REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 20232/2020

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

…… …18/10/2022…
SIGNATURE **DATE**

In the matter between:

RAM TRANSPORT (SOUTH AFRICA) PROPRIETARY LIMITED t/a RAM HAND-TO-HAND COURIERS **Plaintiff**

and

DHL SUPPLY CHAIN (SOUTH AFRICA) PROPRIETARY LIMITED **Defendant**

JUDGMENT – APPLICATION FOR SEPARATION OF ISSUES

MANOIM J:

[1] The defendant in this matter has brought an application to separate the merits from the quantum in terms of Rule 33(4) of the Uniform rules. The application had been opposed by the plaintiff. I gave my order on the day I heard the application on 14 October 2022 and briefly set out my reasons. My fuller written reasons for granting the application now follow.

[2] This case concerns what agreement the parties had in relation to the provision of pharmaceutical products which the plaintiff provided to the defendant. The plaintiff's case is that it had an agreement with the defendant to provide it with these services for a two-year period. The plaintiff alleges that the defendant cancelled this agreement after six months. It now claims damages for loss of profits for the balance of the period, namely eighteen months.

[3] The defendant disputes the terms of the contract are what the plaintiff claims, and furthermore disputes liability for any amount or in the amounts claimed by the plaintiff.

[4] In April this year, at a case management meeting, the issue of a separation first arose. The defendant requested a separation of the merits from the quantum, whilst the plaintiff argued against this. I ruled then, that there should be no separation. Since then, there has been much further preparation for the trial by the plaintiff, and to a lesser extent, the defendant. At the moment only the plaintiff has filed its witness statements (six of them) and a summary by its expert, who has quantified the damages claimed.

[5] In September the defendant decided to brief new counsel, both senior and junior. These counsel were not present at the April meeting. The new counsel have now consulted with the defendant's expert for the first time in late September. Pursuant to this consultation they decided to bring the present application for a separation.

[6] At the stage in which this application has been brought the following timetable has been set for the matter. The trial is set down to run for three weeks commencing on 14 November, thus a month after the date on which I heard this application. Although the plaintiff has filed all its factual witness statements and the expert's summary, the defendant has yet to file any.

[7] The defendant raises several reasons again for seeking a separation of issues. Some relate to the lateness of the hour and whether it can be prepared on time. Next it considers the period of three weeks in any event too short as there are likely to be twelve factual witness (six from each side) and then the two experts. Further discovery may be necessary, and some discovery issues are still not resolved. It would not be in the interests of either party if at the end of the hearing the matter remained part heard which the defendant considers highly likely. It would be unreasonable and undesirable for the court to impose a time cap on the parties in an effort to conclude within the three weeks. These arguments are all based on motivating for a separation as a matter of convenience.

[8] But the defendant also argues from principle. It argues that there is a strong case for separation based on the parties needing an answer as to whether the plaintiff can prove its case on the merits. Here the defendant argues there would be much to be gained by getting the court to decide this question first. As a basis to bolster

this argument, the defendant raises the fact that the plaintiff had brought an urgent application to enforce the same rights before Modiba J. In November 2018, Modiba J dismissed the application, and found that the plaintiff had failed to prove a prima facie right. According to the defendant: *"Her Ladyship Modiba J found prima facie that RAM could not establish the existence of the contract it now relies on in its particulars of claim."*

[9] The plaintiff has objected to the separation application on several grounds. First, it argues that given my April decision the matter is res judicata. Second, it argues that the Commercial Court rules do not allow for separation. I am not convinced by either of these arguments. My April ruling is an interlocutory ruling based on the submissions made by the parties at the time. This was prior to the filing of the any witness statements or expert summaries or further discovery. If the facts justify it, I am entitled to reconsider an interlocutory ruling. As far as the Commercial Court rules are concerned, the fact that a separation is not expressly provided for, does not mean, that in appropriate cases, the presiding judge cannot order a separation. Whilst the Commercial Court has expedition as a guiding principle it also must take practical decisions. A separation of issues, if properly motivated, is not inimical to the broad principles of the Commercial Court which are based on *"… fairness, efficiency and cost effectiveness"*.

[10] Furthermore, the plaintiff argues that the merits and the quantum are inextricably linked. Based on the case law on separation of issues, definitively discussed in the case of *Tshwane City v Blair Atholl Homeowners Association,* this would be a

reason to not separate the issues. [1] I would certainly agree with the plaintiff that the issues of quantum and merits may be linked in that factual witness and possibly some the same who are testifying on the merits, may also need to lay down a factual basis for the respective quantum claims on which the experts can then opine.

[11] I am also mindful of the plaintiff's contention that the Modiba J judgment was decided on an urgent basis. The trial court will have the benefit of oral testimony as well as some further discovery not before the urgent court. Also, the plaintiff relies in the alternative on the theory of quasi mutual consent, a theory not before Modiba J.[2] I agree with plaintiff that the Modiba J decision cannot form the basis for me to decide on the separation. At best it demonstrates that the defendants' case is not frivolous.

[12] The plaintiff also feels aggrieved at the manner in which the defendant, in its view has dragged its feet in this litigation being late on every occasion requiring it to enforce compliance. I have some sympathy with this although I cannot blame this on the new counsel who were only briefed in September. Finally, the plaintiff argues that three weeks will be enough, and that the defendant is exaggerating the time needed to be spent by the experts.

[13] Notwithstanding all the above I have decided in favour of the separation. For me the decisive issue is that we will not be able to complete the hearing in the three

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[1] 2019 (3) SA 398 SCA at 48 to 53

[2] This theory sometimes referred to as the reliance theory is defined in the Law of Contract in South Africa as *"[a] theory providing that when parties are not in actual agreement contractual liability may nevertheless arise on the basis that one party (contract denier) had led the other party (contract asserter) into a reasonable belief that consensus had been reached."*

weeks nor will the experts be ready at that time. I say this because the experts appear to be far apart on methodology and also on preparation. The plaintiff's expert has taken the view that the damages can be extrapolated on the basis of the revenue and costs incurred in the six-month period prior to the notice of cancellation with some adjustments for increases etc. The defendant of course has yet to file its expert summary, so the expert only speaks through the mouth of the defendant's attorney in the latter's affidavit in the separation application.

[14] Nevertheless, based on this, it appears that the defendant's expert takes a granular approach to the calculation. His view is that there must be a calculation based on costs per trip. This means that a lot of data needs to be gathered and then calculated. Clearly the experts will need to meet debate these issues. More than just one meeting may be required. The plaintiff's expert may well want to file a response both on the methodology and the data used. Thus, the back end of the trial i.e., the case on quantum, has since April, became much more nuanced and complicated than may have been anticipated then. In these circumstances it seems unlikely the trial will end in three weeks, and in any event, preparation on quantum may not be complete by the start of the hearing. This means that examination and cross examination of factual witnesses on matters relevant to quantum may lead to disputes over relevance which will be hard to rule on if the parties final cases on quantum are still, at that stage, works in progress.

[15] However, I am not unsympathetic to the position of the plaintiff. It has stuck to the timetable and even produced its expert summary a few days earlier than required. The defendant only briefed an expert on 28 September, over five months since the

April case management meeting. No explanation is given for this lethargy nor is it fair to excuse it on the change of counsel – the two issues are independent. This conduct is worthy of my censure. For this reason, even though the defendant has succeeded in its application I am not going to award it costs. There will be no order as to costs.

ORDER:-

[16] In the result the following order is made:

1. That in terms of Rule 33(4) the determination of the quantum of the plaintiff's claim for damages be separated and determined on a separate date.

2. There is no order as to costs.

N. MANOIM

JUDGE OF THE HIGH COURT

GAUTENG DIVISION

JOHNANNESBURG

Date of hearing: 14 October 2022

Order Issued: 14 October 2022

Reasons Issued: 18 October 2022

Appearances:

Counsel for the Plaintiff:	Adv MM Antonie SC
	Adv AB Berkowitz
Instructed by.	Werksman Attorneys
Counsel for the Defendant:	Adv JPV Mc Nally SC
	Adv JM Heher
Instructed by:	Eversheds Sutherland