Republic of South Africa

IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

Case no: 7234/2013

In the matter between:

COPPERZONE 108 (PTY) LTD	**First Defendant/Applicant**
AFRIFRESH GROUP (PTY) LTD	**Second Defendant/Applicant**
v	
GOLD PORT ESTATES (PTY) LTD	**First Plaintiff/Respondent**
OASE EIENDOMME	**Second Plaintiff/Respondent**

Court: Justice J Cloete

Heard: 5 February 2019

Delivered: 27 March 2019

JUDGMENT

CLOETE J:

Introduction

[1] The applicants (the two defendants in the main action) seek an order separating two issues in terms of uniform rule 33(4). The application is opposed by one of the respondents (the first plaintiff or "respondent"). The second plaintiff in the main action, Oase Eiendomme, has withdrawn its action against the defendants.

[2] The respondent ("Gold Port") issued summons in the main action against the applicants ("Copperzone" and "Afrifresh" respectively) on 9 May 2013. The claim is for payment of R2 million, interest and taxed costs of R166 647.11 which Gold Port was ordered to pay to Oase Eiendomme by the North Gauteng High Court on 13 May 2010, a judgment that was confirmed on appeal to the Full Bench on 11 February 2013.

[3] Oase Eiendomme's claim had been in respect of estate agent's commission. The claim arose as a result of the conclusion of a written deed of sale between Gold Port and Copperzone at Groblersdal, Limpopo Province on 24 June 2008, in terms of which Gold Port sold to Copperzone certain immovable and movable property for R40 million and R1.5 million respectively. In concluding the sale agreement Gold Port was represented by the late Mr Gerrit Monray Meyer ("Meyer"), and Copperzone by Mr Christiaan Paul Conradie ("Conradie").

[4] Clause 23 of the sale agreement provided that no estate agent's commission was payable but that:

'Indien enige eis vir agentekommissie ingestel sou word sal dit deur die KOPER betaal word en vrywaar die KOPER die VERKOPER en stel hom skadeloos teen enige eis vir agentekommissie en regskoste wat ingestel mag word deur enige persoon of instansie.'

[5] Clause 25 of the sale agreement reads in relevant part as follows:

'25. BORGSTELLING:

AFRIFRESH GROEP (EDMS) BEPERK hierin verteenwoordig deur sy Direkteur CHRISTIAAN PAUL CONRADIE, verbind homself hiermee teenoor die VERKOPER as borg en mede-hoofskuldenaar in solidum van die KOPER vir die behoorlike nakoming deur die KOPER se verpligtinge in terme van hierdie ooreenkoms…'

[6] These clauses, together with the North Gauteng High Court's order, are relied upon by Gold Port in claiming payment consequentially from Copperzone and Afrifresh. They in turn have delivered a special plea and a plea. Copperzone has also delivered a claim in reconvention.

[7] The special plea is to the effect that Gold Port's claim has prescribed in terms of s 10(1) read with s 11(d) of the Prescription Act.[1] It is pleaded that the debt arose either on 4 July 2008 (when Oase Eiendomme made written demand to Gold Port), alternatively on 12 February 2009 (when Oase Eiendomme instituted action in the North Gauteng High Court against Gold Port).

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[1] 68 of 1969.

[8] The defences raised in the plea are essentially misrepresentation (that at the time of conclusion of the sale agreement Meyer represented to Conradie that no mandate had been furnished to any estate agent and that accordingly no estate agent's commission would be payable) and, more relevant for present purposes, a denial that Afrifresh bound itself as surety and co-principal debtor for the performance of Copperzone's obligations (if any) in terms of clause 23 of the sale agreement.

[9] Copperzone's claim in reconvention is for payment of damages arising from the alleged misrepresentations. The damages claimed of R844 787.27 are Gold Port's legal costs incurred in defending the action in the North Gauteng High Court and paid by Copperzone which, it is alleged, Copperzone would not have paid on Gold Port's behalf but for the misrepresentations.

The separation application

[10] In the original notice of motion the applicants sought only an order that the issue of prescription be determined separately in terms of rule 33(4). Their attorney, Ms Meyer, deposed to the founding affidavit. The reasons advanced in support of the separation were as follows:

10.1 Should the special plea succeed, it will dispose of the action;

10.2 The issues raised in the special plea are "almost entirely" of a legal nature and can be disposed of expeditiously and inexpensively – feasibly in one day;

10.3 On the other hand, there are several issues on the pleadings that will require evidence of “a variety of witnesses” in relation both to the merits of Gold Port’s claim as well as “questions of quantum”. Conradie “will in all likelihood” be one of them but, given that he will unquestionably be a hostile witness for the applicants, they will be required to place him under subpoena; and

10.4 There can be no, or no substantial, prejudice to Gold Port if the special plea is determined separately.

[11] Conradie is alleged to be a witness of unquestionable hostility towards the applicants for the following reason. During 2016 all the shares in Afrifresh were acquired by Acorn Agri (Pty) Ltd (“Acorn”). Since shortly after this acquisition, Acorn has been engaged in litigation on several fronts against the erstwhile shareholders and key individuals, including Conradie. Meyer submitted that:

> *‘Not only is this likely to place the Defendants at a considerable disadvantage at the trial, but it may well lead to delays and incidental interlocutory proceedings relating to the issuing of subpoenas and possibly even applications to treat witnesses as hostile.’*

[12] The founding affidavit is silent as to what evidence (if any) will be required in the determination of the special plea, despite the allegation that the issues raised therein are “almost entirely” of a legal nature. At the time of deposing to the founding affidavit on 25 June 2018, Meyer must have been aware that Gold Port had not filed a replication to the special plea and that therefore no admissions had been made in

relation to the dates relied upon by the applicants, in particular the earlier date of the first demand.

[13] More importantly, Meyer did not deal at all with the claim in reconvention, which would stand irrespective of whether the special plea is upheld, and more specifically with the pleaded arrangement that Copperzone covered Gold Port's own legal costs, in relation to the same factual dispute in respect of which prescription is now raised, during the North Gauteng High Court litigation. Moreover, no case at all was made out for the second issue now sought to be separated in the amended notice of motion, namely the question whether Afrifresh bound itself as surety and co-principal debtor with Copperzone for the performance of the latter's obligations (if any) in terms of clause 23 of the sale agreement.

[14] In the answering affidavit the deponent, Ms Bondesio (who is one of Gold Port's directors) pointed out that the applicants do not contend that the issues raised in the special plea of prescription are <u>entirely</u> of a legal nature. She submitted *inter alia* that:

14.1 Evidence relating to the manner in which the parties implemented clause 23 of the sale agreement is pivotal, both in deciding the special plea and in determining the merits and claim in reconvention; and

14.2 Given that Conradie will have to testify on all of these, as well as the circumstances giving rise to the inclusion of clauses 23 and 25 (to the extent that such evidence would be admissible), and given the applicants' own

version that Conradie is hostile, it is convenient that he testifies on all of them at once.

[15] In paragraph 17 of the founding affidavit Meyer submitted that Gold Port's right of recourse against Copperzone and Afrifresh arose by not later than 4 July 2008, which according to her was the date upon which Gold Port, in writing, claimed that it was liable to pay estate agent's commission. Bondesio pointed out that it was not Gold Port but Oase Eiendomme which made such a claim on that date. This factual dispute, which directly relates to the special plea, was not addressed by Meyer in the replying affidavit.

[16] According to Bondesio, it was also Copperzone, via Conradie, who in fact defended the action in the North Gauteng High Court on Gold Port's behalf, as is evidenced by him having furnished instructions throughout to Gold Port's attorneys, deposing to an affidavit on behalf of Gold Port resisting summary judgment, and facilitating payment by Copperzone of Gold Port's own legal costs (which, as previously stated, forms the subject matter of the claim in reconvention). Bondesio accordingly submitted that Copperzone in fact implemented clause 23 of the sale agreement, also a factual issue which directly impacts on the determination of the special plea.

[17] In the replying affidavit Meyer, while accepting that clause 23 is relevant to the determination of the special plea, disputed that Conradie would be able to give any admissible evidence on the interpretation of the clause itself, and that the applicants therefore do not intend calling him as a witness for this purpose. This misses the point. It is not only the interpretation of the clause itself which is relevant (a legal

issue) but whether that clause was subsequently implemented (a factual, disputed issue on the papers) which require determination for purposes of adjudicating the special plea. Whether, and in what manner, the clause was implemented by Copperzone will entail evidence that has nothing to do with evidence concerning the negotiations leading to the inclusion of clauses 23 and 25 in the sale agreement, which would likely be inadmissible: see *City of Tshwane Metropolitan Municipality v Blair Atholl Homeowners Association.*[2]

[18] In the replying affidavit Meyer – without any confirmatory affidavit from either applicant – simply alleged that their knowledge of the North Gauteng High Court litigation is limited to what is contained in the two judgments arising therefrom. She also pertinently failed to deal with Bondesio's damning allegation that it was Conradie himself who deposed to an affidavit resisting summary judgment on behalf of Gold Port in those proceedings, contenting herself with a generalised bald denial and, put bluntly, ducking the issue by contending that the applicants were not parties to that litigation. Moreover, and again, Meyer did not deal at all with the claim in reconvention.

[19] Attached to the replying affidavit was a notice of intention to amend the notice of motion, seeking to incorporate the determination of whether Afrifresh bound itself as surety and co-principal debtor with Copperzone as a further separated issue. The only allegation made in relation thereto was that:

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[2] (106/2018) [2018] ZASCA 176 (3 December 2018) at paras [76] – [77].

> *'7. I accept that the interpretation of clause 23 of the sale agreement is of relevance in relation to the Defendants' special plea. (For the avoidance of doubt, the Defendants seek to amplify paragraph 1 of the notice of application and I annex hereto marked "MM1" a copy of the notice of intention to amend, which has been served on the Plaintiffs.)'*

Discussion

[20] 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 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 is appears that the questions cannot conveniently be decided separately.'*

[21] There are conflicting decisions within this Division on whether it is incumbent on the applicant for a separation of issues to satisfy the court that it should be granted. In *Hotels, Inns and Resorts SA (Pty) Ltd v Underwriters at Lloyds and Others*[3] it was held that it is for the applicant to do so, whereas in *Braaf v Fedgen Insurance Ltd*[4] and *Berman & Fialkov v Lumb*,[5] following *Braaf*, it was held that it is for the respondent to persuade the court that a separation should not be granted.

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3 1998 (4) SA 466 (C) at para [10].
4 1995 (3) SA 938 (C) at 939G-H.
5 2003 (2) SA 674 (C) at para [17].

[22] In the leading case of *Denel (Edms) Bpk v Vorster*[6] the Supreme Court of Appeal explained the purpose of the rule and how it should be applied, as follows:

> *'Rule 33(4) of the Uniform Rules – which entitles a Court to try issues separately in appropriate circumstances – is aimed at facilitating the convenient and expeditious disposal of litigation. It should not be assumed that that result is always achieved by separating the issues. 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. And even where the issues are discrete, the expeditious disposal of the litigation is often best served by ventilating all the issues at one hearing, particularly where there is more than one issue that might be readily dispositive of the matter. It is only after careful thought has been given to the anticipated course of the litigation as a whole that it will be possible properly to determine whether it is convenient to try an issue separately.'*

[23] In *Molotlegi and Another v Mokwalase*[7] the same court stated that:

> *'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 considering an application for separation 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.'*

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6 2004 (4) SA 481 (SCA) at para [3].
7 [2010] 4 All SA 258 (SCA) at para [20].

[24] It thus seems clear that, irrespective of which party bears the "burden of persuasion" the court is nonetheless enjoined to apply its mind properly and judiciously to whether a separation should be granted. Self-evidently therefore, it is incumbent on both parties to place all relevant information before the court to enable it to exercise its discretion. If an applicant fails to do so (as in this case) it will have to accept that the court may not be in a position to properly weigh the advantages and/or disadvantages of granting a separation. That being said, there are certain guiding principles that may be gleaned from the case law. Before dealing with these principles, it is important to bear in mind that the Supreme Court of Appeal has in recent times adopted a strong view that the convenient and expeditious disposal of litigation is not always achieved by separating the issues; that piecemeal litigation is not to be encouraged; and that the expeditious disposal of litigation is often best served by ventilating all the issues at one hearing.[8]

[25] The guiding principles are as follows:

25.1 Whether the hearing on the separated issues will materially shorten the proceedings: if not, this militates against a separation. In *Braaf* (*supra*)[9] it was said that despite the wording of the subrule, it remains axiomatic that the

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[8] See *inter alia*: *Privest Employee Solutions (Pty) Ltd v Vital Distribution Solutions (Pty) Ltd* 2005 (5) SA 276 (SCA) at paras [26] and [27]; *Consolidated News Agencies (Pty) Ltd (in liquidation) v Mobile Telephone Networks (Pty) Ltd and Another* 2010 (3) SA 382 (SCA) at paras [89] – [91]; *Absa Bank Ltd v Bernert* 2011 (3) SA 74 (SCA) at para [21]; *South African Broadcasting Corporation v Democratic Alliance* 2016 (2) SA 522 (SCA) at para [67]; *First National Bank – a division of Firstrand Bank Ltd v Clear Creek Trading 12 (Pty) Ltd and Another* 2018 (5) SA 300 (SCA) at para [9]; and *The City of Tshwane Metropolitan Municipality v Blair Atholl Homeowners Association* (106/2018) [2018] ZASCA 176 (3 December 2018) at paras [48] – [53].

[9] At 941D.

interests of expedition and finality are better served by disposal of the whole matter in one hearing;

25.2 Whether the separation may result in a significant delay in the ultimate finalisation of the matter: such a delay is a strong indication that separation ought to be refused.[10] The granting of the application, although it may result in the saving of many days of evidence in court, may nevertheless cause considerable delay in reaching a final decision in the case because of the possibility of a lengthy interval between the first hearing at which the special questions are canvassed and the commencement of the trial proper;[11]

26.3 Whether there are prospects of an appeal on the separated issues, particularly if the issues sought to be separated are controversial and appear to be of importance: if so, an appeal will only exacerbate any delay and negate the rationale for a separation;[12]

25.4 Whether the issues in respect of which a separation is sought are discrete, or inextricably linked to the remaining issues: if after careful consideration of the pleadings, the relevant issues are found to be linked, even though at first sight they might appear to be discrete, it would be undesirable to order a separation;[13] and

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[10] *Netherlands Insurance Co of SA Ltd v Simrie* 1974 (4) SA 287 (C) at 289B-C.
[11] Erasmus Superior Court Practice at D1-437.
[12] *Hollard Insurance Co Ltd v S A Coetzee and Others* (24120/2011) [2015] ZAWCHC 57 (6 May 2015) at para [15].
[13] See *Denel* (*supra*) at para [3]; *Consolidated News Agencies* (*supra*) at para [89].

25.5 Whether the evidence required to prove any of the issues in respect of which a separation is sought will overlap with the evidence required to prove any of the remaining issues: a court will not grant a separation where it is apparent that such an overlap will occur. Such a situation will result in witnesses having to be recalled to cover issues which they had already testified about.[14] Where there is such a duplication of evidence, a court will not grant a separation because it will result in the lengthening of the trial, the wasting of costs, potential conflicting findings of fact and credibility of witnesses, and it will also hinder the opposing party in cross-examination.[15]

[26] Applying these principles to the matter at hand, I am far from persuaded, on the available information, that a separation is warranted.

[27] Rather than materially shortening the proceedings, a separation will unduly prolong finalisation. The implementation or otherwise of clause 23 (upon which the suretyship in clause 25 hinges) is directly relevant, and inextricably linked, to the issue of the special plea of prescription. Evidence will be required which will have to be given at a later stage, again, at least insofar as Copperzone's claim in reconvention is concerned. This will in turn result in a lengthening of the trial, the wasting of costs, and potentially conflicting factual and credibility findings. In this regard, it should also be mentioned that Conradie himself was one of the witnesses who testified in the trial in the North Gauteng High Court and credibility findings have already been made against him in the judgments of that court. To open the door, by way of a separation,

[14] See *Internatio (Pty) Ltd v Lovemore Brothers Transport CC* 2000 (2) SA 408 (SECLD) at 411G-I.
[15] See *Hollard Insurance Co* (*supra*) at para 15.7.

to a series of potentially conflicting factual and credibility findings would not be prudent.

[28] Further, given the history of the prior litigation in the North Gauteng High Court, there is every prospect that the unsuccessful party in a separated hearing will pursue an appeal. This will only exacerbate the delay. While Gold Port itself has dragged its heels in the main action (its counsel rightly did not suggest otherwise) the proper administration of justice calls for no further or unnecessary delay in bringing this matter to an end on all of the disputed issues. Moreover, if Conradie is indeed a witness hostile to the applicants, common sense dictates that the procedural hoops outlined by the applicants, and relied upon by them, should be dealt with in one hearing and not on a piecemeal basis.

[29] **In the result the following order is made:**

The application in terms of uniform rule 33(4) is dismissed with costs, including any reserved costs orders.

J I CLOETE