SOUTH GAUTENG HIGH COURT, JOHANNESBURG

CASE NO: 2009/44153

DATE:29/04/2011

NOT REPORTABLE

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

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DATE SIGNATURE

In the matter between:

JOHAN HENDRIK DE WET First Applicant/Plaintiff

JAMES MOTODZI NESONGOZWI Second Applicant/Plaintiff

ILONKA VAN BREDA Third Applicant/Plaintiff

and

MEMOR (PTY) LTD Respondent/Defendant

J U D G M E N T

TSOKA, J:

[1] This is an application in terms of Rule 33(4) of the Uniform Rules of Court. Rule 33(4) reads –

> *"(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 questions cannot conveniently be decided separately."*

[2] It is common cause that there is a pending action which is set down for trial on 14 March 2011. The application is on the instance of the Plaintiffs who are of the view that the defence of fraudulent misrepresentation, pleaded by the Defendant, may conveniently be decided separately from any other issues raised in the pleadings.

[3] The function of the Court, in an application in terms of Rule 33(4) such as the present, was stated in *Minister of Agriculture v Tongaat Group Ltd* 1976 (2) SA 357 (D) at 364D-E as follows –

> *"…the function of the Court in an application of this nature is to gauge to the best of its ability the nature and extent of the advantages which would flow from the grant of the order sought and of the disadvantages. If, overall, and with due regard to the divergent interests and considerations of convenience (in the wide sense I have indicated) affecting the parties, it appears that such advantages would outweigh the disadvantages, it would normally grant the application."*

[4] In *Tudoric-Ghemo v Tudoric-Ghemo* 1997 (2) SA 246 (WLD) it was held that the word 'convenient' in the context of Rule 33(4) was used to convey not only the notion of facility or ease or expedience but also the notion of appropriateness: The procedure as contemplated in Rule 33(4) would be 'convenient' if, in all the circumstances, it appeared to be fitting and fair to the parties concerned.

[5] In *African Bank v Soodhoo* 2008 (6) SA 46 (D) at 51B-D the Court said the following –

> *"The general principle in law would appear to be that notwithstanding the wide powers conferred on a court under rule 33(4) of the Uniform Rules of Court it is ordinarily desirable, in the interests of expedition and finality of litigation, to have one hearing only at which all issues are canvassed so that the court, at the conclusion of the case, may dispose of the entire matter. Minister of Agriculture v Tongaat Group Ltd 1976 (2) SA 357 (D) at 362G - H, and Denel (Edms) Bpk v Vorster 2004 (4) SA 481 (SCA) ((2004) 25 ILJ 659) at 485B - C have reference. In some instances, however, the interests of the parties and the ends of justice are better served by disposing of a particular issue or issues before considering other issues which, depending on the result of the issue singled out, may fall away. (Minister of Agriculture (supra) at 362H.)"*

[6] The general principles gleaned from the abovementioned cases may briefly be summarised as follows. 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 the disadvantages in granting such 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,

[7] Having briefly set out the general principles to be adopted in an application for separation of issues in terms of Rule 33(4), the question to be answered in this matter is the following: Is it convenient for this Court to grant the application for separation? To answer this question it is essential to establish the issues defined in the pleadings.

[8] The plaintiffs' claims against the defendant are based upon a written Sale Agreement ("*the Agreement*") in terms whereof the defendant purchased from the plaintiffs the entire shareholding in a company known as Gundo Resources (Pty) Limited ("*Gundo*") for R23 million, The agreement was preceded by an option dated 16 October 2008. In terms of the option, Gundo confirmed that it was the holder of valid prospecting rights for chrome over certain properties in Palmietfontein. The defendant was to carry out due diligence. If the defendant was satisfied with the exercise, it would pay the plaintiffs an exclusive fee of R2,5 million. The option period would then commence running. During this option period, the defendant would have the right to acquire plaintiffs' entire shareholding in Gundo for R23 million. The

defendant exercised the option on 12 December 2008 and agreed to pay the purchase price. It paid the exclusive fee of R2,5 million.

[9] In February 2009 the parties concluded a written Sale of Shares and Claims Agreement ("*the sale agreement*"). In fact the merx that was sold was not shares and claims, but the prospecting rights, the sole asset of Gundo. The sale agreement was subject to suspensive conditions defined in Clause 11 of the sale agreement. The plaintiffs gave the defendant various warranties.

[10] According to the plaintiffs, the suspensive conditions were fulfilled and despite the fulfilment, and demand for payment of the deposit and the purchase price, the defendant, on 4 September 2009, repudiated the sale agreement.

[11] In its plea, the defendant admits the option and the sale agreement but pleads that both were validly cancelled. The defendant further pleads that the purchase price of R23 million was induced by misrepresentation made by the first plaintiff acting on behalf of all the plaintiffs that there were approximately 23 million resource tons of minable chrome located on Portion 6 and Remaining Extent of Portion 5 of the farm Palmietfontein No. 208JP. The defendant further pleads that the clause of the sale agreement that denies it the right to raise deliberate misrepresentation as a defence to cancel the sale agreements is contra bonos mores, unlawful and unenforceable. It is further

pleaded by the defendant that the plaintiffs gave the defendant various warranties with regard to Gundo and the prospecting rights, which warranties were breached by the plaintiffs.

[12] The defendant pleads further that the sale agreement was induced by deliberate and fraudulent misrepresentation with the result that on 4 September 2009, in a letter addressed by its attorneys of record to the plaintiffs' attorneys of record, it cancelled the sale agreement and demanded repayment of the exclusive fee in the sum of R2.5 million.

[13] The plaintiffs contend that fraud is defendant's main complaint and defence. They further contend that the resolution of the defence of fraud would curtail the duration of the trial, save costs and reduce the number of witnesses to be called, eliminating the leading of unnecessary evidence. The Plaintiffs contend further that, although in terms of clause 20.5 of the sale agreement, the defendant is precluded from relying on innocent, negligent or deliberate misrepresentation, they abandon their reliance on deliberate misrepresentation as precluding the defendant from raising such misrepresentation as a defence. See *Wells v SA Alumenate Co*. 1927 AD at 73. They, however, insist that the defendant is precluded from relying on innocent or negligent misrepresentation in order to avoid the sale agreement.

[14] According to the plaintiffs, if the defendant proves fraud on their part, such fraud will be dispositive of the entire dispute between the parties.

[15] According to the defendant, fraud is not the only defence raised in the pleadings. In fact in the plea several defences, such as non-fulfilment of the suspensive conditions, breach of the agreement and breach of good faith, warranties and finally, breach of the sale agreement by the plaintiffs, are raised which led to the defendant cancelling the sale agreement.

[16] At the heart of the dispute between the parties, are the prospecting rights that the defendant purchased from the plaintiffs. It is correct that the defendant, in its plea, raises fraudulent misrepresentation in the way the prospecting rights were awarded to the plaintiffs, fraudulent misrepresentation regarding the quantity of the chrome on the property as well as falsification of the geological report furnished to the defendant, which report materially differed from the one submitted to the Department of Minerals and Energy. According to the defendant, the prospecting rights have their own relevant conditions and provisions which have been breached by the plaintiffs. The defendant contends that it is simplistic to characterize fraud as dispositive of the entire dispute between the parties.

[17] It is so, in my view, that the issue of fraud may dispose of part of the dispute between the parties. It is further so that the duration of the trial and some witnesses, in particular the first plaintiff, may be done away with. This is, in the context of this matter, a pyrrhic victory for the plaintiffs. The bigger picture reveals that even if fraud is decided separately from the other issues raised in the pleadings, the first plaintiff still has to appear again in court to testify as to whether the suspensive conditions were fulfilled or not. The three

Plaintiffs' bona fides in dealing with the defendant still needs to be tested in court. The issue whether the warranties given to the defendant regarding Gundo's liabilities and Gundo's maintenance of the validity of the prospecting rights, in terms of the Mineral and Petroleum Resources Development Act No 28 of 2002, have been breached or not, still has to be determined by the court.

[18] That the entire dispute between the parties would not be disposed of by separating the issue of fraud from the other issues, is obvious. It is also obvious that this matter would have to come before court for all the other issues to be decided. The testimony of the geologist that led to two different reports being submitted to the Department of Minerals and Energy in support of the application for the prospecting right, and to the defendant, may still be required.

[19] The law frowns upon multiplicity of actions. It would not be convenient to the court, with its overstretched resources, to be engaged in this matter twice. Courts further discourage piecemeal hearing of issues. What would happen should the finding of the court hearing the issue of fraud be the subject of an appeal? The remaining issues would necessarily be held over until the disposal of the appeal. This cannot be in the interest of justice. Fairness to the parties and their respective witnesses dictates that litigation should commence and be finalized expeditiously. This, in my view, would enhance the administration of justice. The granting of this application,

although convenient to the plaintiffs, in particular with regard to the onus of proof, is undoubtedly inconvenient to the court and the defendant.

[20] In *Denel* referred to above at 484 paragraph [3], the Court said the following –

> *"….Rule 33(4) of the Uniform Rules - which entitles a Court to try issues separately in appropriate circumstances - is aimed at 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."*

[21] The issue of fraud is the common thread that runs through the defence raised in defendant's plea. It does not only relate to the misrepresentation regarding the status, and liabilities of Gundo but relates also to the fraud that the defendant contends was perpetrated by either the plaintiffs or the geologist in applying for the prospecting rights on the property. The beach of the bona fides and the warranties may be the product of the alleged fraud. Other than the fraud, there is also more than one issue raised in the plea that would still require determination by the court in order to dispose of the matter.

[22] In the circumstances of this matter, the conclusion reached is that it is not convenient to separate the issue of fraud from the other issues raised in defendant's plea. The application deserves to be dismissed.

[23] Both parties engaged the services of Senior Counsel. Any order of costs made shall include costs of Senior Counsel.

[24] In the result the application is dismissed with costs, which costs include costs of Senior Counsel.

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M TSOKA
JUDGE OF THE SOUTH GAUTENG
HIGH COURT, JOHANNESBURG

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