Republic of South Africa

IN THE HIGH COURT OF SOUTH AFRICA
WESTERN CAPE DIVISION, CAPE TOWN

Case number: 10038/2014

Before: The Hon. Mr Justice Binns-Ward

Hearing: 27 July 2020
Judgment: 31 July 2020

In the matter between:

INVESTEC BANK LIMITED Plaintiff

and

SIOBHAN LEE O'SHEA N.O. Defendant
(in her capacity as trustee of the St John Trust IT 2429/1998)

JUDGMENT
(Delivered by email to the parties and release to SAFLII.
The judgment shall be deemed to have been handed down at 10h00 on 31 July 2020.)

BINNS-WARD J:

Introduction

[1] The matter for consideration at this stage of the action proceedings instituted by Investec Bank Ltd against the defendant in her capacity as the trustee of the St John Trust (formerly known as the O'Shea Family Trust) is the defendant's application in terms of

rule 33(4) for a separation of issues. The application comes before me as the case manager judge. Notice of the application was served by the defendant on the plaintiff in or about mid-February 2019.[1] The application is opposed by the plaintiff. An affidavit opposing the application was delivered by the plaintiff on 19 March 2019. The application was set down for hearing in court on 27 July 2020 in the circumstances described below. The defendant applied for a postponement of the hearing on that date, which application was also opposed by the plaintiff.

[2] The plaintiff's claim against the defendant arises out of the alleged liability of the Trust in terms of two deeds of suretyship that the Trust, and certain other parties, executed in favour of the plaintiff in respect of indebtedness to the plaintiff of the principal debtor , the Plettenberg Golf Estate (Pty) Ltd (PGE). The sureties' exposure under both deeds of suretyship was limited. In respect of the first deed (a copy thereof is attached to the plaintiff's particulars of claim marked **F1**), which was executed in 2006 and described itself as a '*limited continuing suretyship*', the limit was R18 425 000. The first deed of suretyship was that referred to as having to be provided in terms of clause 2.1.4.1 of an agreement of loan entered into between the plaintiff and PGE on 23 January 2011 (annexure **A** to the particulars of claim). In respect of the second deed (annexure **F2** to the particulars of claim), executed during 2007, which was titled '*suretyship limited to facility and amount*' and pertained to a facility identified with reference to 'Agreement No. 218228/005', the limit of the Trust's liability was originally R6 806 250. However, by deed of amendment, dated November 2007 (annexure **F3** to the particulars of claim), the extent of the Trust's maximum exposure under the second deed of suretyship was reduced to R1 million plus interest and certain other 'charges, expenses and costs'. Agreement No. 218228/005 was a written agreement of loan entered into between the plaintiff and PGE on 24 January 2011 (annexure **B** to the particulars of claim). Clause 2.1.4.1 thereof cross-referenced to the aforementioned second deed of suretyship and related deed of amendment.

[3] It will be noted from the various dates mentioned in the preceding paragraphs that the dates of the suretyship agreements precede those of the two agreements of loan to which they allegedly relate. The apparent oddity in that is explained in paragraph 5 of the plaintiff's particulars of claim where it is pleaded that the attached agreements of loan '*record the latest*

[1] The supporting affidavit was deposed to by the defendant on 11 February 2019 and the notice of opposition was delivered on 25 February 2019.

terms of those agreements'. It may be deduced from that allegation that there were earlier editions of those agreements.

[4] It appears from the plaintiff's particulars of claim that it appropriated certain payments received by it in reduction of the principal debt to that portion thereof to which the second deed of suretyship pertained, with the result that the defendant's contingent liability thereunder has been extinguished. The balance of the payment received by the plaintiff was also appropriated in reduction of the debt to which the first deed pertained, with the result that the defendant's exposure under that deed was alleged to be in the sum of R17 570 210,66 as of 10 April 2013. In the pending action the plaintiff claims payment of that amount, together with mora interest at the contractually stipulated rate from 10 April 2013.

[5] The most recent iteration of the defendant's plea, being that dated 26 February 2019, shows that the defendant has raised a number of defences to the plaintiff's claim. I find it necessary for present purposes to refer to only some of them. It has alleged that the plaintiff has no title to the claims against the principal debtor having disposed of the rights it had '*to one or more third parties, the identities of which are not known to the Defendant*'. The defendant alleges in the alternative that the plaintiff has no standing because it has, according to the defendant, recovered any losses it sustained by virtue of the principal debtor's default from its insurers. It is also denied that the loan agreements attached to the particulars of claim '*were amendments of pre-existing loan agreements*'. The defendant also denies the material terms of the loan agreements as alleged in the particulars of claim. The plea also puts in dispute the existence and computation of the principal debt that is in issue in the action based on the first deed of suretyship. In particular, it is denied that the plaintiff complied with its obligations under the loan agreement, including the obligation to lend and advance the loan amounts. And, notwithstanding an express provision in the second deed of suretyship that it was furnished '*in addition to and without prejudice to any other security or suretyship (including any suretyships signed by the Surety) now or hereafter to be held ...*', the defendant has pleaded that the second deed of suretyship replaced the first deed of suretyship and that she accordingly has no remaining obligations under the latter contract.

[6] In regard to the last-mentioned defence, the defendant introduced paragraph 27A into the latest version of her plea, in which she pleaded that the second deed of suretyship was susceptible to being rectified to reflect the true common intention of the parties. Rectification obviously had to be pleaded if the defence that the second deed of suretyship had replaced the

first were to get around the effect of the parol evidence rule. Paragraph 27A of the plea currently provides as follows:

> 27A To the extent that the written suretyships dated 25 October 2007 and 15 May 2006, purport to represent that they are separate and independent suretyships concluded by the parties, Defendant pleads that:
>
> 27A.1 This does not reflect the true intention of the parties;
>
> 27A.2 The common continuing intention of the parties, as it existed at the time when the suretyship dated 25 October 2007 was reduced to writing, was that it would replace the suretyship dated 15 May 2006;
>
> 27A.3 There was a mistake in the drafting of the suretyship dated 25 October 2007 document, which was the result of an intentional act of plaintiff, alternatively a bona fide common error;
>
> 27A.4 The actual wording of the suretyship dated 25 October 2007 should have contained a provision recording that it replaced the suretyship in favour of Plaintiff, dated 15 May 2006 and the suretyship should be rectified accordingly.

The plea does not specify with any precision how the wording of the second deed of suretyship falls to be changed for the purposes of the pleaded rectification. It says nothing at all about how the rectification of the second deed might affect the first deed in which the Trust is but one of a number of co-sureties, some of which are not party to the second deed.

[7] Notwithstanding the provisions of rule 6(11), the interlocutory application in terms of rule 33(4) was brought on the long form notice of motion. The defendant took no steps to set the application down. This may perhaps be explained by the fact that at the last case management meeting, held in December 2018, I was asked to retain the file in chambers pending anticipated further developments; viz. the possible settlement of the action, alternatively, and if that was not achieved, a 'possible application' by the defendant for a separation of issues.

[8] The anticipated possible application for a separation of issues had been addressed in a pretrial meeting minute, dated 4 December 2018, signed by the parties' respective attorneys. The minute recorded the following in the relevant respect:

> <u>The separation application</u>
>
> 2.7 In the event the parties are unable to conclude a settlement of this matter, then the defendant shall deliver its application for separation by 17h00 on Tuesday, 15 January 2019.
>
> 2.8 The plaintiff shall deliver its answering/ opposing papers (if any) in the separation application by Friday, 1 February 2019.

2.9 The defendant shall deliver its replying papers (if any) in the separation application by Monday, 17 February 2019.

2.10 The parties shall thereafter agree upon the first available date (where both parties' counsel are available) for the hearing of the separation application.

3. **The trial-readiness of this matter**

3.1 In the event that-

3.1.1 the parties fail to settle this matter in the manner detailed above; and

3.1.2 the defendant fails to deliver its separation application as per paragraph 2.7 above,

then the parties hereby agree that this matter is trial-ready, and that the plaintiff may approach the Honourable Mr Justice Binns-Ward to have the matter certified as such.

[9] The matter obviously did not become settled and defendant did not bring an application in terms of rule 33(4) by 15 January 2019, but I was not approached to certify the case as trial-ready, as agreed in para 3.1.2 of the 26 November 2018 pretrial minute. The defendant's attorneys explained the delivery of their client's application for a separation of issues outside of the time frame recorded in the 4 December minute in a letter to my registrar, dated 5 February 2019, in which they stated that the defendant's offer of settlement had been rejected by the plaintiff only on 18 January 2019.

[10] I have not found any formally recorded direction to that effect, but it would appear from the email correspondence in the court file to which I have had regard that I must have indicated at the last case management meeting on 6 December 2018 that, if necessary, I would give directions after the papers in any application for separation had been finalised as to whether it would be heard by me as the case manager judge or referred for hearing on the opposed motion roll. When more than a month had elapsed after the delivery of the opposing affidavit and the defendant had not filed a reply, the plaintiff's attorney emailed an enquiry on 25 April 2019 asking for directions on the hearing of the application. That enquiry, and follow up emails in June and August, respectively, appear to have been sent to the email address of my former registrar, Mrs A. Havemann, who had retired at the end of July 2018. They did not come to my attention.

[11] In response to a further emailed enquiry by the plaintiff's attorney in November 2019, this time addressed to my current registrar, the parties' attorneys were advised that I was on long leave and that the matter would be placed before me at the beginning of January 2020 when I was due to return to do a week of recess duty. The matter, however, escaped notice in the hurly-burly of my duty week and a further email from the plaintiff's attorney sent to my

registrar on Friday, 20 March 2020, did not receive attention because it came in on my last day in chambers before the Covid-19 lockdown.

[12] I spent the entire period of the second court term working remotely from home, being occupied principally with the hearing on an audio-visual platform of a long-running trial that commenced on 11 May and, with a week's interruption, ran through until 23 June. This matter was eventually attended to after I collected the files during a brief visit to my chambers to attend to administrative matters on 10 June 2020 after my registrar had forwarded me a further enquiry from the plaintiff's attorneys, dated 9 June 2020. I found that the papers were not in order. Amongst other things, the papers in the separation application were entirely missing from the court file.

[13] As appears from my registrar's email to the parties' legal representatives, a copy of which is attached, marked **A**, to the defendant's supporting affidavit in the application for postponement, they were advised on 17 June 2020 that, provided that the files were placed in order by 22 June, I would be willing to hear the application on the Zoom audio-visual platform on 25 June if the parties' legal representatives were available. The parties were also advised that, by way of an alternative to the aforementioned proposal, and if they were content for the application to be disposed of in that manner, I would be willing to determine the application without oral argument on written submissions. They were informed that should neither of those proposals be acceptable, the application would be heard by me in court on 27 July 2020, being the first day of third court term.

[14] The plaintiff's attorneys thereafter collected the papers from my home and promptly returned them in good order. They also indicated that they would be willing to participate in an online hearing, or to have the separation application decided on the papers without oral argument.

[15] The defendant's attorney responded in a letter to my registrar, dated 22 June 2020. He advised that the suggested date for an online hearing in June was not convenient. His letter recorded that '[w]*e are trying to make arrangements for the July date, depending on the availability of counsel and we shall revert shortly*'. In her affidavit in support of the application for a postponement, the defendant indicated that she had not been willing to have the rule 33(4) application determined on the papers. She averred that '[the defendant] *wants to have the matter properly argued, as it* (sic) *is entitled to do, in Court, where advocacy of*

the applicant's briefed counsel can have the opportunity of convincing the presiding judge of the merits of the applicant's case'.

[16] When it became apparent that the application could not be heard before the end of the second court term on either of the bases proposed in my communication to the parties' legal representatives of 17 June, I caused them to be advised, on 24 June 2020, that the matter would be heard in court on 27 July, as previously indicated. They were informed that '[s]*hould counsel currently engaged in the matter not be available on the given date, the party affected will be expected to engage alternative counsel. Any party not in a position to proceed on the given date will be expected to bring a formal application for postponement with appropriate expedition*'. I made that stipulation consistently with the longstanding policy of the court that its timetables are as a general rule not dictated by the availability of counsel of first choice,[2] and conscious of the history of delay in the matter, in which the pleadings had closed as long ago as 2016, and in which it was evident from the reasons given by the defendant's attorney to the plaintiff's attorneys for his inability to subscribe to a progress minute required to be filed at the case management meeting held on 13 August 2018 that the defendant did not always timeously furnish him with instructions. The defendant delivered her application for postponement on 14 July 2020.[3]

Application for postponement

[17] The defendant's view of the set down of the rule 33(4) application for hearing on 27 July 2020 was succinctly stated in paragraph 9 of her affidavit in support of the application for a postponement. In that regard she expressed herself as follows:

> Although the applicant understands the difficulties and limitations caused as a result of the so-called national lockdown, it is also important to remember that:
>
> 9.1 There is no urgency in this matter;
>
> 9.2 There is no particular need why the rule 33(4) application must be determined on 27 July 2020. There will be no prejudice to anyone if that application were to be determined on another date, agreed between the parties and which is available to the Court;
>
> 9.3 The litigation in this matter has been ongoing for some years;

[2] Cf. e.g. *D'Amos v Heylon Court (Pty) Ltd* 1950 (2) SA 40 (C).

[3] The application was delivered by email, which was unexceptionable in the circumstances. The hard copy was filed of record on 15 July 2020.

9.4 The applicant should be entitled to have a hearing in court, before a judge, as opposed to a hearing without any oral argument or via a video link only. Justice must not only be done, it must also be seen to be done.[4]

[18] The postponement is sought on the following grounds:

18.1 The unavailability of the defendant's counsel and attorney on 27 July 2020 because, so it was alleged, they were both engaged in other opposed matters on that date. In that regard it is pointed out that the '*matter has a long history and the pleadings ... are extensive*'. It is contended that the attorney and the counsel know the history and that it would be '*expensive and unnecessarily time-consuming to the* [defendant] *to have to brief an entirely new legal team, only because the specific date of 27 July 2020 is not available to either the attorney or the counsel of the* [defendant]'. The defendant concluded on this aspect in her affidavit that '[a]*nother date for the hearing of this matter would be the most suitable alternative for the hearing of this matter*'.

18.2 That further discovery in the action is necessary before the application in terms of rule 33(4) will be ripe for hearing.

The unavailability of the defendant's counsel of choice

[19] Whether the unavailability of counsel previously engaged in a matter might afford a reasonable basis for a postponement at the instance of the affected party will depend on the facts of the given case. Fairness and the interests of justice are the principal determining criteria in all contested applications for postponement. Appropriate regard must be had not only to the position of the applicant but also to the legitimate interests of the other parties to the litigation and the needs of the effective administration of justice. Ordinarily, and certainly when there is sufficient time for another advocate to prepare, alternative counsel should be instructed when counsel of first choice is not available on the date allocated for the hearing of a matter. To avoid doing so is, in effect, a delaying tactic.

[20] If the date of 27 July that was proposed in my registrar's email to the parties of 17 June gave rise to an earnestly felt difficulty for the defendant, I would have expected her legal representatives to have raised the issue before the date was firmly settled in terms of the

[4] Whether a litigant is entitled to insist on a hearing in open court rather than remotely on an audio-visual platform to which anyone applying to attend as a spectator might be admitted is a moot point. I am aware of judgments in other jurisdictions in which applications for postponements on the grounds that an in court hearing was not possible because of lockdown restrictions have encountered judicial resistance; see e.g. the judgment of Perram J in the Federal Court of Australia in *Capic v Ford Motor Company of Australia Limited (Adjournment)* [2020] FCA 486 (15 April 2020).

notification given to the parties on 24 June 2022. There is no evidence that the defendant's attorney was unable during the period of a whole week between 17 and 24 June to ascertain the availability of the defendant's counsel of choice. And it does not escape notice that in his letter to my registrar of 22 June, in which he stated '*We are trying to make arrangements for the July date, depending on the availability of counsel and we shall revert shortly*', the defendant's attorney made no mention of his own unavailability on 27 July that, as indicated above, was urged in the papers as one of the reasons why the matter should be postponed.[5]

[21] The defendant furthermore gave no indication of what the 'suitable alternative' date for the hearing of the rule 33(4) application might be, or that her legal representatives had made any effort, in consultation with the plaintiff's legal representatives, to determine a mutually convenient date that might be proposed to the court if a postponement were to be granted. In the latter regard it bears mention that when the application for a postponement was received, my registrar, in confirming that it would be heard on 27 July - as opposed to 22 July being the alternative date nominated in the notice of application - advised that that would be the date '*unless there is agreement on a postponement before then*'. I can accept that the plaintiff might not have agreed to a postponement, but were the defendant sincerely anxious to settle on an alternative suitable date on which her legal representatives of choice would be available, I would have expected some effort to be made at least identify such a date or choice of dates. How else was the court to be expected to determine a 'suitable alternative' date if it were to grant the postponement? It is after all the defendant who is the applicant in the rule 33(4) application, and I would therefore have expected that she and her attorney would make the running in getting it heard. But, as the history described above illustrates, it has been the plaintiff's attorney who has driven the process. The parties' conduct tells a story. One of them is anxious to get to trial to obtain a final adjudication of its claim; the other is at best indifferent about expediting the finalisation of the case.

[22] It was specious of the defendant to suggest that the matter is lacking in any urgency. Urgency is a relative concept, and whereas the defendant might be right to say that the matter lacked urgency in the sense that that word might be understood in rule 6(12), interlocutory applications concerning procedural issues in pending actions are routinely dealt with as a matter of relative urgency. The set down of an interlocutory application on nearly six weeks' notice was unremarkable, and the insinuation in the defendant's papers that the set down of

[5] Whatever the reason for the attorney's unavailability might have been, it had apparently been resolved before 27 July because, as matters transpired, he did attend the hearing.

her rule 33(4) application was treated with inappropriate urgency was by no means justified. As rule 37A - the rule that regulates judicial case management - expressly acknowledges, case management through judicial intervention is directed at '*obviating the problems that cause delays in the finalisation of cases and expediting actions towards trial and adjudication*'. Obviating delay and expediting matters necessarily enjoins injecting a measure of urgency into them. The direction given by me on 24 June 2020 was of the nature contemplated in rule 37A(12)(e).[6]

[23] The relief primarily sought by the defendant in her application for postponement, viz. '[t]*hat the hearing of the application in terms of Uniform Rule 33(4) be postponed to the first available date allocated by the registrar of this honourable Court, after 7 August 2020*'[7] is directed at taking the matter of the determination of the hearing of an interlocutory issue in a matter under case management out of the hands of the case manager judge and putting it in the hands of the registrar. It is a course that, if followed, would in all likelihood result in the interlocutory application being brought for hearing before a different judge on the semi-urgent roll. That would be inimical to all of the objectives of efficiency and expedition to the achievement of which the system of judicial case management aspires. More especially so in a case like the present where the papers are relatively voluminous, and the injudicious use of judicial resources that would be involved by requiring another judge to familiarise him or herself with them for an interlocutory matter would therefore be stark. More pertinently, any date determined by the registrar in the ordinary course would be fixed without regard to counsel's diaries, and therefore, if the availability of counsel were to be accepted as the determining criterion, liable to risking yet another application for postponement on the same ground as that urged before me at this stage.

[24] For the reasons I shall give presently in respect of the determination of the rule 33(4) application, I was unpersuaded by the contention that the complexity of the questions involved in the argument of that application would make it unreasonable to expect the defendant to engage alternative counsel if counsel previously used by her in the matter was unavailable. As stressed in argument by the plaintiff's counsel, the extent to which the particular senior counsel who the defendant says she would want to argue the rule 33(4) application was in point of fact previously involved in the matter is in any event less than

[6] All case management matters in the Western Cape Division have been attended to by email during the Covid-19 lockdown period. It is only exceptionally in the currently prevailing conditions that a judge convenes an in-person case management conference.

[7] Paragraph 2.1 of the notice of application for a postponement.

clear. For instance, it is usual in an action in which counsel are engaged for them to sign the pleadings. Yet, none of the various iterations of the defendant's plea since the action was instituted all of six years ago was signed by counsel. Nor were the requests for trial particulars. They were signed only by the defendant's attorney, who has right of appearance in the High Court.

[25] That holds true even in respect of the latest edition of the plea that was amended because of a realisation that the question that the defendant wants separated for determination before the other issues in the case could be sustained only if the second deed of suretyship relied upon by the plaintiff for its claim were to be regarded as rectified. As pointed out by the plaintiff's counsel, the relevant amendment was ineptly effected. It fell patently short of compliance with the trite requirement that a pleader relying on rectification should expressly allege, *ipsissimis verbis*, how the rectified document should read; cf. *Levin v Zoutendijk* 1979 (3) SA 1145 (W) at 1147H-1148B and *Anglo-African Shipping Co (Rhod) (Pvt) Ltd v Baddeley and Another* 1977 (3) SA 236 (R) at 241. It is not necessary to make a finding of fact on the point, but I should be surprised if any experienced counsel, and most certainly not the eminent silk named for the first time by the defendant in her replying affidavit as the counsel she would prefer to argue the separation application, had been the draftsperson of such a manifestly deficient pleading. Be that as it may, the only documented previous involvement of the senior counsel that the defendant says she considered it vitally important to engage for the argument of the rule 33(4) application was at a pretrial meeting held in that advocate's chambers on 26 November 2018, which was minuted in the abovementioned minute of 4 December 2018 that was placed before me at the case management conference on 6 December 2018. He was not engaged when an exception against an earlier version of the defendant's plea was argued before Bozalek J.

[26] Whether or not the defendant's contention that she would be unfairly prejudiced by being unable to use the senior counsel of her choice to argue the separation application is cogent or not is something that the court that is able to assess independently. The court is not bound by the defendant's *ipse dixit* in this regard. The question might turn on the evident complexity or lack of complexity of the issues involved. As will appear, I was not persuaded in the current matter that the separation application was something that any counsel new to the case would not be able to master with little difficulty. In my judgment, for reasons that I shall give presently, it would have become apparent to any competent counsel upon a reading of the pleadings that the formulation of the separation sought in terms of the application was

patently defective, and that even if improved to incorporate the newly pleaded defence of rectification, the question that the defendant sought to have determined before and in isolation from the other issues in the case did not lend itself to convenient separation.

[27] In the circumstances the defendant's averment that the trust would be financially prejudiced by having to employ alternative counsel did not carry persuasive weight. There is no reason not to believe that the defendant still intends to use the counsel concerned for the purposes of the trial and therefore the reportedly substantial, but unsubstantiated, investment in his professional services allegedly made thus far will not be wasted whatever the fate of the rule 33(4) application.

[28] In the result I was not persuaded that the unavailability of the defendant's counsel of choice afforded good reason in the peculiar circumstances of the case to grant the defendant a postponement in the face of the plaintiff's justifiable anxiousness to move matters along.

Further discovery

[29] It will be recalled that the pretrial minute of 4 December 2018 advised that but for the possibility of an application for the separation of issues in terms of rule 33(4), the parties were agreed that the action was trial-ready. The defendant would appear to have bethought herself in this regard, however, because she has caused a notice in terms of rule 35(3) for further and better discovery to be served on the plaintiff.

[30] The notice in question is dated 13 July 2020, the same date as the notice of application in the postponement application. The request covers 12 categories of documentation, most of them described in generic rather than specific terms. party's possession. More pertinently, the timing of the request, some 19 months after the defendant accepted that the action was trial-ready, is suspect. Much of the request is not recognisably related to the question that the defendant seeks to have heard and determined separately. For example, in item 11 of the request copies of '*any and all documentation showing the securitisation ... of ... any amounts owing by PGE to the plaintiff, at any time from its inception to the date of summons*' is sought.

[31] Be that as it may, the recent request for broad ranging further discovery indicates on its face that the defendant's case is far from trial-ready. It also indicates that the defendant is busy with the preparation of her case on a broader front than her pending application for a separation might have led one to expect. The furnishing of further discovery might well lead

to a further request for particulars for the purposes of preparing for trial. An application for a separation of issues before a matter is trial-ready will more often than not be premature.

[32] It has been stressed repeatedly that a ruling in terms of rule 33(4) should be made only after very careful consideration by the judge and the legal representatives concerned of the practical import for the conduct of the trial and the determination of the action; see e.g. *Denel (Edms) Bpk v Vorster* [2004] ZASCA 4 (5 March 2004), 2004 (4) SA 481 (SCA), [2005] 4 BLLR 313, at para. 3; *Absa Bank Ltd v Bernert* [2010] ZASCA 36 (29 March 2010), 2011 (3) SA 74 (SCA), at para. 21; *Adlem and another v Arlow* [2012] ZASCA 164; [2013] 1 All SA 1 (SCA), 2013 (3) SA 1, at para. 5; *Road Accident Fund v Mohohlo* [2017] ZASCA 155 (24 November 2017), 2018 (2) SA 65 (SCA), at paras. 2-3; *First National Bank v Clear Creek Trading 12 (Pty) Ltd and Another* [2015] ZASCA 6 (9 March 2015); 2018 (5) SA 300 (SCA) at paras. 8-14; *Government of the Western Cape: Department of Social Development v C B and Others* [2018] ZASCA 166 (30 November 2018); 2019 (3) SA 235 (SCA), at paras. 19-25; and most recently *Petropulos and Another v Dias* [2020] ZASCA 53 (21 May 2020) at para 67-69.

[33] In *Denel* supra, at para 3, the appeal court observed that –

> 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.

In *Consolidated News Agencies (Pty) Ltd (in liquidation) v Mobile Telephone Networks and Another* [2009] ZASCA 130; 2010 (3) SA 382 (SCA), in para 89-90, the court made the following equally pertinent remarks:

> 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 that issue decided first.
>
> This court has warned that in many cases, once properly considered, issues initially thought to be discrete are found to be inextricably linked. 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. A trial court must be satisfied that it is convenient and proper to try an issue separately.

In my view, it is difficult in many cases for both the parties to be properly satisfied in the manner repeatedly enjoined in the authorities that it would be convenient in the relevant sense to try any of the issues separately from the others before the discovery and trial particulars aspects of trial preparation have been completed.

[34] Mr *Fransch*, who appeared for the defendant in the application for a postponement, but did not hold instructions to argue the application in terms of rule 33(4), realistically acknowledged that the application was on any approach probably premature, and tendered from the bar that the separation application should therefore stand over for argument at a later stage after the plaintiff had responded to the defendant's rule 35(3) notice. He indicated that in that event the defendant would be willing to pay the plaintiff's wasted costs incurred in respect of the hearing on the 27th of July. I might have looked favourably on the proposal if I had been able to hold a rosier view about the possible feasibility of the separation of issues sought by the defendant. However, for the reasons to be given shortly, it seems clear to me that such a separation would be convenient because the matter of rectification will be inextricably bound up with questions of fact that are germane to other aspects of the case. Putting off the hearing of the separation application would therefore serve no point.

[35] For all these reasons I have concluded that it would not be fair or in the interests of justice to grant the postponement sought by the defendant.

The application in terms of rule 33(4)

[36] The defendant elected not to instruct counsel to argue her application in terms of rule 33(4) in the event of her application for a postponement not being granted. Mr *Howie*, who appeared for the plaintiff argued the case in opposition to the separation application together with making his submissions in opposition to the application for postponement. This was understandable because the apparent merits or prospects of success of the separation application were relevant considerations in the adjudication of the application for postponement. As already noted, there would be little point in postponing an application that had every appearance of not going anywhere. That would be to grant an indulgence for no real purpose and likely to result in nothing but unnecessary delay.

[37] In her notice of application, the Defendant sought a ruling in the following terms:

1. That this honourable Court direct that the following question be disposed of separately and prior to any other issue in dispute:

   Whether the deed of amendment, annexed to the particulars of claim as annexure "**F3**", limited Applicant's / Defendant's ("Applicant") total liability to Respondent / Plaintiff ("Respondent") to R1 000 000 (one million Rands) when read with the two suretyships annexed to Plaintiff's / Respondent's ("Respondent") particulars of claim as annexures "**F1**" **and** "**F2**" (the separate question).
2. That the action under the case number above be stayed until the separate question has been determined.
3. Costs of suit.
4. Further and / or alternative relief.

[38] The formulation of the relief sought betrays the fact that proper attention was clearly not given to the need that special care be taken to clearly circumscribe precisely what it is that is to be heard separately. See in this regard *Denel* supra, loc. cit., where Nugent JA said *'... where the trial court is satisfied that it is proper to make such an order – <u>and in all cases it must be so satisfied before it does so</u> – it is the duty of that 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. Both 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 clarity and precision*'. (My underlining.)

[39] Had the required attention been given to the formulation of the relief, it would have been evident that the pleaded rectification would need to be identified as a separated issue. The manner in which the relief sought in the separation application was formulated would suggest that the issue to be separated was merely one of interpreting annexure **F3** to the particulars of claim in the context of the two deeds of suretyship, annexures **F1** and **F2**, respectively. Even the most superficial consideration of the pleadings makes it plain, however, that that cannot be the case. For the reason identified earlier, the defendant's allegation concerning the limitation of the Trust's total liability to R1 million is unsustainable without a rectification of at least the second deed of suretyship.[8] In view of the adverse conclusion I have reached on the separation application I have not found it necessary to determine the point, but it also seems to me, having regard to the non-variation clause in the

[8] See paragraphs [5] and [6] above.

first deed (clause 16) and the fact that the Trust's co-sureties under the first deed are not in all respects the same as those under the second deed, that the first deed might also require rectification for the defendant's pleaded defence in this regard to be able to prevail.

[40] In my judgment, quite apart from the fact that, as mentioned, the precise nature of the rectification has not been pleaded, there are very obvious difficulties inherent in treating the rectification issue discretely for the purposes of trial from some of the other issues in the case. The question whether the plaintiff had agreed that the second suretyship would replace the first and that the Trust's entire exposure as a surety would be limited to R1 million will not be determinable in a vacuum. The contested issue will fall to be decided with regard to the probabilities to be established with regard to the existing and anticipated circumstances at the time that the deed of amendment, annexure **F3** to the particulars of claim was executed. Those surrounding circumstances will very foreseeably include the amount in which the principal debtor was indebted to the plaintiff at the time and how it was anticipated that their relationship as lender and debtor would proceed. The defendant's pleaded allegations, summarised in paragraph [5] above, concerning the existence and computation of the principal debt to which the first deed of suretyship relates and whether the loan agreements annexed marked **A** and **B**, respectively, to the particulars of claim manifested the currently amended versions of the loan agreements in existence at the time the deeds of suretyship were executed appear to me to be inextricably bound up with the questions that a trial court seized of the rectification defence would need to treat in determining whether it was probable that the plaintiff would have foregone the security provided by the defendant in terms of the first deed of suretyship.

[41] For these reasons it does not appear that granting the separation order sought by the defendant, even if its formulation were to be improved to address the deficiencies identified above, would be 'convenient' within the meaning of rule 33(4). I am not satisfied that making the separation order that has been sought would facilitate the expeditious disposal of the litigation. On the contrary, I consider that making such a ruling would probably have the opposite effect. The application will therefore be refused.

Costs

[42] In its papers in the postponement application the plaintiff sought an order for costs *de bonis propriis* against the defendant's attorney in that application. In oral argument, Mr *Howie*, advisedly in my view, did not press that point. Both deeds of suretyship in issue in

the litigation provide (in clause 1.3.2 thereof) that the surety undertakes liability for '*all costs, including legal costs as between attorney and own client, which are incurred by* [the plaintiff] *in exercising* [its] *rights against the ... the Surety for the recovery of any or all of the amounts ... (including through the institution of legal proceedings), ...*'. Mr *Howie* therefore moved that both applications should be dismissed with costs on the scale as between attorney and own client.

[43] Mr *Fransch*, if I understood him correctly, sought to argue that it would be inappropriate to hold the defendant to costs on that scale because it might ultimately be determined at the trial that the Trust's indebtedness had been extinguished and that the action against the defendant had therefore been without cause. There is no merit in the argument. The effect of the clause in both deeds of suretyship is that the defendant has undertaken liability to pay any costs that may be awarded against her in litigation for the enforcement of the plaintiff's rights under the suretyships on the stipulated scale. The fact that she may ultimately be successful in the trial affords no basis to immunise her against liability on the basis contractually undertaken for the costs of her unsuccessful interlocutory applications.

Order

[44] In the result the following orders will issue:

1. The defendant's application for the postponement of the hearing of her application in terms of Uniform Rule 33(4) is refused.
2. The defendant's application in terms of rule 33(4) brought under notice of motion dated 8 February 2019 is refused.
3. The defendant is ordered to pay the plaintiff's costs of suit in respect of both of the aforementioned applications on the scale as between attorney and own client.

A.G. BINNS-WARD

Judge of the High Court

APPEARANCES

Plaintiff's counsel:	**R. Howie**
Plaintiff's attorneys:	**Werksmans Attorneys** **Cape Town**
Defendant's counsel: **(Postponement application only)**	**V. Fransch**
Defendant's attorneys:	**Van Rensburg & Co** **Bergvliet**
	BBM Attorneys **Cape Town**