

NOT REPORTABLE

**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE, GRAHAMSTOWN)**

Case no: 3499/2015
Date heard: 10 September 2015
Date delivered: 11 September 2015

In the matter between

ELIZABETH WESTENSEE**Applicant**

VS

LINDE & WESTENSEE CC**First Respondent****M.J. LINDE & E. WESTENSEE CC****Second Respondent****MERELYN JOY LINDE****Third Respondent****KEVIN JOHN BENEDICT POOVAN****Fourth Respondent**

JUDGMENT

PICKERING J:

[1] This is an opposed application for the separation of certain issues in terms of the provisions of Rule 33(4) in respect of a trial action set down for hearing on 20 October 2015.

[2] The present applicant is the defendant in the main action. First and second plaintiffs are two close corporations trading as Hendrick's Pharmacy and Harrison's Pharmacy respectively. Third plaintiff is a member of both first and second plaintiffs and fourth plaintiff is a member of second plaintiff.

[3] Defendant was, at all material times, a member of first and second plaintiffs. She seeks an order in this application directing that the issues raised in her third special plea as well as in paragraphs 1 – 9 of the Plaintiff's replication thereto, together with the costs thereof, be determined separately

from any other questions and that all other issues arising between the parties stand over for later determination, if necessary.

[4] The third special plea raises the prescription of the plaintiff's claim. It is common cause that, if upheld, the special plea will render the decision of all other issues unnecessary.

[5] Plaintiffs alleged in their particulars of claim that defendant, by her unlawful conduct as a member of first and second plaintiffs, not only enriched herself but also caused first and second plaintiffs to suffer certain losses, such unlawful conduct being allegedly constituted by, *inter alia*, defendant's underdeclaration of first and second plaintiff's income in income tax returns as well as the overcharging of input costs in VAT returns, in consequence whereof the South African Revenue Service issued certain audit enforcement notifications in respect of first and second plaintiffs' tax obligations and imposed certain penalties and interest.

[6] In defendant's third special plea defendant alleged that plaintiffs' knowledge of their claims as against the defendant arose on each occasion when the income tax returns of the first and second plaintiffs were rendered, that a period of more than three years has expired since the rendering of the income tax returns relevant to the period in respect of which the plaintiffs' claims have been formulated, and that accordingly, in terms of the provisions of section 11(d) of the Prescription Act, no 68 of 1969, the plaintiffs' claim have prescribed.

[7] In the alternative the defendant pleaded that plaintiffs' knowledge of their claims against the defendant arose on the occasions that the South African Revenue Service issued audit enforcement notifications against the first and second plaintiffs on 5 May 2011 and 6 May 2011, that a period of more than three years has expired since the receipt of the audit enforcement notifications, and that accordingly, in terms of the provisions of section 11(d) of the Prescription Act the plaintiffs' claims have prescribed.

[8] In their replication to this special plea plaintiffs aver that they did not become aware of the existence of the debts and the identity of the debtor until, at the earliest, October/November 2012, and plead accordingly that “*the debts are deemed not to have been due until that date.*” They deny that the plaintiffs’ knowledge of the debts arose on the occasion that the South African Revenue Services issued audit enforcement notifications against first and second plaintiffs and accordingly deny that the debts arose on 5 and/or 6 May 2011. They plead furthermore that the defendant wilfully prevented first and second plaintiffs from coming to know of the existence of the debts.

[9] Rule 33(4) provides that the Court shall make an order for separation on the application of any party unless it appears that the questions cannot conveniently be decided separately.

[10] As was stated in Edward L Bateman Ltd v CA Brand Projects (Pty) Ltd 1995 (4) SA 128 (TPD) at 132D – E, the Court is obliged to grant the application of a party for separation unless it appears that the questions cannot be conveniently decided separately.

[11] In Berman & Fialkov v Lumb [2002] 4 All SA at 432 (C) Van Reenen J stated at 437e – f, para 17, with reference to the matter of Braaf v Fedgen Insurance Ltd 1985 (3) SA 938 (C), that it is incumbent on the party who opposes the application to satisfy the Court that such an order should not be granted. As to “*convenience*” the learned Judge stated as follows at page 437 f - G:

“Convenience in the context does not only connote facility or ease or expedience but also appropriateness in the sense that in all the circumstances it is fitting and fair to the parties concerned (Braaf v Fedgen Insurance Ltd (supra at 940C - D)). The Court's function is to assess to the best of its ability the nature and extent of the advantages and the disadvantages that would result should the order that is being sought be granted (see Minister of Agriculture v Tongaat Group Ltd 1976 (2) SA 357 (D) at 364D - E). Such an application will normally be

granted if the advantages that will flow therefrom outweigh the disadvantages (see Grindrod & Cotts Stevedoring (Pty) Ltd and Another v Brock's Stevedoring Services 1979 (1) SA 239 (D) at 241A).

[12] Plaintiffs aver that it would not be convenient to separate the issue of prescription because, so it is submitted, the evidence required to deal therewith will be largely the same evidence which must be led in regard to the remaining issues. In this regard plaintiffs' attorney, Mr. Clarke, states that the evidence required to be led in order to meet the defendant's plea of prescription will also traverse the actions of the defendant in the understatement of taxes and the benefits which accrued to the defendant and that, in effect, the plaintiffs will be required to lead all the evidence which they intend to lead at the trial upon all the issues, in order to meet the issue of prescription. He states further that the only evidence which may remain is that relevant to the quantification of defendant's liability to the first and second plaintiffs but in respect of which there can be little dispute because, so he avers, the tax liabilities have been determined by the South African Revenue Service and are vouched for in documents issued by it.

[13] He avers further that because of this substantial overlapping of the evidence upon the issue of prescription and the remaining issues a separation of the questions would result in the same evidence being repeated at two separate trials. He submits therefore that in the event that the plea of prescription is not upheld the result would be that in the further trial there would have to be a repetition of the same evidence which would prolong the trial and increase its costs as well as delay the finalisation of the litigation. Furthermore, so he avers, there is the danger of different courts making different credibility findings on the same evidence. The latter danger is, in my view, overstated. I do not believe that an honest witness would be prejudiced if he or she had to testify at the main trial on issues that to some extent overlapped with evidence given by him or her at the hearing of the special plea.

[14] In my view also, Mr. Smuts S.C., who appeared for the applicant, correctly submitted that it appears from the pleadings that there is very little in the matter that is in fact common cause and that on the face of it significant and extensive evidence will be required to deal with all the issues in dispute between the parties over and beyond the issue of prescription. He pointed out that the plaintiffs' particulars of claim and the annexures thereto run to 159 pages, encompassing complex issues and in all probability requiring a forensic audit of the books of account and records of the plaintiffs, whereas the issue of prescription is largely a discrete one from the remaining issues. A degree of overlapping might exist but, in my view, the advantages that would result in the trial being shortened should an order be granted outweigh any alleged disadvantages.

[15] It is also relevant that the initial request for a separation was made over four months ago, on 14 April 2015, and that the defendant was eventually obliged to bring this application in the light of the rapidly approaching trial date. As submitted by Mr. Smuts, if the issues are not separated, the probability is that an application will have to be brought for a postponement of the trial.

[16] I am not persuaded by the submissions of Mr. de la Harpe, who appeared for the respondents, to the effect that the questions cannot conveniently be separated. In my view it is clearly appropriate that these questions be decided separately.

[17] Accordingly the following order will issue:

1. It is directed that the issues raised in paragraphs 7 and 8 of defendant's plea under the heading "Third Special Plea" and paragraphs 1 – 9 of the plaintiffs replication, and the costs relating thereto shall be decided at the outset of the trial separately from any other questions and all other issues arising between the parties shall stand over for later determination, if necessary.

2. It is directed that the costs of this application shall be paid by the respondents, jointly and severally, the one paying the others to be absolved.

J.D. PICKERING
JUDGE OF THE HIGH COURT

Appearing on behalf of Applicant: Adv. Smuts S.C.
Instructed by: Wheeldon Rushmere & Cole: Mr. Brody

Appearing on behalf of Respondents: Adv. D. de la Harpe
Instructed by Netteltons Attorneys, Mr. Nettelton