REPUBLIC OF SOUTH ARICA

IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE HIGH COURT, CAPE TOWN)

Case No: 24120/2011

In the matter between:

HOLLARD INSURANCE COMPANY LTD Plaintiff

And

SA COETZEE 1st Defendant

MB BEGINGSEL 2nd Defendant

HM SANGIORGIO 3rd Defendant

JUDGMENT DELIVERED ON 06 MAY 2015

RILEY, AJ

[1] The applicant, who is the second defendant in the main application, has applied for an order in terms of Rule 33(4) for the separation of certain of the issues which are in dispute in an action instituted against himself and the two other defendants by Hollard Insurance, (the plaintiff).

Background facts and circumstances

[2] It is common cause that on or about the 17th April 2003 Timber Tech Holdings (Pty) Ltd was placed in liquidation and that the three defendants were the duly appointed joint liquidators of Timber Tech Holdings (Pty) Ltd in liquidation on 3

February 2004.

[3] According to the particulars of claim, plaintiff alleges that first, second and third defendants bound themselves jointly and severally to pay the Master such amount, up to a maximum of ten million rand (R10 million) as the Master might claim from them, in respect of any loss or damage that might be suffered by the company in liquidation, due or by reason of their failure to perform their functions properly. The relevant undertakings upon which the plaintiff relies are annexed to the particulars of claim as annexures “POC 1” and “POC 2”.

[4] Plaintiff further alleges that it was the intention of the defendant’s as well as the Master that the liability of the defendant’s would be jointly and severally.

[5] According to the particulars of claim it is further alleged that the defendants represented by their respective insurance brokers thereafter called upon plaintiff to bind itself as surety and co-principal debtor to the Master for the due and proper performance of their duties and obligations as liquidators.

[6] On 24 April 2003 the plaintiff bound itself by way of a written deed of suretyship. It is common cause that during October 2004 to August 2007 the first defendant misappropriated amounts totaling R3 447 109-09 which belonged to the company in liquidation.

[7] As the result of the conduct of first defendant the Master addressed a demand to the plaintiff calling upon it to make good the loss suffered. Plaintiff complied with the demand and on 1 August 2011 it paid to the Master the sum of R3 447 109-09.

[8] On 19 November 2012 default judgment was granted against the first defendant in favour of the plaintiff for payment of the amount of R3 447 109-09 and interest thereon.

[9] In terms of “POC 2”, the applicant and the third defendant undertook an bound themselves ‘*jointly and severally*’ should they be appointed as provisional liquidators and or liquidators of Timber Tech Holdings (Pty) Ltd, to pay to the Master

on demand an amount of R10 milliion as the Master may claim '*in respect of any loss or damage as may be suffered by the said estate or by any person by reason of the fact that I /we failed to perform properly my/our functions in the above capacities or because of any maladministration on my/our part*'.

The underlying purpose of Rule 33(4)

[10] It is necessary to consider the underlying purpose of Rule 33(4) and to highlight the applicable principles. Rule 33(4) provides that:

> *'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*'.

[11] In *Denel (EDMS) Bpk v Vorster 2004(4) SA 481 (SCA)* at para 3 the SCA reiterated the trite principle that the underlying purpose of Rule 33(4) is to entitle a court to try issues separately in appropriate circumstances and is aimed at facilitating the convenient and expeditious disposal of litigation. The court however cautioned, and correctly so, that it should not be assumed that, that result is always achieved by separating the issues. I agree that 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'*.

[12] It is further accepted law that the court has a wide discretion in considering a separation application. As was held in the Denel matter (*supra*), our courts have repeatedly stated that it is ordinarily desirable and in the interest of the expedition and finality of litigation to have one hearing only at which all issues are dealt with so that the court, at the conclusion of the case may dispose of the entire matter. A consideration of the authorities show that the applicant in a separation application

must demonstrate convenience and place sufficient information before the court to enable it to exercise its discretion in a proper and meaningful way. See *Internatio (Pty) Ltd v Lovemore Brothers Transport CC 2000(2) SA 408 (SEC) at 411 A – B*.

[13] In considering a separation application the court must carefully and judicially exercise its discretion so as to determine whether the application will indeed facilitate the proper convenient and expeditious disposal of litigation. See *Molotlegi and Another v Mokwalase [2010] 4 AllSA 258 (SCA) at para 20*. According to the SCA '*it is the duty of the court to ensure that the issues to be tried are clearly circumscribed in its order so as to avoid confusion. The ambit of terms, like the 'merits' and the 'quantum' , is often thought by all the parties to be self-evident at the outset of a trial, but in my experience it is only in the simplest of cases that the initial consensus survives. When making rulings in terms of Rule 33(4) and when issuing its orders, a trial court should ensure that the issues are circumscribed with the clarity and precision ...'* See *LTC of Delmas v Boshoff 2005(5) SA 514 (SCA)* at para 29, *Christalis NO v Meyer NO (916/12) [2014] SASCA 53* (16 .04.2014) at para 8 and *First National Bank v Clear Creek Trading 12 (Pty) Ltd and Others (1054/2013) [2015] ZASCA 6* (9 March 2015).

[14] The paramount consideration in deciding a separation application is convenience. It is now accepted law that the word '*convenient*' in the context of Rule 33(4) include notions of '*appropriateness*', '*fairness*', '*justice*', '*good*', '*sense*' and '*reasonableness*', in all the circumstances of each particular case. It follows that what is prejudicial to one party can hardly be convenient or reasonable to another party.

[15] It is convenient at this juncture to refer to some of the factors which would resort under the heading of the word 'convenient' as succinctly summarised in plaintiffs heads of argument:

15.1 Whether the hearing on the separated issues will materially shorten the proceedings: if not, this obviously militates against a separation. See *Minister of Agriculture v Tongaat Group Ltd 1976 (2) SA 357 (D) at 363A – B*. See also Erasmus Superior Court Practice RS 40, 2012

Rule-B1 p236 and more recent authorities cited in support of this factor at footnote 26 thereof.

15.2 Whether the separation may result in a significant delay in the ultimate finalization of the matter: such a delay is a strong indication that the separation ought to be refused. See *Netherlands Insurance Co of SA Ltd v Simrie 1974 (4) SA 287 (C) at 289B - C* (in that case, the factors that the plaintiff had already waited a considerable period of time, and that the court roll was congested were held to be relevant factors pointing against the grant of a separation).

15.3 Whether there are prospects of an appeal on the separated issues, particularly if the issue sought to be separated out, is highly controversial and appears to be one of importance: if so, an appeal will only exacerbate any delay and negate the rationale for a separation. See *Minister of Agriculture v Tongaat Group Ltd (supra) at 363G – 364B*.

15.4 Whether the number of court days saved by the separation weighs up favourably against the delay that may arise between the finalization of the separated issues and the continuation and the remainder of the proceedings: if as a result of a separation, the delay of the separation may render the saving in court time less significant, the separation will not likely be granted. See *Minister of Agriculture v Tongaat Group Ltd (supra) at 363D - G*, as applied in numerous subsequent decisions.

15.5 Whether the plaintiff seeks a separation contrary to the wishes of the defendant, yet the plaintiff simultaneously insists that he/she enjoys good prospects of success: if the plaintiff adopts this contradictory position it weakens his/her prospects of obtaining a separation of issues. See *Sharp v Victoria West Municipality 1979 (3) SA 510 (NC) at 512C – D.*

15.6 Whether the separated issues and the non-separated issues are linked or discrete: if after careful consideration of the pleadings, the separated

and non-separated issues are found to be linked, even though at first sight they might appear to be discrete, it will be undesirable to separate the issues and to hear the trial on such a piecemeal basis. See *Denel (Edms) Bpk v Vorster (SCA)* (*supra*) at para 3.

15.7 Whether the evidence required to prove any of the separated issues on the merits may also be required to be led when it comes to proving the non-separated issues (i.e witnesses leading evidence twice on the same facts: if so, a court will not grant a separation because it will result in the lengthening of the trial, the wasting of costs, potential conflicting findings on facts and on credibility of witnesses, and it will also hinder the opposing party in cross-examination. See *Internatio (Pty) Ltd v Lovemore Brothers Transport CC (supra) at 411 G – I*.

15.8 In relation to the latter two factors – whether the separated issues and the non-separated issues are linked or overlap, and whether witnesses will be led and cross-examination on more than one occasion on the same facts – there is much recent Supreme Court of Appeal authority for the proposition that these are weighty considerations against the granting of a separation order. Furthermore, whilst, since the amendment of the rule, there are some provincial authority advocating the desirability of separating issues the Supreme Court of Appeal has more recently on several occasions cautioned against the wisdom of separations, because at the time that the application is made, it is particularly difficult for a judge to properly assess whether issues are inextricably linked.

[16] Mr Eloff who was assisted by Mr Van Eeden for the plaintiff / respondent, has in my view correctly submitted that the decisions of Denel (*supra*) at para 3, *Privest Employee Solutions (Pty) Ltd v Vital Distribution Solutions (Pty) Ltd 2005(5) SA 276 (SCA)* at para 26 -27, *LTC of Delmas v Boshoff 2005(5) SA 514 (SCA)* at para 29, *Consolidated News Agencies (Pty) Ltd (in liquidation) v Mobile Telephone Networks (Pty) Limited and Another 2010(3) SA 382 (SCA)* para 90 Molotlegi and Another v Mokwalase (*supra*) at para 20, *Absa Bank Ltd v Bernert 2011(3) SA 74 (SCA)* para

21, *SA Transport and Allied Workers Union v Garvis and Others 2011(6) SA 382 (SCA)* at para 45 and Christelis NO v Meyer NO (*supra*) at paragraph 8, is clear authority that the SCA has now adopted a somewhat different approach with regard to separation applications in that the following principles clearly emerge:

1. caution is expressed against assuming the attractiveness of separating issues;

2. the expeditious disposal of litigation is often best served, by ventilating all the issues at one hearing;

3. there will be some case where a separation would be convenient; especially where there are no real prospects of overlapping issues or evidence.

Discussion

[17] It was contended by Mr Oosthuizen, on behalf of the second defendant / applicant, that whilst "POC 2" clearly constitutes an acknowledgment by applicant and the third defendant, that if appointed as liquidators, that they would between them be jointly and severally liable to the Master for an amount of ten million rand (R10 million) should any loss be suffered from their failure to properly perform their functions, there is nothing in annexure "POC 2" indicating that applicant and third defendant also intended to bind themselves either jointly and severally or in any other fashion for any losses which might be caused by maladministration or dereliction of duty on the part of first defendant.

[18] According to Mr Oosthuizen annexure "POC 2" contains no indication that the appointment of first defendant as co-liquidator was contemplated. He argued that first defendant signed a separate undertaking binding himself to the Master i.e. "POC 1" and that "POC 1" makes no reference to the applicant or third defendant or any intention to impose a joint and several liability on them.

[19] That although applicant acknowledges entering into the undertaking contained in "POC 2", he denies that he or third defendant, by giving the undertaking contained

in “POC 2”, intended to bind themselves for the obligations of the first defendant as contained in “POC1”..

[20] Applicant further avers that plaintiff’s claim against them is based upon a ‘*guarantee policy*’ covering any loss suffered by Timber Tech Holdings (Pty) Ltd as a result of any defaulting performance on the part of the applicant in the performance of his duties as liquidator.

[21] Placing reliance on inter alia *Momentum Group Ltd v Fire Control Systems (Cape) CC* an unreported case of this division (case no 8278/03) Mr Oosthuizen contended that as a matter of law, damages flowing from the risk insured against cannot be claimed from an insured party.

[22] In his view, these disputes are integral to the determination of the main action and unless plaintiff can establish that all three parties undertook to be jointly and severally liable for any loss caused by any one of them and can establish that applicant and third defendant agreed to their being jointly and severally liable for any loss occasioned by first defendant, plaintiff cannot succeed with his action.

[23] In his view, whatever the nature of the guarantee or suretyship undertaking given by applicant and third defendant as contained in “POC 3” to the Particulars of Claim, it cannot impose joint and several liability on the two defendants. If this is so, then on his interpretation, whether “POC 2” is interpreted to be a contract of suretyship or a guarantee, then the obligation undertaken by the surety or guarantee, is of an accessory nature, and can therefore not impose obligations diferring from the principal debt.

[24] Accordingly he submitted on behalf of the applicant that if the plaintiff does not succeed in establishing joint and several liability and in particular the allegation in para 6.4 of the Particulars of Claim, then the issues flowing from the averments set out in paragraphs 9 to 13 of the particulars of claim do not arise, as between plaintiff and applicant and third defendant, and no evidence need be led on such issues. He submitted further that if it is correct that the legal consequences of plaintiff issuing a guarantee policy covering the loss which has arisen, it will be unnecessary for the

court to consider the issue raised in paragraphs 9 to 13.

[25] Consequently he submitted that the issues raised in paragraph 2 of the second defendant's amended plea and in paragraph 2.4 to 2.7 of the third defendant's amended plea be dealt with at the outset of the trial, with all other issues standing over for later determination.

[26] On a reading of the pleadings, and in particular paragraph 2 of second defendant's amended plea, it seems to me that applicant appears to admit that the defendant's entered into the undertakings contained in annexures "POC 1" and "POC 2". Mr Eloff who was assisted by Mr Van Eeden for the plaintiff, contended that this admission did not make sense as it appears that what second defendant is in fact admitting is that the defendants entered into undertakings and bonds of security (i.e. "POC 1" and "POC 2").

[27] On the plaintiff's version it will be obliged, at the hearing of the matter relating to the separated issue, to adduce evidence relating to the interpretation of annexures "POC 1" and "POC 2" to the effect that each defendant was aware that he/she was appointed initially as joint provisional liquidator and thereafter final liquidator by the Master before entering into and requiring their broker on their behalf, to provide the Master with undertakings and bonds of security as contained in "POC 1" and "POC 2" i.e. the undertakings as well as the suretyship and guarantee to be provided at their request by plaintiff in terms of annexure "POC 3".

[28] Plaintiff further avers that it also intends to adduce evidence of the broker instructed by the second and third defendants and to produce documentary evidence which will illustrate that applicant, third defendant and her attorney of record, at all material times considered them bound jointly and severally with the first defendant in terms of the undertaking and guarantee provided by or on their behalf to the Master in the estate.

[29] To illustrate the point Mr Eloff made reference to a letter dated 19 April 2005 by applicant to first defendant (which plaintiff intends to present as evidence at the trial of the matter), in which he expressly stated that "*Is there anything which has*

happened in this estate which we should know off (sic) *as we are jointly and severally liable in the estate* (my emphasis).

[30] Further correspondence to be relied on by plaintiff which appears to point to the fact that third defendants' attorney of record accepted that all the defendants were jointly and severally liable, is a letter dated 27 August 2010 addressed to Astra Brokers by third defendant's attorney of record which reads as follows:

> "*My perusal of the Suretyship given by Hollard Insurance Company ("Hollard") to the Master, and the respective Undertakings and Bonds of Security given in the one instance by Sarel Coetzee alone, and in the other on a joint and several basis by Mark Beginsel and Hanne Sangiorgio, does not alter my view that if any of the Liquidators misbehaves, this would entitle the Master to exercise his rights against any or all of the Liquidators under the Undertakings and Bonds of Security… The fact is that the Liquidators are bound jointly and severally to the Master under their respective Undertakings and Bonds of Security dated 24 April 2003… The Suretyship held by Hollard is a separate legal act and undertaking. If Hollard has to pay the Master in its capacity as Surety, then it has an automatic common-law right of recourse against the Liquidators…'*

[31] Other correspondence which the plaintiff intends to adduce at the hearing of any separated issues will include but not be limited to a letter by first defendant to the applicant advising him of the '*fee split*', the arrangement that applicant would provide the Master with security as required by the estate and the subsequent conduct of the parties which will illustrate that applicant and the third respondent would be bound jointly and severally with the first defendants in terms of the undertakings provided by them to the Master in the Estate.

[32] According to the plaintiff it further intends to adduce evidence, at the separation of issues, trial of the practice at the Masters office which gave rise to the issuing of the documents i.e. "POC 1" and "POC 2" as read with "POC 3" and the manner in which annexures "POC 1" and "POC 2" as well as "POC 3" came to be issued and the policy and attitude of the Master when joint trustees are appointed an

estate.

[33] Accordingly it was contended on behalf of the plaintiff that the instructions given by the applicant and third defendant to their broker to issue the documents and how they were given to the Master are relevant factual material in relation to the interpretation of the undertakings as read with “POC 3”. According to Mr Eloff, evidence of this nature is required so as to put into perspective how the documents such as the undertakings annexures “POC 1” and “POC 2” to the particulars of claim must be interpreted.

[34] On the pleading it is clear that the plaintiff has never regarded “POC 1” and “POC 2” as suretyships, nor does the plaintiff contend that they are suretyships. According to the plaintiff, “POC 1” and “POC 2” are principal obligations and it was never the intention that they were to bind the signatories thereto as accessories to a principal debt. In this regard, plaintiff clearly intends to adduce evidence in relation to the factual matrix which existed at the time that the undertakings i.e. “POC 1” and “POC 2” as read with “POC 3” were signed, issued and provided to the Master by the defendants’ brokers at the request of the defendants.

[35] On the face of it “POC 1” and “POC 2” appear to contain the main obligations undertaken by the defendants. There is accordingly merit in Mr Eloff’s submission that the only question to be decided in relation to the interpretation of “POC 2” and “POC2” is whether the said documents can be interpreted to mean what is set out in paragraphs 6.4 and 6.4(A) of plaintiff’s particulars of claim as amended.

[36] A further factor to consider is that there is nothing on the pleadings or the evidence before me to indicate that any of the defendants had requested their respective brokers to record in any way on the undertakings that they would only be liable for his/her own default, or that he or she did not accept joint and several liability with the others of them for any loss or damages as may be suffered by the estate as set out in each undertaking.

[37] In regard to the contention that applicant is the insured under the guarantee policy and that plaintiff is therefore not entitled in law to recover any amount paid by

the plaintiff in terms of the guarantee policy, it seem to me that there is merit in the submissions made by Mr Eloff on behalf of the plaintiff that:

1. plaintiff is not a party to the undertakings contained in annexures “POC 1” and “POC 2” and that the undertakings cannot be construed in their terms as guarantee policies;

2. in order for the applicant to rely on the defence that “POC 1” and “POC 2” constitute guarantee policies, they would have to prove that a premium was paid for the cover concerned; no such allegation is made in the amended pleas;

3. even if applicant was to allege that the document i.e. “POC 3” constitutes a guarantee policy that would not be sustainable as plaintiff issued annexure “POC 3” under a guarantee policy and one premium was paid annually in respect of such cover;

4. such premium was not paid by the defendants personally but was paid by them as a cost of the administration out of the assets of the estate;

5. only one guarantee in respect of the suretyship “POC 3” was requested to be provided by all the defendants to the Master and there was never any request to defendant’s brokers to issue a separate guarantee or suretyship on behalf of each of the defendants;

6. plaintiff issued the suretyship in the form of annexure “POC 3” under a guarantee policy and now seeks to recover the payment it made from the applicant and the third defendant as the principal debtors.

7. In any event, the only person(s) who could be insured under a guarantee policy would be the Master on behalf of the creditors in the estate.

[38] I agree with the arguments by Mr Eloff that the trial court would be best placed and in a position to make a finding as to the real issues between the parties i.e. whether the principal debt, which was discharged by the plaintiff when it paid the

Master, is that of the first defendant only, or also that of the applicant and third defendant. In my view the proposed separation will not relieve the trial court of the necessity to determine the issues raised in paragraphs 9.2 and 9.3 of the particulars of claim nor in respect of the allegations contained in paragraphs 13 to 13.5.8 thereof in the event of the documents not being regarded as suretyships.

[39] I am further satisfied that in relation to the determination of the alleged failure of the applicant and third defendant to prevent further loss to the estate, the evidence of the officials at the Master's office may be required, and that on plaintiffs case such evidence will also be required with regard to the issues sought to be separated and the background circumstances and practice with regard to the issuing of annexures "POC 1" and "POC 2" as read with "POC 3" by or on behalf of the defendants.

[40] When regard is had to the evidence and the issues involved in the present matter, then it seems to me that they are not as straight forward and or clear cut as Mr Oosthuizen has made them out to be. I must accordingly caution myself that in exercising my judicial discretion that I am guided by the principles outlined in the authorities hereinbefore referred to and that I should be particularly cautious not to adopt an over simplistic approach. This matter must clearly be distinguished from what we know as your normal run of the mill, Road Accident Fund matters where issues relating to the merits and quantum can be dealt with separately very easily.

[41] I am not persuaded by Mr Oosthuizen's contention that much of the evidence which plaintiff intends to lead and traverse in cross-examination of the defendant's witnesses in the interpretation of the documentation would be inadmissible before the eventual trial court. It is accepted law that issues of admissibility should be determined by the trial court and the court hearing a separation of issues application cannot, and at the least, ought not to make binding decisions on the admissibility of the evidence of witnesses that are called at the separation application.

[42] In my view evidence of relevant and admissible context, including the circumstances in which the documents referred to hereinbefore came into being, is crucial to the determination of the matter as a whole. First National Bank v Clear

Creek Trading 12 (Pty) Ltd and Another (*supra*) the SCA made it clear that the circumstances as to how a document came to take the form it did seems to be highly relevant particularly in circumstances where what is signed by the parties appears to be a standard form document.

[43] I further agree with the approach that evidence of the state of knowledge of the defendants at the time when they were appointed as joint liquidators and when they entered into the undertakings, will certainly be relevant and admissible and constitutes the type of evidence which a trial court would require in order to interpret the documents in the present matter. See *Durant v Fedsure General Insurance Ltd 2004(3) SA 350 SCA at 359 to 360*. This approach is endorsed in *Natal joint Municipal Pension Fund v Endumeni Municipality 2012(4) SA 593 at para 18* where Wallis JA stated at para 18 '*… Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production … The 'inevitable point of departure is the language of the provision itself', read in the context and having regard to the purpose of the provision and the background and production of the document.'* In *Comwezi Security Services (Pty) Ltd and Mohamed Shaffie Mowzer NO v Cape Empowerment Trust Ltd,* Case number 759/2011, an unreported judgment of the SCA, Wallis JA at para 14 – 15 held that *'…there is no reason not to look at the conduct of the parties in implementing the agreement where it is clear that they have both taken the same approach to its implementation, and hence the meaning of the provision in dispute, their conduct provides clear evidence of how reasonable business people situated as they were and knowing what they knew, would construe the disputed provision….'*

[44] It accordingly follows that plaintiff would also be entitled to adduce the evidence of the broker engaged by applicant and third defendant on the issue of their joint and several liability with first defendant and in relation to the practice followed

by the Master in regard to the background circumstances and facts known to the parties at the time of the genesis of the documents in question, the practice in the industry and the manner in which defendants conducted themselves subsequently.

[45] The contention by Mr Oosthuizen, that plaintiffs case stands or falls on the interpretation of the documents will depend largely on legal argument, cannot therefore in the circumstances of this case be correct. Such an approach is in my view an over simplification of the issues and more so would result in what Mr Eloff described as an impermissible constraint on the procedural right of a litigant to adduce evidence that will bear on the relevant factual matrix and the contextual setting relating to the genesis of the documents concerned.

[46] In any event, it is trite law that a plaintiff is not limited by its pleadings regarding adducing evidence in relation to the interpretation of the documents upon which it relies.

[47] On a conspectus of the evidence and the pleadings I am accordingly not persuaded that an interpretation of the legal effect of “POC 1” and “POC 2” together with “POC 3” in favour of the applicant will constitute the end of the matter against applicant and third defendant. I have come to this conclusion *inter alia* based on the fact that according to plaintiff’s particulars of claim it clearly pleads under paragraph 9 to 9.4 read with paragraph 10.2 of the particulars of claim as amended, that the applicant and third defendant’s purported delegation of their powers and duties to the first defendant, in itself constituted a failure to administer and account properly, resulting in the plaintiff having to pay in terms of its suretyship and that applicant and third defendant are accordingly liable jointly and severally to reimburse the plaintiff for the amount so paid.

[48] In addition plaintiff also relies on the deliberate or negligent failure of the applicant and third defendants to comply with their statutory duties and obligations to ensure that funds collected on behalf of or belonging to the company were properly dealt with and accounted for. The argument presented on behalf of the applicant in this regard can therefore not succeed.

[49] The situation envisaged by applicant during the separation of issues trial will also result in plaintiff being precluded from adducing evidence in relation to the guarantee policy itself and how it came about. In my view this would result in severe prejudice to the plaintiff which is certainly not one of the purposes sought to be achieved by Rule 33(4).

[50] There is further a great likelihood that if all the issues are not dealt with together at the main trial that it may result in what has been described by Mr Eloff as an artificial curtailment and assessment of the evidence which will have undesirable consequences. See Christelis *supra*.

[51] In my view a determination of the issues sought to be separated will not be dispositive of the entire or even a substantial part of the case. The reality is that the proceedings will not be shortened at all. There is real likelihood that at the conclusion of a hearing on the issues to be dealt with at a separation of issues trial, considering the nature and complexity of the issues, will result in a duplication of witnesses called. In the event of a ruling against either of the parties it is more than likely that an appeal will follow and that the delay occasioned by this will delay and negate the rationale for a separation. I am satisfied that the '*separated*' and '*none separated*' issues in this matter are inextricably linked and that it would be undesirable to separate the issues and to hear the trial on a piecemeal basis. It seems to me to be inevitable that to order a separation of issues trial will ultimately result in a situation where the separation will result in the lengthening of the trial, additional wasted costs, hinder the plaintiff's cross-examination and conceivable result in conflicting findings on the facts and the credibility of witnesses. The facts and circumstances of the matter overwhelming favour a process where all the issues are dealt with at one trial.

Conclusion

[52] Accordingly I am satisfied that based on the facts and circumstances hereinbefore set out that to separate the issues will not result in the convenient and expeditious disposal of the matter as envisaged by Rule 33(4). Accordingly the application cannot succeed.

[53] In the result I make the following order:

The application is dismissed with costs, including the costs of two counsel.

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RILEY, AJ