REPUBLIC OF SOUTH AFRICA

SOUTH GAUTENG HIGH COURT
JOHANNESBURG

CASE NO: 41859/2011

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

26/4/2013
DATE

SIGNATURE

In the matter between:

VEOLIA V WATER SOLUTIONS AND TECHNOLOGIES (PTY) LTD — Applicant

and

RAMPIPING SYSTEMS (PTY) LTD — Respondent

J U D G M E N T

MODIBA, AJ:

[1] This is an interlocutory application for the separation of issues in terms of Rule 33(4). The plaintiff's claim in the main action is for payment of an

amount due for services rendered. The applicant who is the defendant in the main action has applied for the operative contract between the parties to be determined separately from the merits and quantum at the main trial set down for hearing on 30 April 2013.

[2] The questions to be decided in this application are the following:

2.1 whether there exist two different contracts sought to be relied on by the parties;

2.2 if the question in 2.1 is answered in the affirmative, whether separating the determination of the contract operative between the parties from the determination of the merits and quantum is convenient.

[3] In this judgment I have only considered submissions made on behalf of the parties which I deem relevant for determining these questions.

[4] According to the applicant the parties seek to rely on two different versions of the contract. Counsel for the applicant referred the court to a succinct comparison of the two contracts annexed to his heads of argument where the following differences in these contracts are articulated.

[5] The version of the contract sought to be relied on by the respondent contains:

5.1 the contract schedule (annexure "A" to the plaintiff's particulars of claim);

5.2 standard conditions of sale (annexure F1 to the plaintiff's particulars of claim);

5.3 bill of material (annexure "B" to the plaintiff's particulars of claim);

5.4 surety;

5.5 cession;

5.6 the certificate of indebtedness; and

5.7 consent to the jurisdiction of the magistrates court.

[6] The version of the contract sought to be relied on by the applicant contains the following:

6.1 the scope of works (annexure "L" to the defendant's plea);

6.2 technical specifications, bill of quantities and isometric drawings (annexure "B" to the defendant's plea);

6.3 a quotation (annexures "M", "N" and "O" to the defendant's plea);

6.4 orders (annexure "P" to the defendant's plea);

6.5 standard conditions of purchase (annexures "P", "K16" to "K18" to the defendant's plea);

6.6 an arbitration clause; and

6.7 a warranty clause.

[7] Counsel for the applicant submitted that it is important for the court to first determine which agreement is operative between the parties because the

operative agreement sets out the parties' contractual rights and obligations and is therefore pivotal in determining the merits and quantum. He contended that if there is a separation, the trial will be curtailed significantly thereby saving considerable effort, time and costs. He further pointed out that the minute of the pre-trial conference held in preparation for the trial and signed on behalf of the parties reflects the respondent's agreement that separating the determination of the operative contract from the merits and quantum will curtail the duration of the trial. Furthermore, argued counsel for the applicant, if the version of the contract sought to be relied on by the defendant is found to be the operative contract between the parties, the defendant may apply for stay of the proceedings and refer the matter to arbitration.

[8] Counsel for the applicant correctly pointed out that the test for determining whether the court should order separation is one of convenience as determined in *Minister of Agriculture v Tongaat Group Ltd* 1976 (2) SA 357 (D) at 363. He argued that if this application is granted, and the trial court finds that no contract was entered into because there was no meeting of minds between the parties, the respondent's claim may be based on unjustified enrichment in which case the need to hear evidence on the merits and quantum would be obviated.

[9] In it's answering affidavit, the respondent submits that the contracts relied on by the parties are irrelevant for determining the merits and quantum because the plaintiff's claim is based on allegations of defective workmanship, ordering excessive materials, unauthorised variation orders and

overcharging. These issues can be determined solely by having regard to the work undertaken and without resorting to the terms of the different contracts relied on the by the parties. The respondent further submits that whatever the terms and conditions of the agreement the trial court might find applicable are irrelevant and will not affect the nature and extent of the plaintiff's claim.

[10] When requested to address the court on whether there is one or two contracts operating between the parties, counsel for the respondent argued that there is only one contract operating between the parties. He submitted that the court can determine the terms of that contract by resorting to the work that has been undertaken. He further argued that the defendant has failed to raise a special plea of arbitration prior to filing pleadings in the main action thereby waiving it's right to refer the matter to arbitration.

[11] He further argued that it is not convenient for the contract operating between the parties to be determined separately from the merits and quantum in this matter because witnesses will have to be called to testify twice and that this will prolong the trial.

[12] According to Erasmus Superior Court Practice at B1-234 the entitlement to seek separation of issues was created in the rules so that a factual issue which can give direction to the rest of the case can be determined thereby obviating the need for leading of evidence. In *Rauff v Standard Bank Properties* 2002 (6) SA 693 (W) at 703I-J it was held that this procedure is so important that an attorney should as soon as pleadings have

closed make a strategic assessment of the real trial needs of the case bearing in mind the duty to avoid delays and costs. In it's answering affidavit the respondent submits that the applicant delayed in bringing this application. In my view the assessment of the need to separate issues seems to have only been made at the pre-trial conference during which the parties agreed to the estimated duration of the trial if the separation is ordered and the estimation of the trial if the separation is not ordered. I am further of the view that the assessment of the need to separate the issues was not made late because in terms of Rule 37(6)(f) that is one of the objectives of a pre-trial conference.

[13] I agree with the argument by counsel for the respondent that the applicant may not refer the matter to arbitration at this stage of the proceedings. S6(1) of the Arbitration Act 42 of 1965 precludes such late referral. Furthermore where the validity or the existence of a contract is in dispute, stay of proceedings may not be granted. *Scriven Bros v Rhodesian Hides & Produce Co. Ltd* 1954 (2) SA 262 (N).

[14] I do not see how the trial court would determine the merits and quantum without resorting to the operative contract between the parties. I do not agree with counsel for the respondent that the trial court will be able to determine the merits and quantum by reference to the work itself. The work undertaken between the parties cannot be a barometer by which to measure whether the work was defective or not. That question can only be determined by reference to the operative contract that articulates the performance standards agreed to by the parties. Similarly, the value of the work can only

be determined by reference to the contract amount and other applicable incidental amounts agreed to between the parties.

[15] It is evident from the pleadings and annexures thereto, that the parties seek to rely on different versions of the contract. I agree with the applicant that if the question of the contract operative between the parties is determined first, the main trial will proceed in a logical manner and its duration will be curtailed in that:

15. 1 it will not be necessary for the court to determine the merits and quantum based on two versions of the contract but on one version;

15. 2 if the court finds that there was no meeting of minds between the parties, then the respondent's claim based on contract stands to fail and the need to lead evidence on the merits and quantum is obviated;

[16] I am of the view that the applicant has satisfied the convenience test applicable in an application for separation of issues in terms of Rule 33(4). Therefore the application must succeed.

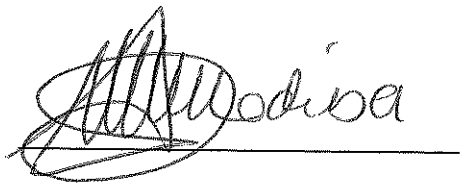
COSTS

[17] The applicant has requested a cost order against the respondent in the event that the application succeeds. The respondent has requested a cost order against the applicant in the event that the applicant's claim is dismissed. It is trite practice that the successful party in a matter is entitled to costs. I am

therefore of the view that having succeeded in this application, the applicant is entitled to costs against the respondent.

ORDER

1. The application in terms of Rule 33(4) is granted.
2. The determination of the operative contract between the parties is to be decided separately from the merits and quantum in the trial set down for hearing on 30 April 2013.
3. The merits and quantum are hereby postponed for separate determination once the operative contract between the parties has been determined.
4. The respondent is to pay the costs of this application.



L MODIBA

Acting Judge of the High Court