IN THE NORTH GAUTENG HIGH COURT, PRETORIA

(REPUBLIC OF SOUTH AFRICA)

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: ~~YES~~ / NO.
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~ / NO.
(3) REVISED.

DATE 16/11/2012 SIGNATURE

CASE NO: 16476/11

DATE: 15 November 2012

IN THE MATTER BETWEEN

NELBROS BOUKONSULTANTE (PTY) LTD 1st Respondent/Plaintiff

PETRUS JACOBUS NEL 2nd Respondent Plaintiff

and

STEVEN MARTIN TSAI 1st Applicant/Defendant

AND 17 OTHERS

JUDGMENT

LEDWABA, J

[1] This is an application in terms of Rule 33(4) of the Rules of this High Court in terms whereof the applicants seek an order in the following terms:

> *"1. That a special plea of prescription raised by the defendants be decided separately from any questions of law or fact in the action pending between the parties:*
> 2. *That the respondents pay the costs of this application on an attorney and own client scale, jointly and severally, the one paying the other to be absolved, only in the event of the respondents opposing this application."*

[2] The respondents are opposing this application.

[3] The applicants are the defendants in the main action and the respondents are the plaintiffs. For convenience sake the parties will be referred to by their nomenclature in the action proceedings.

[4] In the summons the plaintiffs are claiming an amount of R3 862 455.76 from the third defendant, and against all defendants, an order for the rendering and debatement of a full account pertaining to the financial years ended February 2003 to February 2008. Further that whatever amount is to be due to them after the debatement of the account.

[5] The plaintiffs in the particulars in describing their claim alleged *inter alia* that:

> 5.1 a first agreement was concluded on 28 June 1996 between the second plaintiff and the first, second, fourth, fifth, sixth, eleven and twelfth defendants;
>
> 5.2 an amending agreement was concluded during or about June 1997 between the second plaintiff and the then existing companies

and close corporations of the first and second defendants (the "amending agreement");

5.3 an agreement was concluded during or about January/February 2002 between the first and second plaintiffs, and the third to fifteenth defendants (the "substitution agreement") in terms whereof the first plaintiff was substituted as a party to the first agreement as amended by the amending agreement, in the place of the second plaintiff.

5.4 The second plaintiff was appointed as Manager: Building Operations for all the companies and close corporations of the first and second defendants, with commencement date 1 October 1996;

5.5 the second plaintiff would be paid 10% of the net profit of all the then existing and future companies and/or close corporations falling under the control of the first and second defendants and conducting building operations, earned in the period from date of conclusion of the agreement until the termination thereof, which 10% net profit would be calculated in the manner set out in paragraph 22.5 of the particulars of claim.

5.6 the second plaintiff would be entitled to receive an annual account supported by all relevant documents, reflecting the calculation of the 10% of the net profit to which he was entitled, which statement of account and supporting documents would be made available to him within a reasonable time after the end of the financial year of the company, and which reasonable time would be a period of no more than three months.

[6] The plaintiffs allege that, in respect of the amending agreement, the first agreement was amended as follows:

6.1 The 10% of the net profit of the companies close corporations to which the second plaintiff was entitled would be paid to the second plaintiff six months in arrears, within a reasonable time (not exceeding three months) at the end of each six month period falling within a financial year;

6.2 The first payment of net profit would be made to the second plaintiff in August 1997, and subsequent payments would be made six monthly in arrears thereafter;

6.3 The remainder of the terms in the first agreement remained unaltered.

[7] The plaintiffs alleged that, in terms of the substitution agreement, the parties, in addition to agreeing that the first plaintiff would be substituted as a party to the first agreement in the place of the second plaintiff, agreed as follows:

7.1 In respect of any commercial property constructed and developed by a company which was a party to the agreement being let and not being sold, a sum equal to 15% of the cost of the land and the construction of the building thereon, would be deemed to constitute a net profit earned by the company, and the first plaintiff would be entitled to payment of 10% thereof;

7.2 Upon the determination, from time to time, of 10% or the net profit to which the first plaintiff was entitled, the first plaintiff would invoice the company, as nominated by the first defendant or the second defendant, with a tax invoice containing a VAT inclusive amount, equivalent to the salary and bonuses described in annexure "A" to the particulars of claim, and equivalent to 10% of the net profit.

[8] The plaintiffs alleged that the defendants have failed and/or refused to comply with the obligations of rendering to the first plaintiff detailed statements of account, supported by the necessary vouchers and documentations, of the calculations of the 10% or the net profit to which the first plaintiff was entitled for the period commencing 1 March 2002 and ending on 28 February 2008.

[9] The plaintiffs further alleged that, in a letter dated 29 May 2008, the third defendant admitted that it was indebted to the first plaintiff in an amount of no less that R3 862 455,67.

[10] The defendants filed a special plea of prescription and a plea to the plaintiffs action. They further filed a counter claim and the plaintiffs filed a replication to the defendants' special plea of prescription. I will deal with the special plea, the replication and the counterclaim later in the judgment.

[11] On the merits of the action proceedings the defendants:

11.1 admitted the conclusion of the first agreement and the amending agreement;

11.2 denied the plaintiffs' allegations in respect of the second plaintiff's entitlement to a statement and debatement of account and pleaded that the second plaintiff would be entitled to an annual reconciliation and calculation of the 10% of the net profit upon the expiry of the financial year of all the companies and/or close corporations;

11.3 denied the conclusion of the substitution agreement and pleaded the conclusion of a second amending agreement.

[12] At the pre-trial held by the parties' legal representatives the defendants requested the plaintiff to agree that the special plea of prescription be adjudicated separate but the plaintiff's attorney did not accede to the request hence this application.

[13] Advocate A.C Ferreira SC for the defendants, has in the heads of argument correctly set out in detail the legal principles regarding the objective of Rule 33 (4) and Advocate N Maritz SC for the defendant has no issue with the legal principles. It will suffice to state that I agree with the quotation in Civil Procedure in the Supreme Court by the learned author D Harms on page B-228 that:

> *"The basis of the jurisdiction is convenience – the convenience not only of the parties but also of the Court. The advantages and disadvantages likely to follow upon the granting of an order must be weighed. If overall, and with due regard to the divergent interests and considerations of convenience affecting the parties, it appears that the advantages would outweigh the disadvantages, the Court would normally grant the application. 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 separate hearing "unless there appears to be a reasonable degree of likelihood that the alleged advantages would in fact result."*

[14] What is crucial is the application of the legal principles to the facts or circumstances of the case before me, which aspect I will deal with hereafter.

[15] In the replication to the defendants' special plea, the first plaintiffs raised the following issues:

15.1 That the defendants willfully prevented it to know about the amount or the 10% share of the profit when it was entitled to. In terms of section 12 (2) of the Prescription Act (the Act), prescription did not commence to run against it.

15.2 In terms of section 14(1) of the Act, the acknowledgement of debt alleged in paragraph 29 of the particulars of claim interrupted prescription.

15.3 That in terms of section 12(3) of the Act, the debt was not due and prescription did not commence to run in term of section 12(1).

15.4 That the debt which the defendant's seeks to enforce in their counterclaim, has not become prescribed. In terms of the Act and is a reciprocal debt to the debt claimed by the first plaintiff, the provisions of section 13(2) of the Act were therefore applicable and the debt which the first plaintiff seeks to enforce has not become prescribed.

15.5 That the running of prescription was in respect of the debt that was interrupted by the service of the summons under case no 40185/09 on the defendants.

[16] It is trite that I am not to decide on the merits of the special plea. I need to consider whether it would be convenient to grant a separation as contended for by the defendant.

[17] I should also determine, on the facts or circumstances of this case the advantages and disadvantages that could flow from an order of separation. In *Braaf v Fedgen Insurance Ltd 1995 (3) SA 938 (C) at 939*, King J said Rule 33(4):

"enjoins the court to accede to an application and make the necessary order 'unless it appears that the questions cannot conveniently be decided separately'. Thus it is incumbent on the plaintiff to satisfy the court that the application should not be granted."

[18] I do appreciate what was said in the *Braaf case*, however the court should also consider carefully the nature, convenience and complexity of the main case *vis-à-vis* the issue to be raised when the special plea is considered separately.

[19] Advocate Ferreira SC argued forcefully that, *prima facie*, the defendants special plea would succeed because it is clear that when the summons was issued on 14 March 2011 the period of three years had already lapsed.

[20] He submitted that even if the contents of the replication are taken into account the evidence that would be led to deal with the issue raised would be limited if a separation is granted.

[21] He further submitted that separation would be convenient because it will also save time and costs in that the document to be discovered may be limited if separation is granted.

[22] In considering the cogency of the special plea, in my view, it is clear that the first plaintiff's claim in respect of the debatement of a full account pertaining to the financial year ended February 2008 the claim could not have prescribed because in terms of the contract on which the claim is based the plaintiff was entitled to receive an annual account, supported by all relevant documents reflecting the calculation of the 10% or the net profit to which he was entitled which statement of account and supporting documents would be made available to him within a reasonable time after the end of the financial year of the company, and which reasonable time would be a period of no more than three months. This simply means the period to claim the documents ended on the 31st of May 2008.

The summons in respect of the period ending 2008 appears to have been issued within three years.

[23] I have also considered the financial period of the other previous years and think evidence in respect of the said period is relevant for the period ending 2008, especially having regard to the defendants' counterclaim.

[24] The first plaintiff, in the replication also raised the debt which the defendants seek to enforce in terms of the counterclaim on which the issue of prescription has not been raised. The evidence to be presented on the counterclaim and the plaintiff's claim of the sum of R 3 866 455.75 may show that the debts are reciprocal. To order separation may prolong the trial in that such evidence may be led in two trials.

[25] The evidence to be led to deal with the issues raised in the replication even though it may be limited, I think to avoid unnecessary delaying the trial which I was told the date has been allocated for next year in about June it will not be convenient to order a separation.

[26] I agree with Advocate N Maritz SC that the question of discovery of the documents will not be affected by the separation.

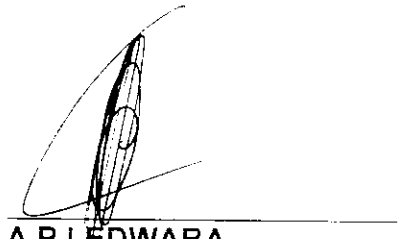
[27] I have carefully considered the legal issue raised in the papers and in the heads of argument, the submissions made on legal issues by the respondents on certain aspects are not binding on me in deciding whether a separation should be granted or not.

[28] I am not persuaded that the separate adjudication of the special plea would curtail the litigation and save the costs. There is no way that it would dispose of the action in its entirety as it was submitted on the defendants behalf.

[29] Regard being had to all of the aforesaid I make the following order:

29.1 The defendants' (applicants) application in terms of Rule 33(4) is dismissed.

29.2 The costs of this application are reserved and will be determined by the trial court.



A P LEDWABA
JUDGE OF THE HIGH COURT

HEARD ON: 5 November 2012

FOR THE APPLICANT: Adv A C Ferreira SC and Adv J Ellis

INSTRUCTED BY: Etienne Naude Attorneys, Pretoria

FOR THE RESPONDENT: Adv NGD Maritz SC

INSTRUCTED BY: A B Lowe Attorneys, Pretoria