IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE PROVINCIAL DIVISION

Reportable:	**YES/NO**
Of interest to other Judges:	**YES/NO**
Circulate to Magistrates:	**YES/NO**

Case No.: 3683/2018

In the matter between:

PHATSHOANE HENNEY ATTORNEYS First Applicant[1]
SKEIN, PIETER LABUSHAGNE Second Applicant

and

TROLLIP, JUANITA Respondent[2]

In re the matter between:

TROLLIP, JUANITA Plaintiff

and

PHATSHOANE HENNEY ATTORNEYS First Defendant
SKEIN, PIETER LABUSHAGNE Second Defendant

Coram: Opperman, J

Date of hearing: 26 November 2020 on virtual platform on application by both parties and as authorised by the court.

Delivered: The judgment was handed down electronically by circulation to the parties' legal representatives by email and released to SAFLII on 1 December 2020. The date and time for hand-down is deemed to be 1 December 2020 at 15h00.

[1] First and Second Applicants will be referred to as "Applicants".
[2] "Respondent"

Summary: Separation of hearings - special plea of prescription from liability - and quantum - Rule 33(4)

ORDER

Having considered the documents filed on record and having heard Counsel for the Applicants and the Respondent:

IT IS ORDERED THAT:

The Applicants' motion is dismissed with costs of two counsel

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JUDGMENT

I BACKGROUND

[1] The incident that caused the litigation occurred on the 28th of November 2009; 11 years ago. The Respondent was in a motor vehicle accident on the day and she sustained bodily injuries. "The plaintiff had a valid claim against the Road Accident Fund. The merits of the accident of 28 November 2009 were conceded and the Road Accident Fund accepted liability for the plaintiff's proven or agreed damages."[3]

[2] Respondent sues as Plaintiff in her personal capacity for damages against the Applicants (practising attorneys), arising out of the alleged negligence on the part of the Second Applicant whilst in employ of the First Applicant on the following:

1. The Applicants were negligent in issuing summons against the RAF out of the Regional Magistrate's Court – with a jurisdictional limit of R400 000.00;
2. The Applicants allowed the Respondents claim to become prescribed;
3. The Respondent alleged that the Applicants "disentitled the plaintiff to fully and properly prosecute her claim for the recovery of the quantum of damages occasioned by her injuries against the Road Accident Fund";

[3] Page 19 of the Notice of Motion at paragraph 3.2.

4. The Respondent alleges that the Applicants "advised the plaintiff that she had no option but to accept the jurisdiction of the Bloemfontein Regional Magistrate's Court and thereby limited her compensation claimable to R400 000.00";
5. The Respondent also alleges that the Applicants "were negligent in not properly quantifying and timeously assessing the Plaintiff's claim, and in not referring the Plaintiff timeously to an orthopaedic surgeon for the purposes of a medico-legal report."

[3] The Applicants deny that they were negligent and deny both the liability- and quantum portions of the action instituted by the Respondent. The Applicants furthermore raised a special plea of prescription against the Respondent.

[4] The judgment turns on the application for the separation of the special plea of prescription from the liability- and quantum portion of the matter.[4] [5]

II THE LAW[6]

[5] Rule 33(4) decrees 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."

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[4] The application is that:
1. The issues in the First and Second Defendant's special plea of prescription and the Plaintiff's Replications thereto are in terms of Rule 33(4) of the Uniform Rules of Court separated from the liability and quantum portions of the matter;
2. The issues raised in the First and Second Defendants' special plea of prescription and the Plaintiff's Replication thereto are to be determined at the first available date for the hearing of the matter;
3. The liability and quantum portions of the matter are postponed *sine die*;
4. The Respondent is ordered to pay the costs of the application; and
5. Further and alternative relief.

[5] The Respondent prays for the Applicants' motion to be dismissed with costs of two counsel.

[6] Erasmus, Superior Court Practise, 2nd Edition, Van Loggerenberg, volume 2, CD-Rom & Intranet: ISSN 1561-7467 Internet: ISSN 1561-7475, Jutastat, e-publications on 29 November 2020; Harms, Civil Procedure in the Superior Courts, Last Updated: August 2020 - SI 68, https://www.mylexisnexis.co.za/Index.aspx on 29 November 2020, Joffe, Neukircher *et al*, High Court Motion Procedure, Last Updated: August 2020 - SI 13, https://www.mylexisnexis.co.za/Index.aspx on 29 November 2020 with reference to case law.

[6] Rule 33(4) describes two situations; a *mero moto*-scenario and an application-scenario. In the *mero moto*-scenario the court has a discretion to order that evidence is led and decided separately if legal convenience dictates. In the application-situation the court shall order separation if convenience so dictates.

[7] The considerations

1. The rule in its present form provides that an application for separation made by any party must be ordered unless it appears that the questions cannot conveniently be decided separately.
2. In context; the word convenience means legal appropriateness. The separation will be appropriate if in all the circumstances it appeared fitting and fair to all the parties concerned.
3. Each case must be adjudicated on its own peculiarities and merits.
4. The court must have sufficient information before it to make the decision.
5. The court may not rule on the merits or law in issue.
6. The court may not telescope the manner in which the hearing shall or will take place.
7. The court must have a "clear view" that it would be convenient for the issues to be separated.
8. In *City of Tshwane Metropolitan v Blair Atholl Homeowners Association* [2019] 1 All SA 291 (SCA) and *NK v KM* 2019 (3) SA 571 (GJ) it was held that careful thought should be given to a separation of issues. Convenience and expedition should be the object not heeded when issues are inextricably linked and full ventilation of all the issues is more often than not the better course and might ultimately prove expeditious and provide finality.
9. Convenience is appropriateness in all the circumstances. It is when it is fitting and fair to the parties concerned and the Court and the interest justice.
10. It is not only ease and expedience.
11. Substantial grounds should exist for the exercise of the power.
12. The advantages and disadvantages likely to follow upon the granting of an order must be weighed. If overall, and with due regard to the divergent interests and considerations of convenience affecting the parties, it appears that the advantages would outweigh the disadvantages, the court would

normally grant the application. A court should not grant an application for a separate hearing unless there appears to be a reasonable degree of likelihood that the alleged advantages would in fact result.

13. The function of the court is to determine, on the available material, the nature and extent of advantages and disadvantages that would flow from a separation.

14. The relief is not a mere formality and 'convenience' must be demonstrated. It is crucial, therefore, that the court be given sufficient information to enable it to come to a meaningful decision.

15. An important consideration is whether a preliminary hearing will shorten the proceedings. It is, however, not the only consideration and the overall convenience may be determined by factors other than those relating only to the probable duration of the hearing.

16. If evidence will overlap, it may be inconvenient to grant a separation.

17. The interests of finality of litigation should be taken into account.

18. The order should clearly demarcate the issues. In this regard, it is necessary that an order be made and that the issue be defined in the order. This is so, even where the parties have re-defined the issues by agreement and wish different issues to be decided at different hearings.

19. Practitioners should always bear in mind that if they wish to have issues decided separately at different hearings it is essential that they utilise Rule 33(4) to ensure that the orders made in respect of the separated issues are appealable and to avoid the possibility of absolution from the instance if all the necessary evidence has not been led.

20. It should not be assumed that the result of expedience 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 disconnected. And even where the issues are detached 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.

III THE EVIDENCE

[8] The case for the Applicants is that:

1. If the separation is granted the parties will only be required to deal with whether the Plaintiff had knowledge of the identity of the debtor and the facts giving rise to the Plaintiff's claim on 10 June 2015, alternatively 9 July 2015.
2. The matter may be finalised in 2 to 4 days.
3. If the separation is not granted the parties will have to delay with the prescription, the liability and the quantum issues. This will require a trial of more than 5 days but less than 10 days.
4. If the separation is not granted it will only cause a trial of long duration and an escalation of costs.
5. The factual evidence relating to the special plea of prescription will only relate to the communications between the Plaintiff and the Defendants in the period leading up to 10 June 2015 and 9 July 2015.

[9] The case for the Respondent is that:

1. The Respondent denies the oversimplification of the matter by the Applicants and maintain that the evidence required to prove the issues in respect of which the separation is sought will and does overlap with the evidence required to prove any of the remaining issues. Therefor the court must not grant a separation where it is apparent that such an overlap will occur.[7]
2. The Respondent also assures that duplication of evidence will eventuate and separation will result in the lengthening of the trial, the wasting of costs, potential conflicting findings of fact and credibility of witnesses and it will hinder the opposing party in cross examination.

IV CONCLUSION

[7] Erasmus, Superior Court Practise, 2nd Edition, Van Loggerenberg, volume 2, D1-438/439 referring to *Copperzone 108 (Pty) Ltd v Gold Port Estates (Pty) Ltd* (Unreported case number 7234/2013 dated 27 March 2019 at paragraph 25: WCC.)

[10] The court was not favoured with much information from the Applicants on the witnesses that will be called, the detail thereof, the duplication of evidence, if any, and how the issues of prescription, liability and quantum link. 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 in the papers. Separation of the special plea of prescription from the liability- and quantum portion of the matter is not convenient in law.

[11] Costs should follow the cause of the application.

V ORDER

The Applicants' motion is dismissed with costs of two counsels

M OPPERMAN, J

APPEARANCES

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