IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

Case Number: 30004/2013

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: ~~YES~~ / NO.

(2) OF INTEREST TO OTHER JUDGES: ~~YES~~ / NO.

(3) REVISED. ✓

13/6/14

DATE

SIGNATURE

13/6/2014

In the matter between:

TELKOM SA SOC LIMITED	**FIRST PLAINTIFF**
MULTI-LINKS TELECOMMUNICATIONS LIMITED	**SECOND PLAINTIFF**

And

BLUE LABEL TELECOMS LIMITED	**FIRST DEFENDANT**
AFRICA PREPAID SERVICES (PTY) LTD	**SECOND DEFENDANT**
AFRICA PREPAID SERVICES LIMITED	**THIRD DEFENDANT**
MARK PAMENSKY	**FOURTH DEFENDANT**
PERRY-MASON MTHUNZI MDWABA	**FIFTH DEFENDANT**
THAMSANQA (THAMI) GOODENOUGH MSIMANGO	**SIXTH DEFENDANT**

JUDGMENT

Fabricius J,

1.

In my capacity as case manager I was required to rule on an application in terms of ***Rule 33 (4).*** Most of the interesting facts are reported from a previous preliminary hearing between the same parties in ***2014 (3) SA 265 GP***.

2.

Plaintiffs seek to separate certain issues for a Round 1 and a Round 2 hearing. It is not seriously disputed that if Round 1 commences in 2015, Round 2 may proceed in 2018. Summons was issued in May 2013.

3.

The First to Fifth Defendants filed a substantial answering affidavit which in turn elicited a long reply.

4.

Both parties say in many instances, that the one does not understand the pleadings of the other. I was given a booklet that contains the pleadings and in A5 format it comprises some 300 pages. The pleadings require careful and critical analysis. The Heads of Argument made my task somewhat easier, but it is clear that both Senior Counsel see them in a different light or from a different angle. This again became apparent on the second day of the hearing when a number of alternative formulations to the prayers were discussed.

5.

I do not intend to analyse the pleadings and the argument in any great detail. No trial judge has yet been appointed and it would not be wise if I had to give a definitive

view in this context and at this stage. Suffice it to say that I considered the causes of action carefully, and of course the pleadings as a whole.

6.

I need to say something about the approach in law though. Mr Badenhorst SC referred to ***Denel (Edms) Bpk v Venter 2004 (4) SA 481 par. 3*** initially, but then also relied on ***Absa Bank v Botha 1997 (3) SA 510 (O) at 513 C - J, Braaf v Fedgen Insurance Ltd 1995 (3) SA 938 (K) at 939 G - H, Edward L. Bateman Ltd v C A Brand Projects (Pty) Ltd 1995 (4) SA 128 T at 132 C - E*** and ***Lappemann Diamond Cutting Works (Pty) Ltd v MIB Group (Pty) Ltd (No. 2) 1997 (4) SA 925 (W) at 927 H - I.***

He therefore submitted that an application for separation of certain issues should ordinarily be granted unless the opposing party can satisfy the Court that the application should be refused. Mr Trengrove SC called this the "separate when in doubt" approach, and submitted that it is wrong in law. He relied on a number of dicta of the SCA of more recent times. As a starting point he referred to ***S v Malinde 1990***

(1) SA 57 AD at 67 and 68 C - D, although this was a criminal appeal. What is important however is that it was said (at 67 F) that the Appellate Division is in principle strongly opposed to the hearing of appeals in piecemeal fashion. It did however also refer to the old ***Rule 33(4)*** which applied to trial actions in the Supreme Court. In ***Denel supra*** Nugent JA pointed out that (at 485 B) once properly considered, issues will be found to be inextricably linked, even though at first sight they might appear to be discrete. For instance, in the present case it would in my view not be wise, prudent or practical, let alone convenient, to separate the question of legal causation from factual causation, having regard to the formulation of Plaintiffs' claims. Also, the delictual claims cannot be suitably divorced from the so-called "avoidance" claim. Plaintiffs say that a "Super Dealer Agreement" ("SDA") concluded on 1 December 2008 between Second Plaintiff and Second Defendant, which was later ceded by Second Defendant to Third Defendant, can be "avoided" on a number of grounds.

7.

In ***Minister of Health v New Clicks SA (Pty) Ltd and Others 2006 (2) 311 at 355*** the Constitutional Court also referred to ***S v Malinde*** restating the view of the SCA that it was in principle strongly opposed to piecemeal hearings, whether in appeals or in applications. Substantial grounds should exist for the exercise of this power taking into account the convenience of the parties and of the Court.

8.

In ***CNA v MTN 2010 (3) SA 382 AT 408*** the Court said the following, after having been referred to ***Denel supra***:

Par. 89..."Piecemeal litigation is not to be encouraged. Sometimes it is desirable to have a single issue decided separately, either by way of a stated case or otherwise. If a decision on a discrete issue disposes of a major part of a case, or will in some way lead to expedition, it might well be desirable to have issue decided first.

Par 90: This Court has warned in many cases, once properly considered, issues thought initially to be discrete are found to be inextricably linked. And even where the

issues are discrete, the expeditious disposal of the litigation is best served by ventilating all the issues at one hearing. A trial Court must be satisfied (I underline) that it is convenient and proper to try an issue separately. In this specific context therefore I respectfully disagree with the ***Lappemann*** decision *supra.*

9.

The same line of thought underlies the dictum by Navsa JA in ***SATAWU v Garvis 2011 (6) SA 382 SCA at 392 par. 45.***

10.

See also: ***Nick Christelis N. O. and Others v V. L. Meyer N. O. and Others, (916/) [2014] ZASCA 53 of 16 April 2014*** where the same thought was expressed in par. 8

11.

In my view the correct approach was set out in ***Molotlegi v Mokwalase 2010 JDR 0360 (SCA)*** a judgment of 1 April 2010. At par. 20 the following appears:

"A Court hearing an application for separation of issues in terms of Rule 33(4) has a duty to satisfy itself (I underline) that the issues to be tried are clearly circumscribed to avoid any confusion. It follows that a Court seized with such an application has a duty to carefully consider the application to determine whether it will facilitate the proper, convenient and expeditious disposal of litigation. The notion of convenience is much broader than mere facility or ease or expedience. Such a Court should also take due cognisance of whether separation is appropriate and fair to all the parties. In addition the Court ... is also obliged, in the interests of fairness, to consider the advantages and disadvantages which might flow from such separation. Where there is a likelihood that such separation might cause the other party some prejudice, the Court may, in the exercise of its discretion, refuse to order separation. Crucially in deciding whether to grant the order or not the Court has a discretion which must be exercised judiciously. The Court cannot simply grant such an application because it is unopposed."

12.

In its Heads of Argument, Senior Counsel for Plaintiff said that the "avoidance question" of the relevant SDA should be and could be decided separately. He annexed three Tables which dealt with the issues in the pleadings, and in Table C summarized these issues again in convenient form, pointing out which issue would be heard in Round 1 and which in Round 2. The issue number 29 was however amended. The last part thereof would be dealt with in Round 2.

It is clear from this analysis and proposal that the evidence required for this "avoidance" issue would only be up to December 2008. However, from the Particulars of Claim it is also clear that material issues would be relevant up to 2012 at least, if not up to 2018.

Furthermore, the relevant SDA in the context of delictual claims runs like a golden thread throughout the Plaintiffs' Particulars of Claim.

13.

I agree that Annexures A, B and especially C are more precise than the rather obscure formulation of prayers 1 and 2 of the Notice of Motion , but the parties differ on the interpretation of the pleadings, the relief sought in the context of the "avoidance" question, and the inter-relationships of the causes of action and the fifth counter claim. I agree with Mr Trengrove SC that to limit the questions around the SDA up to 2008 would be wrong and impractical in any event. Much of that evidence would again be relevant in Round 2, maybe in four years' time. In my view the facts leading up to the conclusion of the SDA, its conclusion, and its effect or role thereafter should conveniently be decided in one hearing. It underlies the crux of all of Plaintiffs' claim and the fifth counter claim. I must also add that the only parties to the "avoidance" question are the second Plaintiff and the third Defendant. The pleadings are complicated. Quantum should be a matter of calculation. Factual and legal causation should not be separated in the present case. One must also ask what would the status of the evidence in Round 1 be in Round 2? Would there be two

self-contained trials? How would the other parties be bound by findings of fact that one might make between only two parties?

See: ***International Shipping Company (Pty) Ltd v Bentley 1990 (1) SA 650 AD at 700.***

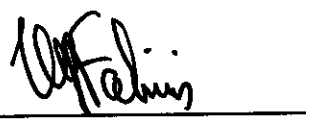
Overlapping considerations would make this undesirable and – and therefore prejudicial.

14.

I have referred to some of the most important considerations. It is my view that I would invite a vulture to sit on my left shoulder should I grant the application. The mere formulation of the issue or issues to be separated is fraught with difficulties. Overlapping issues are inevitable considering the three causes of action and the fifth counter claim. Factual findings made in Round 1 could be doubted in Round 2. Long delays would be inevitable. The role of the sixth Defendant at any given stage would be uncertain. Witnesses would have to be re-called. In other words, I am not satisfied

that the order sought can properly and justifiably be made. It would be severely prejudicial to the Respondents and the Court, given all the uncertainties.

The application is accordingly dismissed with costs including the costs of two Counsel.



JUDGE H.J FABRICIUS

JUDGE OF THE NORTH GAUTENG HIGH COURT

Case no.: 30004/2013

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Heard on: 11/06/2014

Date of Judgment: 13/06/2014 at 10:00