

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

- (1) REPORTABLE: **NO**
(2) OF INTEREST TO OTHER JUDGES: **NO**
(3) REVISED:

Date: **18th May 2020** Signature: _____

CASE NO: 2018/39734

DATE: 18TH MAY 2020

In the matter between:

MARKIT SYSTEMS (PTY) LIMITED

Plaintiff

and

FULCRUM GROUP (PTY) LIMITED

Defendant

Coram: Adams J

Heard: 15 May 2020

Delivered: 18 May 2020

Summary: Civil procedure – separation of issues in terms of rule 33(4) – aimed at facilitating the convenient and expeditious disposal of litigation – not to be granted if issues are found to be inextricably linked – separated issues must be discrete in order for separation application to succeed – separation application refused –

Uniform Rules of Court – rule 33(4).

ORDER

- (1) The defendant's application in terms of rule 33(4) for a separation of the issues is dismissed, with costs.
 - (2) The defendant shall pay the plaintiff's costs of the said application, which costs shall include the costs consequent upon the employment of Senior Counsel.
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JUDGMENT

Adams J:

[1]. The defendant applies in terms of Uniform Rule of Court 33(4) for an order for the separation of its special plea from any and all other issues in dispute between the parties in this action. The defendant also seeks an order for the postponement of discovery and all other further proceedings in this matter outside of the scope of the special plea until it is disposed of.

[2]. The application is opposed by the plaintiff, which contends that the issues raised in the special plea are inextricably linked with the other issues between the parties. Therefore, so the plaintiff contends all of the disputes between the parties should be ventilated in one hearing.

[3]. The question which needs to be decided in this application is simply whether it is convenient to separate the issues raised in the special plea from the balance of the issues. In deciding that question, cognizance should be taken of the issues on the pleadings and whether those issues are inextricably linked. Put another way, the enquiry relates to whether the issues which the defendant requires to be separated out are discrete and separate from all other issues.

[4]. 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.'

[5]. The process of dealing with a matter under rule 33(4) was clarified in *Denel (Edms) Bpk v Vorster* 2004 (4) SA 481 (SCA) as follows:

'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. But, where the trial Court is satisfied that it is proper to make such an order – and, in all cases, it must be so satisfied before it does so – it is the duty of that Court to ensure that the issues to be tried are clearly circumscribed in its order so as to avoid confusion.'

[6]. In order to decide whether it is convenient to separate the issues *in casu* it is necessary to assess what the issues are between the parties.

[7]. In this action the plaintiff claims contractual damages from the defendant on the basis of an alleged unlawful repudiation of a Technology Agreement ('the agreement') entered into between the parties on the 26th April 2017. In terms of the said agreement, the plaintiff was to provide the defendant with technology and related services in order to build and thereafter support a software system ('the System') to replace the defendant's *Flexibroker* information technology system. On the 13th of December 2017 the defendant purported to cancel the agreement on the basis *inter alia* that the parties had not agreed upon a 'Business Requirements Document (BRD)', defined in the agreement as a

'document detailing the business processes the system will need to address'. The BRD was intended to explain 'in more detail' the scope of the project.

[8]. The agreement itself expressly provided that once the plaintiff had analysed and documented the defendant's business requirements, 'both parties [should] jointly agree on' the BRD, 'which [should] set out what the [defendant's] requirements are subsequent to a detailed analysis of the [defendant's] business by the [plaintiff]'. The agreement made provision for the type of issues to be included and considered in the BRD.

[9]. It is the case of the plaintiff that its ability to provide the relevant services, including the compilation of the BRD, was dependent upon the full and timely cooperation of the defendant, which the defendant agreed to provide. Therefore, so the plaintiff pleads, the defendant breached the Technology Agreement in various respects, including a failure to give input and cooperate in relation to the development of the requisite BRD.

[10]. The case of the plaintiff in sum is therefore that the defendant breached the agreement, which entitles it (the plaintiff) to claim damages. One respect in which the defendant committed a breach of the contract, so the plaintiff avers, is in relation to the development of the BRD – defendant failed to cooperate with the plaintiff in ensuring that the BRD is completed and agreed upon. This conduct on the part of the defendant resulted in the premature termination of the contract. Plaintiff alleges that the parties' inability to reach agreement on the BRD was a breach of the agreement by the plaintiff and not a ground for cancelling the agreement as alleged by the defendant

[11]. This cancellation of the agreement by the defendant the plaintiff avers constituted the unlawful repudiation of the contract.

[12]. The defendant denies liability. It raised a special plea, which is a fulcrum of this application. In its special plea the defendant denied that its conduct constituted a repudiation of the agreement. It avers that it was justified in its termination of the agreement by a clause 16(c)(v) of the agreement, read with clause 4(d). The latter clause reads thus:

'Either party shall be entitled to cancel this agreement in accordance with clause 16 (c) below in the event that the parties are unable to reach agreement on the details of the BRD'.

[13]. In terms of clause 16(c)(v) of the agreement either party was entitled to terminate the agreement immediately, at any time by written notice to the other party 'if the parties [failed] to reach agreement in respect of the details to be documented in the BRD'.

[14]. The defendant's special plea in essence is to the effect that the agreement provided that the BRD had to be completed and agreed upon within a reasonable time, whereafter the building of the system would commence. The building of the system, so the defendant avers in its special plea, was, as per the agreement, expressly expected to commence by the 1st of July 2017.

[15]. The defendant furthermore alleges that a reasonable time had elapsed with the BRD neither having been completed nor agreed upon. By the 13th of December 2017 no agreement had been reached on the details of the BRD, whereupon the defendant cancelled the agreement. The defendant alleges that it was entitled to cancel the agreement on the basis that agreement had not been reached on the BRD, as provided for in the agreement. This is what the defendant did on the said date, which means, so the special plea concludes, the plaintiff's claim should be dismissed.

[16]. There is a common thread between the plaintiff's case and the defendant's special plea, that being the BRD and the fact that the parties were unable to reach agreement on the details of the BRD.

[17]. The defendant contends that the issue to be decided in the special plea is this: Whether, in the light of no agreement on the BRD having been reached, the defendant was within its rights in cancelling the agreement? In my view, an important aspect of this issue relates to whether or not the defendant is correct in its assertion that the right to cancel the agreement accrues after the expiration of a reasonable time without the BRD having been agreed upon. Closely linked to this is what would constitute a reasonable time.

[18]. The plaintiff says no, the fact that agreement could not be reached on the detail of the BRD was as a result of the defendant's breach of the agreement.

[19]. In my judgment it is therefore clear that the issues raised by the plaintiff in its particulars of claim and those raised by the defendant in its special plea overlap. It is self-evident, in my view, that the issues are inextricably intertwined. It would be difficult, if possible at all, to deal with the defendant's special plea without having to deal with the case of the plaintiff as pleaded in its particulars of claim.

[20]. Mr Morison, who appeared on behalf of the defendant, submitted that the issues relating to whether the defendant was entitled to cancel the agreement because no agreement was reached on the BRD, and irrespective of any breach of that agreement, are not intrinsically linked with *inter alia* the issue whether the defendant complied with the obligation in terms of clause 4(a) of the agreement to cooperate with the plaintiff by providing accurate and complete information timeously to enable the plaintiff to perform its obligations. I disagree and I do so for the reasons mentioned above.

[21]. It may very well be that, as contended by Mr Morison, a failure to agree on the detail of the BRD is in terms of clause 16(c)(v) non-culpable. It may also be that failure to agree on the BRD is not a breach of the agreement. However, that is not the end of the matter. There are issues relating to the events leading up to the clause 16(c)(v) cancellation, which, according to the plaintiff may very well constitute a breach of the agreement – those are the issues raised by the plaintiff's particulars of claim. And those are the issues which are interlinked with the cancellation by the defendant of the agreement.

[22]. This point is in fact aptly demonstrated by the alternative submission by Mr Morison that, even if it is found that the issues are interlinked, the defendant's contention is that it discharged its obligation to cooperate with the plaintiff and still the parties could not agree on the BRD. This is an issue which relates to both the plaintiff's case as well as to the defendant's special plea.

[23]. I am therefore of the view that the defendant's application for a separation of issues should be refused.

Costs

[24]. The general rule in matters of costs is that the successful party should be given his costs, and this rule should not be departed from except where there are good grounds for doing so, such as misconduct on the part of the successful party or other exceptional circumstances. See: *Myers v Abramson*, 1951(3) SA 438 (C) at 455.

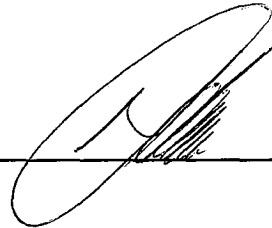
[25]. I can think of no reason why I should deviate from this general rule.

[26]. I am therefore of the view that the defendant should pay the plaintiff's costs of the application.

Order

Accordingly, I make the following order:-

- (1) The defendant's application in terms of rule 33(4) for a separation of the issues is dismissed, with costs.
- (2) The defendant shall pay the plaintiff's costs of the said application, which costs shall include the costs consequent upon the employment of Senior Counsel.



L R ADAMS

Judge of the High Court

Gauteng Local Division, Johannesburg

HEARD ON:	15 th May 2020
JUDGMENT DATE:	18 th May 2020
FOR THE PLAINTIFF / RESPONDENT:	Adv Bruce Berridge SC
INSTRUCTED BY:	Clyde & Co Incorporated
FOR THE DEFENDANT / APPLICANT:	Adv L J Morison SC, together with Adv Ntombi Mncube
INSTRUCTED BY:	Nicqui Galaktiou Incorporated