

**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, GRAHAMSTOWN)**

Case No: 851/2017

In the matter between:

ANINE VAN DER WESTHUIZEN

Applicant

And

**STRÖMBECK PIETERSE INCORPORATED
(reg. no.: 2010/017256/21)**

First Respondent

JUSTIN JOHANN STRÖMBECK

Second Respondent

SCHALK WILLEM PETRUS PIETERSE

Third Respondent

JOHAN BARRON FINLAISON

Fourth Respondent

HANNELIE-MARIE BRONKHORST

Fifth Respondent

JUDGMENT

BESHE J:

[1] *Rule 33 (4) of the Uniform Rules* of this court provides that:

“(4) If, in any pending action, it appears to the court *mero motu* that there is a question of law or fact which may conveniently be decided either before any evidence is led or separately from any other question, the court may make an order directing the disposal of such question in such manner as it may deem fit and may order that all further proceedings be stayed until such question has been disposed of, and the court shall on the application of any party make such order unless it appears that the question cannot conveniently be decided separately.”

[2] Applicant, who is the plaintiff in the main action wants the court to order that the following question of law be separated and decided before any evidence is led:

“Is it necessary for the plaintiff to prove fault on the part of the defendants, or any one of them, in order for her claim to succeed?”

It is common cause that the dispute between the parties arises out of an agreement between the parties wherein the defendant's firm of attorneys was to attend to the transfer of plaintiff's property. It is common cause that the said property was indeed sold for a consideration of R740 000.00. Plaintiff did not receive the ± R679 219.00 being the amount she was entitled to after certain disbursements were made, from the defendants. She is now suing the defendants for payment of that amount. According to the applicant, her claim is no longer founded in a contract of a mandate, but on a debtor-creditor relationship. It is on that basis that applicant would like the question whether, that being the case (action based on a debtor-creditor relationship) she is required to prove that the defendants or any of them was negligent, before evidence can be led. Initially, applicant had sued on the basis that the first defendant had breached a mandate she gave to it. The liability of the remainder of the defendants is based on them being directors in first defendant.

[3] There appears to be an acknowledgement from the parties that, applicant's claim as it was initially (before the amendment of her particulars of

claim), she would have been required to prove fault of the part of the defendants. This is also apparent from respondents' plea which was filed in response to plaintiff's particulars of claim before the amendment thereof. Which occurred after the dismissal of her application for summary judgment against the defendants.

[4] It is clear that the parties are not *ad idem* as to what the consequences of their agreement is. Whether the agreement is a simple debtor-creditor one or one based on a mandate (for example, as between attorney / client). Each party therefore carries the *onus* of proving that the relationship is one as contended for by each party, as *Mr Van Der Linde* rightly pointed out.

[5] *Ms Watt* for the applicant acknowledged that a decision on the separated question (should one be ordered) is not likely to dispose of all issues in the matter, but will have the effect that the parties will be on the same page as to nature of the relationship the agreement between the parties created.

[6] There also appears to be an acknowledgement from applicant's side that there might be a need for evidence to be led in order to determine the nature of the relationship between the parties – or in interpreting the agreement between the parties. This led to *Ms Watt* arguing in the alternative that, should the court deem it appropriate to order the separation of the question sought to be separated - it may make such order but exclude the words "and before any evidence is led" from its order. This in order to deal

with respondents' concern that if the order is granted as sought, the respondents will be precluded from leading evidence regarding the interpretation of the contract between the parties.

[7] The application is opposed on the basis mainly that:

(i) The question sought to be separated does not arise from the pleadings – applicant's case as it stands.

(ii) Because the interpretation of a contract takes the form of a unitary approach – being the consideration of not only the text but the background facts, that it will be inevitable that evidence will need to be led in a bid to determine the proper interpretation of the contract between the parties. And that should there be a separate enquiry in this regard, witnesses will be required to give evidence twice, which is not desirable.

(iii) That the issues in this matter are so inextricably linked that the expeditious disposal of the litigation will likely be achieved if the issues are ventilated in one hearing.¹

[8] I am inclined to agree with *Mr Van Der Linde* especially for the second and third ground of opposition mentioned above, that the question contended for by the applicant cannot be decided separately. That it will not be convenient to decide this question separately due especially to the fact that it is extricably linked to the other issues in this matter. I am of the view that it will

¹ Denel (Edms) Bpk v Voster 2004 (4) SA 481 (SCA) at 485 A – B.

convenient, costs effective and time saving to deal with all the issues in one hearing.

[9] Accordingly the application for a separation of issues in respect of *Rule 33 (4)* is dismissed with costs.

N G BESHE
JUDGE OF THE HIGH COURT

APPEARANCES

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Date Heard	:	29 March 2018
Date Reserved	:	29 March 2018
Date Delivered	:	3 April 2018