

IN THE HIGH COURT OF SOUTH AFRICA /ES
(TRANSCVAAL PROVINCIAL DIVISION)

CASE NO: 22368/2004

DATE: 9/12/05

NOT REPORTABLE

IN THE MATTER BETWEEN

INTENSIVE AIR (PTY) LTD (IN LIQUIDATION) APPLICANT/PLAINTIFF

AND

ABSA BANK LIMITED

RESPONDENT/DEFENDANT

JUDGMENT

MOTATA, J

This is an application in terms of rule 33(4) of the Uniform Rules of Court for separation of issues. The applicant seeks an order in the following terms:

1. that it be directed in terms of rule 33(4) that the following questions of law and/or fact be decided prior to and separately from any other questions in this action:

- 1.1 whether the plaintiff had the right of disposal over money credited to the cheque account held with Absa private bank under account no 4051777725 (the ticket account); and
- 1.2 whether the right to dispose of money credited to the ticket account constituted "property" of the plaintiff as contemplated in section 2 of the Insolvency Act, 24 of 1936 read with section 340(1) of the Companies Act 61 of 1973.

The facts of this case are briefly that the plaintiff is a company registered and incorporated in terms of the Companies Act 61 of 1973 which was placed under provisional winding-up by order of the Witwatersrand Local Division of this court on 11 April 2002, and under final winding-up by the said court on 5 July 2002.

The plaintiff then instituted an action in this court and the defendant pleaded thereto. The plaintiff claims payment of the amounts of R31 874 414,11 and R265 581,82 with interest and costs. The defendant denies liability and prays that the plaintiff's claim be dismissed with costs. The Registrar of this court had allocated a trial date for the action being 21 September 2006.

The plaintiff applies for an order that the following questions be decided prior to and separately from other questions in the action:

1. whether the plaintiff had the right of disposal over money credited to the ticket account; and
2. whether the right to dispose of money credited to the ticket account constituted the plaintiff's "property".

The plaintiff submitted in its heads of argument and orally that these issues can be conveniently separated. The advantages of a separation will outweigh any potential prejudice, for the following reasons:

1. it is necessary to establish first of all whether the plaintiff had the right of disposal over the funds and whether such funds constituted the plaintiff's "property";
2. it would be pointless to investigate whether debits against the ticket account are liable to be set aside if the funds in the account were not plaintiff's "property".

The plaintiff submitted further that to determine the issues referred to in the notice of motion before any other issues will be cost effective and convenient because it will determine the defendant's potential liability or absolve it from any liability at an early stage and it will be beneficial in relation to the magnitude of what may have to follow in relation to the preparation and time spent during a trial if each and every debit has to be

investigated and eventually the only potential prejudice may be in relation to the extra time which will be taken up if the matter has to be finally concluded.

The defendant on the other hand contends that the plaintiff's particulars of claim comprise of twenty paragraphs (some with subparagraphs) and fifteen of these paragraphs are in dispute. Some of these and on a proper consideration of the pleadings the issues earmarked for separate adjudication overlap with numerous other issues pleaded by the plaintiff and denied by the defendant. The separate adjudication of the two issues will necessarily lead to a duplication of evidence and a waste of time and money.

It is further submitted that the defendant in its opposing affidavit dealt comprehensively with the facts and all relevant considerations militating against the separate hearing of the two issues. The plaintiff, however, in its replying affidavit elected not to deal with the material factual allegations contained and considerations raised in the answering affidavit. This failure is fatal to the plaintiff's application. The uncontested facts illustrate clearly that it will not be convenient to order the separate adjudication of the two issues.

Rule 33(4) provides that:

"If, in any pending action, it appears to the court *mero motu* that there is a question of law or fact which may conveniently be decided either before any evidence is led or separately from any other question, the court may make an

order directing the disposal of such question in such manner as it may deem fit and may order that all further proceedings be stayed until such question has been disposed of, and the court shall on the application of any party make such an order unless it appears that the questions cannot conveniently be decided separately."

The word "convenient" within the context of rule 33(4) conveys not only the notion of facility or ease or expedience, but also the notion of appropriateness and fairness. It is not the convenience of any one of the parties or of the court, but the convenience of all concerned that must be taken into consideration. The function of the court in an application under this rule is to gauge to the best of its ability, the nature and extent of the advantages which would flow from the granting of the order sought and of the disadvantages. The procedure is aimed at facilitating the convenient and expeditious disposal of litigation. It should, however, not be assumed that the result is always achieved by separating the issues. The convenience must be demonstrated and sufficient information must be placed before the court to enable it to exercise its discretion in a proper and meaningful way. The relief is not a mere formality and the convenience must be demonstrated. Where grave prejudice may result for the opposing party should separation be ordered, it would be a further factor, which the court would take into account when considering a separation.

From both counsel's submissions it is that the plaintiff's particulars of claim consist of twenty paragraphs (some with subparagraphs) and fifteen of those paragraphs are in dispute. From the particulars of claim and the plea and on a proper consideration

of the two, it is evident that the issues earmarked for separate adjudication overlap with numerous other issues pleaded by the plaintiff and denied by the defendant and in my opinion the separate adjudication of the two issues will necessarily lead to a duplication of evidence and a waste of time and money.

Counsel for the defendant further argued that the application by the plaintiff is premature. The parties have not yet discovered and the parties have not yet requested nor furnished further particulars for purposes of trial. The issues in the trial have not yet been defined with any degree of certainty. I pose the question whether a pre-trial conference has been held and what the attitude of the parties were in respect of matters which are in dispute and not in dispute and counsel conceded that such a pre-trial conference has not been held.

In my opinion to now order a separation of issues at this early stage would have undesirable side effects that the parties will only have to discover in respect of the issues reserved for separate adjudication and there will be no request for further particulars in respect of other issues and there would be no attempt at curtailing the proceedings in respect of the other issues.

It is my opinion that the time to consider the issues to be determined separately, is that period shortly before the trial when the issues had been clearly defined. It will be counter-productive to order a separation of the issues this early when the parties are going to trial in September 2006, only for the matter to be postponed for the adjudication of the

remainder of the issues. It is my view that it is quite clear that the two questions isolated by the plaintiff cannot conveniently be decided separately and the plaintiff cannot succeed. However, there remains a question which was raised by counsel for the plaintiff that should I not order a separation of the issues that I should postpone this matter *sine die*. The question to be answered is whether this will serve any purpose when there has been no discovery, no pre-trial conference and the parties have not requested and furnished further particulars for purposes of trial. Should that happen and the issues narrowed what would be the purpose of this postponement? In my mind it would be academic and the court cannot leave matters hanging because there would still remain a question of costs which the parties have to approach the court for determination of same.

In the circumstances as I said above the application cannot succeed and therefore the application is dismissed with costs.

N J MOTATA
JUDGE OF THE HIGH COURT