IN THE HIGH COURT OF SOUTH AFRICA
(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

CASE NO: 7673/04

In the matter between:

NELISWA PAMELA DUMBU Plaintiff

and

GOLDEN ARROW BUS SERVICES
Defendant

JUDGEMENT DELIVERED ON THIS 6TH DAY OF NOVEMBER 2007

NDITA, J:

[1] On 26 December 2001, the plaintiff was injured in a motor vehicle accident when the driver of the Golden Arrow bus, in which she was a paying passenger, allegedly steered such vehicle into a pothole, thereby losing control and causing the passengers, inter alia the plaintiff, to be flung from their seats and roll onto the floor. Arising from the said collision, the plaintiff instituted an action for damages.

The matter is due to proceed on trial on 26 November 2007.

[2] In terms of Rule 33 (4) the defendant seeks separation of the issues of liability and quantum of damages. The plaintiff opposes the application.

APPLICABLE LEGAL PRINCIPLES

[3] Rule 33 (4) provides 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 be conveniently 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 such party, make such order unless it appears that the questions cannot be conveniently decided separately."*

Miller, J in **Minister of Agriculture v Tongaat Group Ltd** 1976 (2) SA 357 summarises the meaning of convenience as follows:

> *"The word 'convenient' in the context of Rule 33 (4) is not used, I think, in the narrow sense in which it sometimes used to*

convey the notion of facility or ease or expedience. It appears to be used to convey also the notion of appropriateness; the procedure would be convenient if, in all circumstances, it appeared fitting and fair to the parties concerned.… It must be borne in mind that the grant of the application under the Rule, although it might result in the saving of many days of evidence in Court, might nevertheless cause a considerable delay in the reaching of a final decision in the case because of lengthy, barren interregnum between the conclusion of the first hearing at which special questions are canvassed and the commencement of the trial proper… In such a case, the advantages, in the form of curtailment of time, actually spent in Court, which would result from the separate decision of the special questions might be outweighed by the disadvantages of delaying the ultimate decision of the case; it might cause prejudice to the party who ultimately obtains a judgement in his favour and who might suffer considerable pecuniary loss through the circumstance that he could only receive payment of

what was found to be due to him very much later than he would have received it had the trial been allowed to proceed in the ordinary way."

[5] Flowing from this dictum, it is clear that the function of the Court in an application under this Rule is to assess to the best of its abilities the nature and extent of the advantages and disadvantages that would flow from the granting of such an order. One of the factors to be taken into account by the Court, when deciding whether to order separation, is the possibility of grave injustice to the opposing party. However, the plaintiff must show that the balance of convenience favours him. (See **Braaf v Fedgen Insurance LTD** 1995 (3) SA 938 at 940.)

FACTUAL BACKGROUND

[6] When the plaintiff was involved in the collision on 26 December 2001, she was 53 years old and working as a domestic assistant. Summons in the current action were issued on 13 September 2004. It is not clear from the papers filed of record why there has been a

considerable delay in bringing the matter to trial.

[7] The grounds upon which the defendant seeks the separation of the merits and the quantum are as follows:

a) The merits are in dispute and the defendant is confident of success on merits.

b) The separation will be cost effective because it will not only avoid an opposed trial on both the quantum and the merits but it is also apparent that the plaintiff's financial situation is extremely limited as a result of which the defendant will not be in a position to satisfy an adverse costs order.

c) The separation of the determination of the quantum, and merits would facilitate the convenient and expeditious disposal of the litigation.

[8] From the plaintiff's point of view, the application should be refused because the balance of convenience favours same on the following grounds:

a) It is clear from the orthopaedic surgeon's report that the plaintiff has been unable to work since the collision and

accordingly has been without an income for a period of almost six years.

b) Even if the plaintiff is successful at the hearing of the merits, the determination of the quantum of her claim, if separation is granted, will in probability be delayed until the end of 2009 because currently, according to the Registrar, no Fourth Division dates are available before August 2009.

c) Should the defendant appeal after hearing of the merits, which may done prior to the hearing on quantum, the plaintiff's claim would still further delayed.

APPLICATION OF THE LAW TO THE FACTS

[9] In this matter, it is clear that there has been a lengthy delay between the date upon which the collision occurred and the hearing of this application. Although no reasons have been advanced for the delay, it is clear that the separation of the issues will keep the plaintiff out of her entitlement, (assuming that the plaintiff's claim on the merits will be successful), for a considerable long time. This is unfair to both parties. Seeing that convenience, does not only concern

expediency, efficacy and desirability, but also fairness, justice and reasonableness, I am of the view that the balance of convenience favours the plaintiff. (See **ABSA Bank v Botha** 1997 (3) SA 510.) Furthermore, the interest of expedition and finality of litigation are better served by the disposal of the matter in one hearing. (See **Braaf v Fedgen** supra at 941.)

[10] In my view, the balance of convenience in this matter favours the plaintiff. Accordingly, the application for a separation of the issues is dismissed. No order is made as to costs.

NDITA, J