REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 20378/2008

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

DATE 1 August 2019 SIGNATURE

In the matter between:

SAP SOCIETAS EUROPAEA (SAP)	**Applicant**
And	
SYSTEMS APPLICATIONS CONSULTANTS (PTY) LTD	**1st Respondent**
t/a SECURINFO	
UNGANI INVESTMENTS (PTY) LTD	**2nd Respondent**

JUDGMENT

TSOKA J

[1] In this application, the applicant, Systems Application Products AG (SAP) (the first defendant in the main action) a German company, seeks an order for separation of a Special Plea on the already separated issue of merits from quantum in terms of Rule 33(4) that this court determine whether the respondent, Systems Applications Consultants (Pty) Ltd t/a Securinfo (SAC) (the plaintiff in the main action) was a party to an agreement (the SDA) it contends it concluded with SAP Systems Integration AG (SAPSI) during 2001.In other words SAP challenges SAC's locus standi to have instituted the main action in this court on the basis of the SDA as this was concluded between Securinfo Limited, a deregistered Irish Company, and SAPSI, and not with SAC as the latter alleges in its particulars of claim.

[2] The basis of the application, according to SAP, is that in terms of Rule 33(4) it would be convenient to dispose of the issue of locus standi raised in the Special Plea without any further delay and thereby save precious time and legal costs.

[3] The application is opposed by SAC. It contends that, inter alia, the issue as to whether SAC was a party to the SDA is inextricably linked with the issue as to whether the SDA was indeed concluded. It is thus SAC's a contention that the determination of the identity of the parties who concluded the SDA and whether the SDA was in fact concluded is in reality two sides of the same coin that is incapable of separation.

[4] The issue for determination by this court is therefore whether it is indeed convenient, on the pleadings, to order the separation of the Special Plea regarding the locus standi of SAC and thus save time and money for all the parties involved including the court.

[5] In the main action SAC describes itself as "Systems Applications Consultants (Pty) Limited trading as Securinfo, a company duly incorporated in accordance with the laws of the Republic of South Africa which carries on business as a software developer and implementer, in particular of security software for SAP systems with its place of business at 32 Springfield Road, Carlswald, Midrand."

[6] SAP AG is a German company incorporated in accordance with the company laws of Germany and carries on business as a developer and marketer, worldwide, of a comprehensive range of enterprise software applications and

business solutions comprising computer programs and related activities with its principal place of business at NeurostraBe 16, D - 69190 Waldorf, Germany.

[7] The second defendant in the main action is Ungani Investments (Pty) Ltd (Ungani) which funds SAP's legal costs in defending the main action instituted by SAC against SAP. Ungani is not party to the present application for separation in terms of Rule 34(4) other than as the funder of SAP's legal costs.

[8] The party that SAC alleges it concluded the SDA with is SAP Systems Intergration AG (SAPSI), also a German company, incorporated in accordance with the laws of Germany with its principal place of business at St Petersburger, Strasse 9, 01069,Dresden, Germany. SAP held and owned in excess of 90% of the issued shares in SAPSI.

[9] This court has jurisdiction to entertain the action instituted by SAC against SAP by virtue of an order granted during 2008 by this court (Claasen J) under Case No.08/10475 to find and/or confirm jurisdiction over SAP by attaching the latter's shares held in SAP (Africa Region) (Pty) Ltd as SAP is a *peregrinus* and the SDA was, according to SAC, concluded in Germany.

[10] The resolution of the issue raised by SAP depends on the correct interpretation of the pleadings filed in this matter.

[11] Prior to embarking on the analysis of the pleadings, it is apt to first restate the warning sounded by the Supreme Court of Appeal when faced with an issue such as the one in the present matter. In *City of Tshwane*[1], Navsa ADP and Motlhe AJA, speaking for the court, said –

'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:

> '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 entitled 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 readily dispose of the matter. It is only after careful

[1] The City of Tshwane Metropolitan Municipality v Blair Atholl Homeowners Association (106/2018 [2018] ZASCA 176 (3 December 2018) para 51

thought has been given to the anticipated course of litigation as a whole that it will be possible properly to determine whether it is convenient to try an issue separately.'

[12] In order for this court to heed the warning issued by the Supreme Court of Appeal, it is necessary to consider the facts and issues raised by the parties in the pleadings.

[13] In 2008, SAC instituted an action in this court against SAP for damages approximately amounting to €600 million on the basis that the latter unlawfully interfered with an agreement, the SDA, entered into between the former and SAPSI. As SAPSI did not sign the SDA which was only signed by SAC, the latter pleaded the circumstances of the negotiation of the agreement, its conclusion and ultimately its implementation by the parties. In particular SAC intends relying on the subsequent conduct of itself and SAPSI and their representatives to prove that the SDA was indeed concluded.

[14] In the alternative, SAC relies on tacit conclusion of the SDA by SAPSI's subsequent conduct after the delivery of its written offer of 6 August 2006.

[15] Although the matter commenced in 2008, it has not been finalized. In 2012 the parties agreed to separate the determination of the issue of the merits from the issue of quantum. The agreement for separation was repeated in 2016. It was on this basis that a case manager was appointed to facilitate the finalization of the determination of the merits.

[16] In the meantime, several legal skirmishes ensued between the parties with the result that no less than four judges of this court dealt with several interlocutory applications, one of which found its way to the Supreme Court of Appeal. That this is a protracted and a slow moving litigation is undeniable. Although in May 2019, the Deputy Judge President of this Court issued a directive for the finalization of all the pre-trial processes in order to render this matter ready for trial in the early part of 2020, the matter is still not ready for trial. This is common cause.

[17] Once the merits were separated for determination in 2012 and confirmed in 2016, the parties expended a lot of money and time in an attempt to bring the determination of the merits to finality. Sight should not be lost that the SDA was concluded in Germany and that most of the witnesses and the documents to be used in the pending trial are in German. This involves a lot of translation and expert witnesses on the correct interpretation of German law on the issues raised by the parties as it is common cause that the circumstances of the negotiations,

conclusion and implementation of the agreement is governed by the laws of Germany.

[18] After delivery of the discovery affidavit by SAC and realizing that the trial would not commence in early 2020 as envisaged, SAP launched the present application in terms of Rule 33(4) to separate the issue of the Special Plea for the determination as to whether in terms of SDA, SAC was indeed a party to the said agreement.

[19] According to SAP, the party to the agreement was Securinfo Limited an Irish company which was deregistered in 2000 and not SAC. Thus, so contends SAP, SAC has no locus stand to enforce the terms of the SDA. It is on this basis that SAP contends that that the issue is discrete and that it can conveniently be disposed of in terms of Rule 33 (4).

[20] Not so, says SAC. The latter contends that It is indeed itself that concluded the agreement with SAPSI under its trading name of Securinfo. This being the case, the identity of the parties who concluded the agreement and whether the agreement was in fact concluded are inextricably interlinked that no separation of one from the other is possible.

[21] That the issue as to whether SAC is the party who concluded the agreement with SAPSI, SAP relied on *Kuter*[2] wherein the court stated that a point in limine should be approached on the basis that the facts alleged by a party are true. In the present matter, so argued SAP, the issue of locus standi must be approached on the basis that SAC is in fact Securinfo Limited.

[22] The facts in *Kuter* were briefly the following. The third respondent, a co-operative society formed on co-operative basis, to carry out the business of a chemist and druggist, had amended its constitution to provide that one of its directors, who would be managing director, should be a registered chemist and druggist in terms of Act 13 of 1928.When Kuter, who was a chemist and druggist, was informed that it was the intention of the Pharmacy Board to grant the co-operative society to carry on business as a chemist and druggist, he applied for and interdict restraining the Society from being so registered. The first ground upon which Kuter apprehended injury from the registration of the Society as a chemist and druggist was on the allegations that some of his customers are already members of the Society and that probably others will become so with the result that they are likely to transfer their custom from him. The Society denied the contended injury by Kuter. In dealing with the denial on the basis of an objection in limine to the locus standi of Kuter the court said the following-

> 'An objection taken in limine to the locus standi of a plaintiff or an applicant, like an exception, must be dealt with on the assumption that all

[2] Kuter v South African Pharmacy Board & Others 1953 (2) SA 307 (T)

the allegations of fact relied upon by the party are true. The question for decision by the Court is whether, if they are true , he is entitled to come to Court...'

[23] According to SAP, SAC's allegations in the present matter must also be assumed to be true and then determine whether the latter was indeed a party to SDA that was entitled to approach the court.

[24] The correctness of Kuter's ratio and judgment is not doubted. The facts, in the present matter, which must be assumed to be correct are not as put up by SAP. The facts relied upon by SAP are selective and self-serving. According to SAC it is the plaintiff in the present matter and trades as Securinfo. As the SDA was signed by it only, it intends to rely on the circumstances surrounding the negotiation, conclusion and implementation of the terms of the SDA which circumstances, as I understand SAC's case, do not offend the parole evidence rule. In addition, SAC's particulars of claim are pleaded in the alternative that the latter and SAPSI tacitly concluded the terms of the SDA. The Replication raised against the Special Plea pertinently states that in 2001 and in the offices of SAP, the officials of the latter and SAPSI were informed that SAC had abandoned the use of the company name Securinfo Limited registered and incorporated in Ireland to market and license SAC's products. And that from now onwards SAC would continue to market its products under the brand name of "Securinfo" and

going forward SAC would describe itself as and use the trade "Securinfo Limited". And that all references to "Securinfo Limited" would be reference to SAC. All subsequent interactions between it and SAPSI were on that basis and that the agreement was thus negotiated and concluded on that basis as well. These, according to the ratio in Kuter, are the facts that must be assumed to be true and not the selective ones put up by SAP. It is on this basis that the Special Plea of locus standi of SAC must be approached.

[25] It is trite that the convenience envisaged by the provisions of Rule 33(4) must not only be one of the parties but must be of all the parties to the litigation including the court. On the conspectus of the pleadings filed and in particular paragraphs 1, 5, 7, 10 and 11 which are pleaded in the alternative plus the replication filed by SAC to SAP's Special Plea and in particular clause 2 thereof, it is clear that SAC had abandoned the name of "Securinfo Limited", that it markets its products under the name of "Securinfo", and that all reference to "Securinfo" would be reference to it; and that all subsequent interactions between it and SAPSI were on that basis; that the SDA was negotiated and concluded on that basis. It is on this basis that clause 1.42 of the SDA defines "Securinfo" as meaning "Securinfo Limited a company with principal offices at 32 Springfield Road, Carlswald, Midrand, South Africa" which corroborates SAC's contentions that subsequent 2000 when Securinfo Limited, an Irish company, was deregistered, it adopted the name and from henceforth it traded as Securinfo, a South African company.

[26] Therefore a rhetorical question may be asked as to why SAC refers to itself by a deregistered Irish company name which was no longer in existence with a physical address here in South Africa? It seems to me that SAC indeed trades as Securinfo, not "Securinfo Limited". And Contrary to SAP's assertions and reliance on Kuter, all these facts must, for the determination of SAC's locus standi, be assumed to be correct. On that assumption, the issue of locus standi of SAC is not as discrete as SAP likes to have it. The identity of the entity that concluded the SDA with SAPI is inextricably linked with the SDA itself. As counsel for SAC puts it, the two sides are indeed of the same coin incapable of separation.

[27] Although the separated issue, at a glance, is attractive, it is nothing else but a mirage. On closer consideration this mirage disappears into nothingness. The separated issue, though attractive, discrete and dispositive of the entire matter, on proper consideration, the separated issue would be nothing but pyrrhic. Any party who loses may be entitled to an appeal all the way to the Constitutional Court for a matter that started in 2001 and the action instituted in 2008.And only to return to the court for the determination of the merits.

[28] To adopt the strategy taken by SAP, that is, the piece meal adjudication of this matter, it is obvious that it would be more than two decades to finalize an action that commenced in 2008. In the meantime, witnesses pass on and memory

fades. Documents are lost. Judges who started with this matter, some of them have since retired and while others have been elevated to the higher courts.

[29] According to SAC the same witnesses in the Special Plea are the same witnesses that would be required to testify in the trial on the merits. According to SAC, the Special Plea is also not ready for determination as there are still a lot of documents that must still be translated from German into English. The said same documents are as much relevant in the contended separation as they are on the merits of this matter. In my view, the contended separated issue would not facilitate the convenience and expeditious disposal of this matter. On the contrary, it would exacerbate the already long delay experienced in this matter. The delay would not only be inconvenient but would frustrate the expeditious finalization of the disputed merits between the parties contrary to the provisions of Rule 33(4).

[30] To conclude, it is convenient for all the issues raised in this matter including the defences raised by SAC such as *falsa deomnstratio non nocet - the wording of a written agreement does not override the true intention between the parties* and - knowledge of attribution - the doctrine that holds that the knowledge of the employees of the company may be imputed to the company - particularly if one has regard to acknowledgement that one of SAP's employees in an email written

to his seniors pertinently states that "Securinfo" is in fact SAC. In *Malinde*[3] the then Appellate Division, when dealing with an application for separation, held that-

> 'When deciding an application under the sub-rule, the Court is not called upon to give a decision on the merits. But it must consider the cogency of the point concerned, because unless it has substance a separate hearing would be a waste of time and costs. So, the court should not grant an application for a separated hearing 'unless there appears to be a reasonable degree of likelihood that the alleged advantages would in fact result'.

[31] In this application there are no reasonable likelihood that there would be advantages in ordering the separation. On the contrary, to order a separation would be a waste of time and costs that will not only be inconvenient but contrary to the interest of justice that dictates that litigation must be disposed of promptly.

[32] Having regard to the aforesaid, the application for separation of the Special Plea of SAC's locus standi is dismissed with costs including the costs of two counsel.

[3] S v Malinde and Others 1990 (1) SA 57 (AD)

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JUDGE OF THE HIGH COURT

GAUTENG LOCAL DIVISION, JOHANNESBURG

Date of hearing:	24 June 2019
Date of judgment:	1 August 2019
Appearances:	
For the applicant:	Adv Badenhorst SC & Adv Spottiswoode
Instructed by:	Werksmans Attorneys
For the respondents:	Adv Loxton SC & Adv d'Oliveira
Instructed by:	Robin Twaddle & Associates