actions) is conditional upon the separation application pertaining to each of the four individual actions succeeding.

2. The eighth respondent, Gary Pita ('*Pita')* opposes the separation application in three of the actions in which he is cited as a defendant, being the actions instituted under case numbers 41666/2018; 44041/2018 and 44043/2018. As he is not a party to the action instituted under case number 44359/2018, he did not participate in the separation application pertaining to that matter. Additionally, Pita has only raised a special plea of prescription in the action instituted under case number 41666/2018.

3. The basis for Pita's opposition is that:

[1] In effect, a separation of issues is sought in each of the four actions and therefore essentially four applications for a separation of issues arise for consideration in these proceedings. The applications will, however, for convenience, be referred to as 'the separation application' given that the individual actions involve in some instances an overlap of parties whose special pleas of prescription, as raised in each of the actions, are substantially similar, if not identical, and are met by the self-same replication by the plaintiff in each respective action.

[2] The idea is that the issue of prescription should be determined separately from other issues arising for determination in each action, such as liability, causation and quantum.

3.1. The issues in dispute on the merits and in relation to the question of prescription are inextricably linked, even though at first glance, they might appear discrete, and therefore cannot be conveniently separated;

3.2. If the issue of prescription were to be separated from the other issues, not only would Pita (and other defendants implicated in the proposed consolidated hearing) be deprived of the material procedural advantage provided for in rule 39 (13) to (15) of the Uniform Rules of Court, but he will then be forced to attend and/or participate in an additional hearing (being the separate consolidated hearing) in respect of which he is only a directly affected role player in respect of one of the four actions;

3.3. The expeditious disposal of the litigation in the four separate actions will best be served by a court dealing with *all* the various issues arising for determination at the same hearing.

4. None of the other defendants (apart from Pita) who have raised special pleas of prescription in the four actions[3] have either objected to or opposed the relief sought by Transnet in these proceedings.

5. In terms of each of the respective defendants' special pleas of prescription, it is alleged that the actions instituted by Transnet have become prescribed because the summonses in each of the actions were issued more than three years after the date on which prescription started to run, being the date on which certain alleged overpayments were made by Transnet to the companies (Regiments and Trillian[4]) who are defendants in one or the other

[3] These include the fourth, fifth, sixth and seventh respondents herein (the sixth and seventh respondents as second and third defendants in the action under case no. 41666/2018); (the seventh respondent as second defendant in the action instituted under case no. 44041/2018 and the fourth defendant in the action instituted under case no. 44043/2018); (the sixth respondent as third defendant in the action instituted under 44359/2018); and (the fifth respondent as second defendant in the action instituted under case no. 44359).

[4] Being either: Regiments Capital (Pty) Ltd or Trillian Asset Management (Pty), Ltd /Trillian Capital Partners (Pty) Ltd/r Trillian Financial Advisory (Pty) Ltd, depending on the action in question.

of the four actions. In respect of the companies, Transnet's main cause of action is based on unjust enrichment.[5] Its alternative claim is based on an excusable error on the part of Transnet employees who were responsible for the payment of creditors, who made the overpayment whilst honestly, genuinely but mistakenly (and consequently excusably) believing that more was due, owing and payable to the company in question than was in fact the case, resulting in the implicated company (Regiments or Trillian) being enriched and Transnet being impoverished by the overpayment made to it.

6. The cause of action against the individuals who are defendants in two of the actions and who are alleged to have been senior and/or executive managerial employees of Transnet at the relevant time, is based on their fraudulent collusion in misrepresenting the amount payable to the company concerned in each action, thereby causing Transnet to make an overpayment to the company concerned, alternatively, a breach by them of their statutory and contractual fiduciary duties owed to Transnet in recommending and/or soliciting and/or approving and/or permitting the overpayments concerned in the respective actions.

7. In terms of the special pleas of prescription, it is alleged that the claims made in the respective actions have become prescribed in the following circumstances:

    7.1. In respect of the action instituted under case number 41666/2018: The alleged overpayment of R189 240 000.00 was allegedly made to Regiments on 11 June 2015 whilst summons was issued on 9 November 2018, i.e., more than three years thereafter;

[5] This claim is premised on Transnet paying more than was due to the company concerned so that the said company was without cause, unjustifiably enriched, and Transnet impoverished by the amount of the overpayment forming the subject matter of each respective action.

7.2. In respect of the action instituted under case no 44041/2018: an overpayment of R93 480 000.00 was allegedly made to Trillian on 3 December 2015, with summons being issued on 23 November 2018;

7.3. In respect of the action instituted under case no 44043/2018: an overpayment of R41 040 000.00 was allegedly made to Trillian on 26 April 2016 whilst summons was only issued on 23 November 2018;

7.4. In respect of the action instituted under case number 44359/2018: an overpayment of R79 230 000.00 was allegedly made to Regiments on 30 April 2014, whilst summons was only issued on 27 November 2018.

8. Transnet replicated to the special pleas. Its replication in each action is the same. Transnet alleges that it only became aware of the identity of the defendants as debtors and the facts from which the debts arose during September or October 2018, when MNS Attorneys reported to the new Board - appointed in May 2018 - that overpayments had been made to Regiments or Trillian for transaction advisory services. MNS Attorneys also reported on the circumstances of how those overpayments were made or were caused to be made by the individual defendants pursuant to investigations conducted by them between February 2018 to September and/or October 2018.

Relevant legal principles

9. 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." (emphasis added)

10. Under this rule, a court must grant an application for separation unless it would not be convenient to separate issues.

11. Convenience in the context of the rule concerns the convenience of all parties and of the court, and is established when the advantages outweigh the disadvantages of separation.[6]

12. In *Blair Atholl*,[7] The Supreme Court of Appeal endorsed that which is stated in D E van Loggerenberg *Erasmus Superior Court Practice* (2016) 2 ed at D1-436:

> "'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…
>
> 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) (emphasis added).

The court went on to state as follows:[8]

> 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:

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[6] See *Lappeman Diamond Cutting Works (Pty) Ltd v MIB Group (Pty) Ltd (No 2)* 1997 (4) SA 921 (W) at 927D.
[7] *The City of Tshwane Metropolitan Municipality v Blair Atholl Homeowners Association* 2019 (3) SA 398 (SCA) ('Blair Atholl') at paras 49-50.
[8] Id *Blair Atholl,* at paras 51-53.

'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.'

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.'

....

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."

13. When it comes to the consolidation of actions or hearings, a court has a discretion whether or not to order consolidation. As was stated in *Stone*:[9]

[9] *New Zealand Insurance Co Ltd v Stone* 1963(3) SA (CPD) at 69 A-B ("*Stone*").

"In … an application for consolidation the Court, it would seem, has a discretion whether or not to order consolidation, but in exercising that discretion the Court will not order a consolidation of trials unless satisfied that such a course is favoured by the balance of convenience and that there is no possibility of prejudice being suffered by any party. By prejudice in this context it seems to me is meant substantial prejudice sufficient to cause the Court to refuse a consolidation of actions, even though the balance of convenience would favour it. The authorities also appear to establish that the *onus* is upon the party applying to Court for a consolidation to satisfy the Court upon these points."

14. It is clear from Rule 11[10] of the Uniform Rules of Court that convenience is the paramount consideration in a consolidation application. The avoidance of a multiplicity of actions and attendant costs are other considerations in terms of the rule.[11]

15. From a reading of the pleadings in the respective actions, disputes on the merits *inter alia* relate to: what amount was due to Regiments (in the actions under case numbers 41666/2018 and 44359/2018) and Trillian (in the actions under case numbers 44041/2018 and 44043/2018); whether the companies concerned were overpaid by Transnet in the absence of a valid *causa* for such receipt, alternatively, whether the overpayment occurred due to an excusable error on the part of those Transnet employees responsible for the payment of creditors; what the amount of the overpayments are in each instance; whether overpayments were made as a result of either fraudulent collusion between the individual defendants and Regiments or Trillian in *inter alia* misrepresenting the amount due, owing and payable to the company concerned, thereby causing Transnet make the overpayment; or whether the individuals who are defendants breached their fiduciary duties arising from contract and statute in recommending the overpayment to the

[10] Rule 11 reads, in relevant part, as follows:
"Where separate actions have been instituted and it appears to the court convenient to do so, it may upon the application of any party thereto and after notice to all interested parties, make an order consolidating such actions…"
[11] See: *Mpotsha v Road Accident Fund and Another* 2004(4) 696 (C) at 699 E-F.

company concerned and thus in preventing the overpayments from being made in each instance.

16. Transnet claims from each of the respondents (defendants in the actions) on an alternative basis. In other words, there are two causes of action against each of the respondents, be it Regiments or Trillian or the individuals who are defendants. Whether an overpayment in fact occurred, as alleged in each action, remains hotly disputed on the pleadings. Furthermore, each action is concerned with a different and independent contractual regime.

17. As regards the issue of prescription, there is no dispute between the parties that a debt does not become due until the creditor has knowledge or should have had knowledge of the identity of the debtor and the facts from which the debt arose. Creditors are deemed to have knowledge of the identity of the debtor and the facts from which the debt arose if they could have acquired that knowledge by exercising reasonable care.

18. The onus is on the defendants to prove prescription, i.e., that Transnet had knowledge of their identities and the facts on which the debts against them arose, more than three years before summons was issued in each of the actions.[12]

19. As indicated earlier, Transnet has pleaded the same replication in each of the actions, namely, that it only became aware of the identity of the defendants as debtors and the facts from which the debts arose during September or October 2018.

Submissions on behalf of Transnet

20. Transnet contends that the issue/s in the special pleas are limited and can conveniently be excised from the rest of the issues in the action; the

[12] See: *Fourie v Minister of Police* 2019 JDR 0682 (GJ) at paras 6-11, a case in which Van Der Linde J applied the legal principles set out in *Gerick v Sack* 1978 (1) SA 821 (A) at 824.

evidence relevant to those issues is limited and convers a limited area of dispute; the determination of the special pleas, if successful, would put an end to further litigation against those defendants who raised special pleas and would thereby save costs; and separation would in the circumstances be advantageous, that is, in the absence of Pita showing that substantial and material disadvantages would result from determining the special pleas separately.

21. The dispute arising out of the special pleas and replication filed in each action is, when did Transnet become aware that overpayments were made to the companies because of either an alleged breach of fiduciary duties owed by the individual defendants to Transnet to prevent those overpayments from being made, or because of the alleged fraudulent collusion on the part of the individuals, as relied on in the actions instituted under case numbers 41666/2018 and 44043/2018.

22. Transnet accepts, by virtue of its replication, that it has the duty to begin in relation to the issue of prescription. It submits that the evidence that it is required to lead in support of its replications is restricted to the following questions: when did it first obtain knowledge that overpayments were made to Regiments and Trillian because of the breaches of fiduciary duties by the individual defendants or on account of their fraudulent collusion? Or, whether it only acquired knowledge when it did because of its failure to exercise reasonable care? That evidence, so it was contended, is not relevant to the disputes on the merits and there is no likelihood of any major duplication of evidence.

23. As regards the alternative claim based on fraudulent collusion, in a separated hearing of the special pleas, the question that will arise is not when the various defendants colluded, but rather when the Board obtained knowledge

of the collusion and whether there was anything Transnet could have done, through its reasonable efforts, to obtain knowledge thereof earlier.

24. Transnet submits that a consolidated hearing of the special pleas would be convenient and not one defendant would or should be prejudiced thereby in that:

(i) The plaintiff is the same;

(ii) The defendants are the same, and different, across the four actions;

(iii) The dispute/s arising out of each special plea and replication is/are the same;

(iv) The evidence and witness/es is/are or will be the same;

(v) Accepting Transnet's duty to begin, based on its replication, the defendants will have an opportunity to cross-examine Transnet's witness/es and will have an opportunity to rebut the restricted evidence; and;

(vi) The evidence relevant to the special pleas is restricted to the issue of prescription and such evidence is not relevant to the merits.

25. Transnet thus submits that the special pleas, which are self-standing defences, ought to be separated from the merits and quantum in the actions for determination at one consolidated hearing.

Submissions on behalf of Pita (eighth respondent)

26. Pita submits that the issues to be canvassed during testimony in respect of the pleas of prescription are inextricably linked to the issues that would need to be examined and investigated as part of the hearing of the merits in each of the actions. In this regard, it is submitted that:

26.1. The four actions involve entirely different and independent service contracts. The conduct of each of the defendants and the execution by individual defendants of their duties and obligations in respect of

each contract will need to be scrutinised in order to determine whether they are liable on the basis of fraudulent collusion and/or breach of their respective fiduciary duties;

26.2. Where special pleas of prescription have been raised, Transnet's knowledge (actual or deemed) of the alleged fraudulent collusion and/or breach of fiduciary duties would need to be determined within the context of each of the different contractual regimes applicable in each of the actions;

26.3. Thus, in the event of separation and consolidation, evidence relevant to the special pleas of prescription would need to be adduced within the context and against the background of four independent contractual regimes. The same evidence will then be repeated in respect of the merits trials;

26.4. Evidence that will need to be adduced in respect of the merits of each of the independent claims will to a larger or lesser extent also enter the fray and be adduced in determining Transnet's knowledge (actual or deemed) of the facts that gave rise to its four different claims, each of which is to be considered within the context of a differing contractual regime.

27. Pita thus submits that the issues in dispute which are to be canvassed in a separated hearing are interwoven with the issues in dispute on the merits so that they cannot be conveniently separated, as part of the same evidence pertaining to each of the merits trials will have to be led in determining the separated issue, so that the practicalities of the matter do not satisfy the required threshold of convenience.

28. From a practical perspective, only the seventh respondent (Gama) has raised a special plea of prescription in the actions instituted under case numbers 44041/2018 and 44043/2018. Thus, irrespective of the outcome of Gama's

special plea, the actions will in any event proceed on the merits against Pita and the other defendants in those actions. Moreover, since Pita has only raised a special plea of prescription in the action instituted under case no. 41666/2018, if a separation were to be ordered, not only would he be forced to participate in a hearing on the separated issue in respect of the other three matters, but he would then be forced to participate in four trials as opposed to three, as would be the case if no separation is ordered. Therefore, so it was submitted, a separation of the issue of prescription would not have the potential to curtail the litigation expeditiously, nor will potentially bring about finality of the actions.

29. As regards the action instituted under case number 41666/2018, only three of the defendants (including Pita) have raised special pleas of prescription.[13] Default judgment was previously granted against the fourth defendant (Ramosebudi-the ninth respondent herein), who has since applied for rescission of judgment, which application is pending. If rescission of judgment is granted, the fourth defendant may decide to raise a special plea of prescription. The practical implication, in such event, is that one court would decide the special pleas raised by three defendants on a consolidated basis whilst the trial court hearing the merits would in any event have to decide the fourth defendant's special plea of prescription in the merits trial.

30. As regards the action instituted under case no. 44359/2018: Should a separation of issues be granted, Pita will have to sit through an extended consolidated hearing in respect of four different actions, meaning that he will be involved in four trials as opposed to three, and will have to partake in an additional hearing to determine the issue of prescription (should separation be ordered) - albeit that he has only raised a special plea of prescription in one action - where evidence will, *inter alia*, be adduced in respect of the

[13] Being: Singh (second defendant/sixth respondent), Gama (third defendant/seventh respondent) and Pita (fifth defendant/eighth respondent).

matter under case no. 44359/2018, to which he is not even a party. He is thus prejudiced not only by the delay in having the three actions in which he is a party determined on their merits, but by the costs that will be occasioned by an additional extended hearing.

31. Irrespective of whether Transnet assumes the duty to begin at the proposed consolidated hearing, should a separation of issues be granted, Pita submits that the procedural advantage provided for in Rule 39 (13) to(15) will be lost to him and the other defendants in each of the actions, which redounds to their prejudice.

Discussion

32. The fact that four separate actions were instituted against the some of the same defendants (including different defendants), presupposes that the factual basis for the relief sought in each action is distinct, given that different contracts are applicable in each of the actions. Each of the defendants in the actions are represented by different legal practitioners, meaning that various sets of attorneys and counsel will be involved in each of the trials, which will proceed separately, irrespective of whether or not the special pleas of prescription are to be determined separately from all other issues in the actions at a consolidated hearing.

33. For purposes of determining the special pleas of prescription raised in the four actions, a court will be required to determine whether the plaintiff's claim has become prescribed in circumstances where the overpayment is alleged to have been made on a certain date, with summons being issued more than three years later. In this regard, Transnet argues that the pivotal issue to be determined is when it either obtained or ought reasonably to have obtained knowledge of the overpayment made by it in each action instituted, given that the date of the overpayment is when the indebtedness

arose. Pita, on the other hand, submits that the question of when Transnet obtained or ought reasonably to have obtained knowledge of the overpayment is interwoven with the facts giving rise to the cause of action in each instance.

34. In terms of section 12(1) of the Prescription Act, 1969, prescription commences to run as soon as the debt is due. In terms of section 12(3) 'A debt shall not be deemed to be due until the creditor has knowledge of the identity of the debtor and of the facts from which the debt arises: Provided that a creditor shall be deemed to have such knowledge if he could have acquired it by exercising reasonable care.'

35. For purposes of determining prescription, Transnet's knowledge of the facts giving rise to the alleged debts (i.e., the overpayments) would have to be investigated and examined.

36. When considering the claim against the defendants based on fraudulent collusion, the fact of the overpayment is but one of the *facta probanda*, whilst the fraudulent collusion of one or two or more defendants would encompass the rest of the *facta probanda*. Relevant considerations in a prescription enquiry would include, *inter alia*, the following: But for the collusion, would or could Transnet reasonably have obtained knowledge of the overpayments earlier? If defendants who had knowledge of the overpayment prevented the company (Transnet) from obtaining knowledge because of their collusion, then the facts concerning the the collusion would be relevant, for purposes of prescription, to show that Transnet did not or could not reasonably have known about the overpayment earlier. Thus facts underpinning the alleged fraudulent collusion, including when it occurred and when Transnet acquired knowledge or should reasonably have become aware thereof, would be relevant in determining the issue of prescription

37. A further consideration is this: In its replication, Transnet avers that the claims have not become prescribed because it only received a report from M&S Attorneys during September or October 2018 pursuant to an investigation conducted by such attorneys at the request of the new Board, and Transnet therefore only learned about irregularities uncovered by those investigations and the overpayments made, in September or October 2018. I agree with the submission of Pita's counsel that one would have to consider the contents of the investigation report, which may point out, as far as Pita is concerned (or any one of the other individual defendants), that Pita (or one or the other defendants) was already involved in committing irregularities before the overpayments forming the subject matter of the respective actions were made. The enquiry, for purposes of prescription, would be whether Transnet obtained knowledge thereof by virtue of the knowledge thereof possessed by other Transnet employees, whose knowledge is attributable to Transnet as corporate Plaintiff. Thus, insofar as the contents of the investigation report are relevant to the merits of the claims, it will likely be relevant to determine the date upon which Transnet ought reasonably to have obtained knowledge about the facts giving rise to the cause of action relied upon.

38. Transnet's main claim against either Regiments or Trillian is based on the *condictio sine causa*. Its alternative claim is based on the *condictio indebiti*. In terms of the *condictio indebiti*, a party who, owing to an excusable error, made a payment to another in the mistaken belief that the payment was owing, may claim repayment from the recipient to the extent that the latter was unjustifiably enriched at the claimant's expense who was impoverished thereby.[14] Whether the error was reasonable depends on the circumstances in which the payment was made.[15] The date when Transnet found out about

[14] See: *Willis Faber Enthoven (Pty) Ltd v Receiver of Revenue* 1992 (4) SA 202 (A) ('*Willis Faber')*
[15] Id *Willis Faber.*

the mistake that led to or resulted in the overpayment being made, or when it ought reasonably to have obtained such knowledge, will be relevant for purposes of determining the issue of prescription. In order to answer the question as to why Transnet could not reasonably have obtained knowledge of the mistaken overpayment earlier, the facts giving rise to the mistake that led to an overpayment being made would have to be examined and interrogated. The question then again arises as to whether the company was prevented from obtaining such knowledge by people who in fact had knowledge thereof but who prevented the company from acquiring such knowledge, or whether or not any other Transnet employees obtained knowledge thereof prior to the date of overpayment so that their knowledge is attributable to Transnet as corporate plaintiff.

39. What therefore appears at first blush to be a discreet issue (i.e., the issue of prescription, which requires proof of the date on which Transnet actually obtained or should reasonably have obtained knowledge of the alleged overpayments and the facts giving rise thereto) is not entirely discreet after all. In my view, it is unrealistic to suggest, as Transnet does, that there will not be a significant measure of overlap in the evidence required to determine the issue of prescription and the merits of the individual claims.

40. On the authority of *Blair Atholl*, it matters not that the other defendants (apart from Pita) failed to oppose these proceedings. The convenience of all concerned must be taken into consideration.

41. In *Privest*,[16] the Supreme Court of Appeal emphasized that the objective of Rule 33(4) of the Uniform Rules of Court is to facilitate the convenient and expeditious disposal of litigation and that 'Courts should not shirk their duty to ensure that at all times, when approached to separate issues, there is a realistic prospect that the separation will result in the curtailment and expeditious disposal of litigation.'

[16] *Privest Employee Solutions v Vital Distribution Solutions* 2005 (5) SA 276 (SCA) at paras 26-27.

42. In respect of all defendants who have not raised pleas of prescription (including Pita, who did not raise a plea of prescription in two of the actions), it cannot be gainsaid that irrespective of the outcome of the special pleas under case numbers 44041/2018 and 44043/2018, the trials on the merits of the matters will in any event need to proceed and will continue separately. If there were to be a separation of issues, and if Pita's special plea under case number 41666/2018 were to fail, then the separation will give rise to Pita being involved in four trials as opposed to three, as would otherwise be the case in the absence of a separation. Moreover, in respect of two actions in which Pita did not raise a special plea of prescription, Pita (and other defendants who did not raise special pleas in the four actions) would have to incur the additional expense of an extended hearing on the separated issue, notwithstanding that he is not implicated one of the four actions and further notwithstanding that he did not raise a special plea in two of the actions.

43. Furthermore, what is envisaged in Rule 39 (13) to(15)[17] is the following: where the onus in respect of certain issues are on the defendants, (*in casu*, in relation to the issue of prescription in respect of those defendants who have raised raised prescription) whilst the onus in respect of the other issues is on the plaintiff (*in casu*, *inter alia*, in respect of a breach by individual

[17] The sub-rules reads as follows:
"(13) Where the onus of adducing evidence on one or more of the issues is on the plaintiff and that of adducing evidence on any other issue is on the defendant, the plaintiff shall first call his evidence on any issues in respect of which the onus is upon him, and may then close his case. The defendant, if absolution from the instance is not granted, shall, if he does not close his case, thereupon call his evidence on all issues in respect of which such onus is upon him.

(14) After the defendant has called his evidence, the plaintiff shall have the right to call rebutting evidence on any issues in respect of which the onus was on the defendant: Provided that if the plaintiff shall have called evidence on any such issues before closing his case he shall not have the right to call any further evidence thereon.

(15) Nothing in subrules (13) and (14) contained shall prevent the defendant from cross-examining any witness called at any stage by the plaintiff on any issue in dispute, and the plaintiff shall be entitled to re-examine such witness consequent upon such cross-examination without affecting the right given to him by subrule (14) to call evidence at a later stage on the issue on which such witness has been cross-examined. The plaintiff may further call the witness so re-examined to give evidence on any such issue at a later stage."

defendants of their fiduciary duties and in relation to the claim based on their fraudulent collusion), the plaintiff has the duty to begin and then importantly, may be cross examined on *all* issues, including the issue in respect of which the defendants bear the onus. On behalf of Pita, it was submitted that it is no solution to argue, as Transnet does, that the plaintiff has assumed the duty to begin on the issue of prescription and that therefore the defendant will have an opportunity to cross-examine its witnesses first. Transnet remains firm in its assertion that any prescription trial will be restricted to curtailed issues only. If that be so, then the fact remains that the defendants who wish to employ rule 39(13) to (15) will not be able to cross examine Transnet's witnesses in respect of *all* issues. The defendants will be restricted in their cross-examination to the issues raised in the replication, namely the date upon which the plaintiff had knowledge of the overpayment and the fraudulent collusion or the rest of the facts giving rise to the respective overpayments in relation to the respective causes of action.

44. The aforementioned disadvantages are not in my view outweighed by the possible advantage to be derived from a separation, should the special pleas of prescription be upheld, namely, the disposal of the action/s against those defendants who successfully raised prescription pleas, with the shortening of the respective merits trials (sans those defendants) which will nonetheless have to proceed against the defendants who did not raise special pleas (including Pita in two of the actions). If the special pleas were not to succeed, then no possible advantage will have been derived from a separated hearing. Instead, a lengthy trial involving an overlap of evidence that will in any event have to be canvassed during the merits trials will have ensued at great expense to the parties.

45. In the circumstances and for all the reasons given, I am not persuaded that it would be convenient to separate the special pleas of prescription for separate determination at a consolidated hearing. It follows therefrom that the applications in each of the four actions fall to be dismissed. It is apparent from the Applicant's founding papers that no consolidation was sought unless the separation application in each of the four trials was successful.

Costs

46. Both parties involved in these proceedings employed the services of two counsel. The issues were far from simple and in my view, warranted the employment of two counsel.

47. The general rule is that costs follow the result. I see no reason to depart therefrom. The eighth respondent seeks a dismissal of the application/s with costs, inclusive of the cost consequent upon the employment of two counsel.

48. Accordingly, the following order is granted:

ORDER:

1 The applications for a separation of issues under case numbers 41666/2018, 44041/2018, 44043/2018 and 44359/2018 are dismissed with costs, including the costs attendant upon the employment of two counsel.

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AVRILLE MAIER-FRAWLEY
JUDGE OF THE HIGH COURT,
GAUTENG DIVISION, JOHANNESBURG

Date of hearing:	11 May 2022
Judgment delivered	19 September 2022

This judgment was handed down electronically by circulation to the parties' legal representatives by email, publication on Caselines and release to SAFLII. The date and time for hand-down is deemed to be have been at 10h00 on 19 September 2022.

APPEARANCES:

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