IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

Case Number: 11641/2015

In the matter between:

Lambertus von Wielligh Bester N.O.	First Plaintiff
Reinette Pieters N.O.	Second Plaintiff
Barend Pietersen N.O.	Third Plaintiff
(Acting in their capacity as joint trustees of the sequestrated estate of the RVAF Trust IT 932/2004)	

And

Gertruida Johanna Horn	First Defendant
and various other Defendants forming part of the consolidated action	

JUDGMENT ELECTRONICALLY DELIVERED

23 NOVEMBER 2022

Baartman, J

[1] The defendants[1], applicants in the main application for a separation of issues, now apply for leave to appeal against my judgment, dated 5 October 2022 (**the October judgment**), refusing the separation application. It is in issue whether the judgment is appealable and whether the defendants met the test for leave to appeal[2].

Is the judgment appealable?

[2] It is now accepted that a judgment/order that is not final in effect might nevertheless be appealable, if it is in the interests of justice to hear the appeal. In Lebashe[3], the court, faced with an order that effectively intruded on a constitutional right, held that it was in the interests of justice to grant leave to appeal. This is not such a case.

[3] In refusing the application for the separation of issues, I have not, nor could I have, finally pronounced on any issue. On the contrary, I was persuaded that the evidence to be led in support of the divergent views expressed, during lengthy arguments, were an indication that the evidence to be led would be lengthy and that the same witnesses would be subjected to cross-examination multiple times. It is axiomatic

---

[1] In terms of a court order, dated 5 November 2018, and a directive, dated 18 November 2021, approximately 466 defendants, against whom the plaintiffs had instituted actions in the various magistrates' courts, were transferred to this court and consolidated.

[2] Section 17 of the Superior Courts Act, 10 of 2013 (the Act): '17. **Leave to appeal** – (1) Leave to appeal may only be given where the judge or judges concerned are of the opinion that –

(a) (i) the appeal would have a reasonable prospect of success; or
(ii) there is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration; ...

(c) where the decision sought to be appealed does not dispose of all the issues in the case, the appeal would lead to a just and prompt resolution of the real issues between the parties.'

[3] *United Democratic Movement and Another v Lebashe Investment Group (Pty) Ltd and Others* 2022 JDR 2651 (CC).

that the witnesses would also be subjected to credibility findings in the various hearings.

[4] Mr Stelzner SC, who appeared with Mr Rabie, the defendants' counsel, submitted that the prescription plea would have to be decided on the facts of each specific case. There are approximately 400 cases. I have no doubt that it would be convenient to those defendants to have their issues separated. The relevant defendants were among 9 000 investors enticed into investing in a Ponzi scheme. Their funds were invested in the RVAF Trust[4] (**the Trust**). On 3 September 2012, the Trust was finally liquidated.

[5] Mr Brand (**Mr Brand**), the Trust's only surviving trustee, is elderly and has since 2012 testified in various proceedings; he would have to testify in the separated hearing and again in the main trial. The latter hearing would undoubtedly be some years hence. It is in dispute how much of Mr Brand's evidence would be relevant in a separated hearing; in any event, in the main trial, he would be required to testify again about events that occurred pre- and post-2012.

[6] Mr Brand would be confronted with his evidence in earlier proceedings and court time would be taken up with substantially the same factual matrix. In those circumstances, it is difficult to appreciate the submission that it would be in the interests of justice to grant leave to appeal. It is not enough that the separation is convenient for the defendants.

[7] I am persuaded that it would not be in the interests of justice to grant leave and have already indicated that I have not disposed of any of the issues to be dealt with in the trial. In the circumstances of this matter, expressing a view based on the papers before me cannot be

---

[4]The RVAF Trust, with ref.NO. IT932/2004, was established on 26 March 2004. Pretorius and Eduard Brand were trustees. It is common cause that the Trust deed provided for a minimum of three trustees who had to act jointly in all events.

construed as having finally disposed of the issue. That is not the purpose of the rule; instead, the rule is directed at the procedure for a convenient and expedited trial[5]. Govern AJA held[6]: '...On my reading of the rule, unless an order is made, the court is required to deal with the action as a whole'. In the circumstances of this matter, the judgment/order is not appealable.

Prospects of success

[8] Despite, my view on the appealability. I have nevertheless considered the prospects of success on appeal. As indicated above, the defendants had invested in the Trust and in 2012, it was finally liquidated. The claims against the defendants, relevant to the prescription plea, were instituted more than 3 years after the plaintiffs took office. The claims arose in the following circumstances: (paras 3–5 of the October judgment)

'[3] The defendants in this action are investors who have received a return on their investment in the scheme. Their funds were invested in [the Trust], the entity in the scheme through which Pretorius invested their money. The Trust was provisionally sequestrated on 1 August 2012, and on 3 September 2012 a final sequestration order was granted. The plaintiffs were appointed as provisional trustees on 7 August 2012 and as final trustees on 23 October 2012. The plaintiffs seek to recover from the defendants the profit they received from the Trust over and above their investment. The Trust had approximately 9 000 investors; the plaintiffs therefore had to determine who

---

[5] Rule 37(A) (12)(*f*) read with Rule 33(4) of the Uniform Rules of Court: Rule 37(A)(12): 'The case management judge may at a case management conference –
...(f) order a separation of issues in appropriate cases notwithstanding the absence of agreement by the parties thereto;...'
Rule 33(4): '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.'

[6] *First National Bank-A Division of Firstrand Bank Limited v Clear Creek Trading 12 (Pty) Limited and another* [2015] JOL 32957 (SCA) para 11.

the "winners" had been and institute action against them to recover their winnings.

[4] The plaintiffs based their main claim, for the return of money paid from the Trust's bank accounts to the defendants, in excess of the amount invested, on unjustified enrichment. They allege that the payments were unauthorised and *sine causa* in that:

(a) the Trust lacked capacity to make the payments as at times of the payments, there were only two trustees, Pretorius and Mr Brand (**Brand**), holding office while the trust deed specified a minimum of three trustees;

(b) Pretorius acted unilaterally as the Trust's controlling mind to the exclusion of Brand;

(c) the two trustees failed to exercise their powers in accordance with the Trust deed;

(d) the payments made to the defendants were made pursuant to an unlawful and fraudulent Ponzi scheme operated through the Trust.

(5) Alternatively, the plaintiffs based their claim for return of the payments on sections 26(1)(*a*) and (*b*) and/or section 29 of the Insolvency Act, 24 of 1936 (i.e., dispositions without value and voidable preferences).'

[9] The defendants intend to raise 2 prescription pleas. The basis for the first prescription plea appears from the October judgment to be as follows: (paras 6–7)

'[6] The 462 defendants alleged that separating their prescription issue (**the first prescription issue**) and staying the rest of the trial would be convenient for the court and the parties. These defendants allege that on 7 August 2012, the plaintiffs had access to all the relevant information to have instituted action against them, in that, on that date, the plaintiffs, as the provisional trustees, had access to the Trust's property where separate hard copy investor files containing relevant information pertaining to potential claims against them were kept. On the same date, the Master of the High Court also authorised the plaintiffs to appoint attorneys to provide legal advice[7]. The defendants allege that the plaintiffs prioritised other matters thereby delaying the action against them and therefore the claims against them had

---

[7] Section 18(2) of the Insolvency Act, 24 of 1936.

prescribed. It is common cause that action was instituted more than 3 years after 7 August 2012.

[7] The defendants rely, to a great extent, on the Bester judgment in which the brokers who assisted Pretorius had the prescription issue separated and obtained judgment in their favour, which relief the Supreme Court of Appeal (**SCA**) upheld, and the Constitutional Court refused to entertain a further appeal. In Bester, the court held as follows:...' (Some internal footnotes omitted.)

[10] I accepted that there 'might be a saving of many days of evidence, but that the separation will inevitably delay the finalisation of the main trial'. Mr Stelner's submission that the prescription plea would have to be decided on the facts of each specific case suggests that I was optimistic in holding that there might be a saving of many days of evidence. In this matter, both parties have accepted that an appeal would follow the outcome of the separated hearing. King J[8] held:

'Defendant based the application on the following factors:

(a) The merits are in dispute and the issues can easily and conveniently be separated. This is so.

(b) In the event that the defendant succeeds on the merits there would be no further incurrence of costs; in this context it is relevant that plaintiff is on legal aid and it would accordingly be public funds which would be disbursed. This applies also to defendant's costs which would come from the MVA Fund. ...

(c) Should plaintiff succeed on the merits a date for the resumed trial could be arranged for a date three to four months hence. Plaintiff gives the delay period as "11 months plus".

Neither estimate takes into account the possibility of an appeal.

(d) The so-called loss of interest is immaterial insofar as future medical expenses and future loss of earnings would be calculated as at date of determination. That is so, but the claim of R236 060 includes claims of R50 000 for general damages and over R10 000 in respect of incurred

---

[8] *Braaf v Fedgen Insurance LTD* 1995 (3) SA 938 (C) 940I–941D.

medical expenses...There is also, of course, the "interests of expedition and finality of litigation" which are better served by the disposal of the whole matter in one hearing.... Despite the wording of Rule 33(4), this, in my view, remains axiomatic.

In my view the balance of convenience in this matter has been shown clearly to favour plaintiff. The application ...dismissed...'

[11] In respect of the second special plea, the defendants' case is the following: (paras 20–24 of the October judgment)

'[20] The plaintiffs claimed repayment of amounts paid to investors before 1 August 2009, more than 3 years prior to their appointment as the Trust's trustees. The affected investors want to raise prescription as a special plea to be dealt with in a separate hearing. It is common cause that the Trust at times relevant to the dispute had only two appointed trustees, while the trust deed prescribed a minimum of three trustees. Therefore, the Trust could not have authorised any payment.

[21] The defendants allege that the trustees, appointed to represent the Trust and its creditors, cannot institute action to recover amounts paid out more than 3 years after payment. The defendants allege that Brand could have instituted action timeously for the recovery of the amounts paid out. He, so the submission went, had the necessary knowledge and *locus standi* and further that any Trust beneficiary had the required *locus standi.*

[22] The defendants concede that Brand's evidence 'may be relevant...as the sole surviving trustee of the RVAF trust' but importantly that he had already testified in the brokers' matter and that a transcript of his evidence is available. Brand is an elderly man who, if possible, should not have to testify about the same facts in multiple proceedings.

[23] However, in a further "Defendants' Note", the following is alleged:

"73. No evidence will have to be led for the second special plea of prescription, the lack of jurisdiction and the Administration of Estates special pleas as these special pleas can be decided by way of a stated case."

[24] However, in the same note, it is alleged that: "106...Brand in particular [had] the necessary knowledge of the alleged facts". As indicated above, it is in dispute whether Brand had the necessary knowledge in respect of the investors. Brand's knowledge of the brokers' files cannot simply be equated with knowledge of the investors' files. Brand's knowledge in respect of the

investors' files is in dispute and would require evidence to be led. Nugent JA[9] held that:...'

[12] I agreed that the second prescription plea was 'eminently arguable'. However, it would not dispose of the entire matter in respect of the relevant defendants, as it was only raised in respect of the 'plaintiffs' claims based on unjustified enrichment'. Opperman J[10] held as follows:

'[17] It remains that the danger of a calamity for both parties and the interest of justice should the matter be separated, is just too real on the facts released by the Applicants and Respondent in the papers. The grant of the application, although it may result in the saving of two to five days, may cause a delay in the reaching of a final decision in the case because of the possibility of a lengthy interlude between the first hearing and the main hearing. This matter is old; it hales from 2009. Most important are the dangers that were described by Erasmus with reference to case law and that have already started to show itself in this case. History and law prove that the case must proceed unseparated....

[18] Separation of the special plea of prescription from the liability and quantum portion of the matter is not convenient in law. The application for leave to appeal is not based on a sound, rational basis that convinces that there are prospects of success on appeal and another court would come to another conclusion.'

[13] In respect of comments such as that the plaintiffs in respect of their special plea 'hold good prospects' and that the defendants' case is 'eminently arguable' in the context of a Rule 33(4) hearing, these cannot be construed as a pronouncement of the issue. That is simply not the purpose of the process. Similarly, without more, it cannot dictate that a separation of issues is appropriate.

---

[9] *Denel (Edms) Bpk v Vorster* 2004 (4) SA 481 (SCA) para 3.
[10] *Phatshoane Henney Attorneys and another v Trollip* (Leave to Appeal) [2021] JOL 49637 (FB).

Conclusion

[14] I, for the reasons stated above, am persuaded that the defendants have not met the requirements for leave to appeal and make the following order:

(a) The application is dismissed with costs, to include the costs of two counsel.

Baartman, J