

SOUTH AFRICA / JUDGMENT

Eskom Holding SOC Limited v Santam Limited and Another (2021/51709; 2023/104516) [2025] ZAGPJHC 725 (21 June 2025)

[2025] ZAGPJHC 725

COURT

South Gauteng High Court, Johannesburg

BEFORE

R. Strydom

CASE / FILE NUMBER

2021/51709; 2023/104516

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REPUBLIC

OF SOUTH AFRICA

IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

DIVISION, JOHANNESBURG

Case

Number: 2021/51709

Case

Number: 2023/104516

(1)

REPORTABLE: YES / NO

(2)

OF INTEREST TO OTHER JUDGES: YES/NO

(3)

REVISED: YES/NO

In

the matter between:

ESKOM
HOLDINGS SOC LIMITED
Plaintiff
and
SANTAM
LIMITED
First Defendant
ESORFRANKI
CIVILS (PTY) LTD
Second Defendant

JUDGMENT

STRYDOM, J

- [1] This is a separation of issues application. In this matter two actions were consolidated and allocated to this Court to be heard in the Commercial Court. The first action was instituted by the plaintiff (“Eskom”) against the second defendant (“Esorfranki”) and the second action was instituted by Eskom against the first defendant (“Santam”).
- [2] The action against Esorfranki is for the repayment of a substantial amount of money allegedly overpaid to Esorfranki in its capacity as a contractor appointed by Eskom for purposes of the construction of certain works at the Kusile Power Station.
- [3] The second action is a claim against Santam pursuant to performance and retention guarantees which were issued in favour of Eskom.
- [4] Esorfranki raised four special pleas against the claim of Eskom.
- [5] Esorfranki has applied, in terms of Rule 33(4), to have the four special pleas to be heard separately. Esorfranki abandoned one special plea but persisted with special pleas of prescription, a time bar plea and a plea in terms of which it is claimed that the interim payment certificate 96 (“IPS96”) was invalid.
- [6] Eskom is opposing the separation application, whilst Santam is in support thereof.
- [7] Rule 33(4) provides as follows:

“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 other 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 a question has been disposed of, and the court shall on the application of any party make such order unless it appears that the question cannot conveniently be decided separately.”

- [8] Considering that this separation application was brought by a party, the Court shall, in terms of Rule 33(4), grant the application unless it appears that the issues requested to be separated, cannot conveniently be decided separately.
- [9] The first issue to consider in an application of this nature is when it would be convenient to decide an issue or issues separately from the remaining issues.
- [10] The procedure is aimed at facilitating the convenient and expeditious disposal of litigation. The word ‘convenient’ within the context of the sub rule 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.[1]

- [11] The issues to be separated must be capable of being ring-fenced or delineated with precision. This is to avoid uncertainty as to which issues were separated and decided. Further, the evidence required to decide the separated issues and the evidence required to decide the remaining issues should not overlap materially. Should the likelihood exist that substantially the same evidence would be required to decide the separated issues, as which would be required to decide the remaining issues, it would ordinarily not be convenient to decide issues separately. This does not mean that there should not be any duplication. It would depend on the degree of duplication.
- [12] Special pleas are well suited to be separated if the possibility exists that the upholding of such plea or pleas would be dispositive of the action or actions. The question remains whether it can conveniently be separated.
- [13] Counsel for the respective parties referred this Court to many judgments dealing with the separation of issues. These decisions provided guidelines to this Court on whether it would be convenient in this matter to separate the three special pleas raised by Esorfranki.
- [14] The Court was referred to the matter of Denel (Edms) Bpk v Vorster[2] where the SCA warned that separation applications should be properly considered. The court found as follows:

“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.”

- [15] In Minister of Agriculture v Tongaat Group Ltd[3] it was held, in relation to when it would be convenient to separate issue, as follows:

“The word “convenient” in the context of rule 33(4) is not used, I think, in the narrow sense in which it is sometimes used to convey the notion of facility or ease or expedience. It appears to be used to convey also the notion of appropriateness; the procedure would be convenient if, in all the circumstances, it appeared to be fitting and fair to the parties concerned.”

- [16] Thus, the Court would have regard to the interests of all the parties and that of the Court to decide whether separation of issues should be ordered. The view of a party opposing the separation application will be considered having regard to the merits and demerits of the application, but clearly, such a view taken needs to be tested against the convenience criteria. The Court needs to undertake a balancing exercise as was summarised by Van der Linde J in *Pieters NO v Absa Bank*[4]. In this matter, where the special plea of locus standi was separated from other issues, the court held that ‘separation is all about the convenient and expeditious disposal of litigation’ and that ‘convenience is the password.’ Having warned against ‘blunt’ operations, the court held that issues involving little documentary or viva voce evidence, which have the potential to finally decide the case one way or the other, are issues that are eminently suitable for separation.
- [17] On behalf of Eskom, it was argued that *Pieters NO* was distinguishable from this matter on the facts whilst it was argued by Esorfranki that the matter is on all fours with this matter.
- [18] It was argued on behalf of Esorfranki that on careful consideration of the matter as a whole, the Court will find that the issues are not intertwined or inextricably linked. They are distinct, separate and capable of convenient separation.
- [19] On behalf of Eskom, it was argued that the evidence which would be required to adjudicate the prescription special pleas would materially overlap with the evidence required to prove the main issues. Should a separation be ordered, the remaining issues relate to the alleged substantial overpayment as was certified by the engineer in terms of the Interim Payment Certificate 96 (“IPC96”). This is the payment certificate in terms of which Esorfranki was required to repay the amount of the certificate to Eskom. The engineer, according to the particulars of claim, remeasured the works for which Esorfranki previously received payments pursuant to the issuance of interim payment certificates. After a re-measurement of the works, it is alleged that Eskom overpaid Esorfranki to the extent of R 285 946 260. To substantiate this claim, expert and other evidence would be required to prove the value of the works, within the contractual framework, and then to compare it with the amount already paid to Esorfranki by Eskom for the work performed. Clearly, this would entail the leading of many witnesses, including expert witnesses, occupying many court days.
- [20] During the argument before this Court, Mr. La Grange, acting for Eskom, stated that his client would not object to a separation of the special pleas dealing with the issues of the time bar and the validity of IPC96. These are issues which can be decided through a process of contractual interpretation. The opposition against the separation was raised against the separation of the prescription special plea, more particularly, as evidence would have to be led when prescription started to run. This would be the date when the debt became due as contemplated in the Prescription Act 68 of 1969 (“the Prescription Act”). It is common cause that the summons was served on Esorfranki on 13 October 2023 and that the

period of prescription is three years. What is contentious is when prescription started to run. This is then the issue which this Court ultimately would have to consider. It is not for this Court, at this juncture, to decide the merits or demerits of the prescription pleas, but rather, to consider whether the evidence required to decide the prescription special plea would substantially overlap with the remaining issues to be decided at a later stage. If this is the case, it may not be convenient and expeditious to hear the prescription plea separately.

- [21] The starting point to consider this would be to refer to the relevant sections of the Prescription Act 68 of 1969 (“the Prescription Act”).

“12.(1) Subject to the provisions of subsections

- (2) and (3), prescription shall commence to run as soon as the debt is due.
- (2) If the debtor willfully prevents the creditor from coming to know of the existence of the debt, prescription shall not commence to run until the creditor becomes aware of the existence of the debt.
- (3) A debt shall not be deemed to be due until the creditor has knowledge of the identity of the debtor and of the facts from which the debt arises: provided that a creditor shall be deemed to have such knowledge if he could have acquired it by exercising reasonable care.”

- [22] It was argued on behalf of Eskom that evidence would overlap to establish when Eskom obtained knowledge of the facts from which the debt arose and whether Eskom should have obtained such knowledge by exercising reasonable care. It was argued that the debt only arose upon when the engineer certified the over-payment after a remeasurement was conducted by him pursuant to the terms of the contract. It is not merely a matter where an overpayment could be reclaimed outside the contractually regulated payment certification mechanisms.

- [23] These are the disputed issues. It should be mentioned at this stage already that most of the disputed issues can be resolved through contractual interpretation, having regard to common cause facts and the written contract itself. No, or limited evidence, would be required to decide these issues, which to some extent have already been traversed before me during argument and in the affidavits filed in this matter. Eskom argued that it only acquired all the knowledge of the facts from which the debt arose when IPC96 was issued on 16 October 2020. The summons was issued on 13 October 2023, a date within the 3-year prescription period. On behalf of Esorfranki it was argued that Eskom had acquired all knowledge from 6 of October 2018 when the take-over certificate was issued in terms of the contract or at least by 6 February 2020 when Esorfranki submitted a proposed final account with an excel spreadsheet setting out all the information which Eskom and the engineer required to calculate any alleged overpayment made to Esorfranki. This would mean that when summons was issued, the debt had prescribed. As indicated, it is not for this Court to decide this issue. This Court will, however, consider what evidence is required to prove the

special plea of prescription and then compare it with the evidence to prove the overpayment.

- [24] In my view, the question relating to prescription is a legal issue and a matter of interpretation of the contract entered between the parties. Does the debt only become due when a final payment certificate is issued or when the facts which gave rise to the debt become known to the creditor, outside the ambit of certification? Is the claim for a repayment different to a claim for payment upon certification? These are legal issue which can be decided without the need for evidence, alternatively, by receiving limited evidence on these distinct issues. It would also be a legal argument if the *conditio indebiti* was available to Eskom as a ground to claim an overpayment.
- [25] The evidence required to prove when Eskom became aware of the debt, or reasonably ought to have become aware thereof, is limited and could be established without hearing evidence pertaining to the entire re-measurement exercise to compare the work performed against the payments previously certified and paid. I fail to see where the limited evidence, which may be required to decide the special pleas, would overlap with the evidence required to prove the main claim of Eskom. I am not persuaded by the argument that for purposes of the special plea of prescription, Eskom will have to lead evidence pertaining to the facts and circumstances giving rise to the engineer issuing IPC96 and that evidence would overlap with the evidence to prove Eskom's claim. The question of when prescription started to run does not require evidence on the issue of what the reasons for the delay were before IPC96 was issued or why there was an overpayment. The question is rather to decide when Eskom became aware of the existence of the debt or should have acquired such knowledge by exercising reasonable care. This would include a finding on when the debt became due as referred to in section 12(1) of the Prescription Act.
- [27] A finding that the claim has prescribed or is time barred or that IPC96 was invalid would obviously curtail proceedings which would otherwise have taken many court days to decide. Should such a finding be made, it would be dispositive of the entire matter against Esorfranki. The consequence of such a finding may have the result that the claim against Santam also stands to fail or is substantially curtailed. For purposes of the current application, however, I do not make any finding on what the consequences would be of a finding upholding the special pleas of Esorfranki on the claim of Eskom against Santam. What may happen is that the time required to decide that claim may possibly be curtailed.
- [28] It was argued that if any of the special pleas of Esorfranki are upheld, Eskom would appeal and that would militate against an expeditious finalisation of the matter should the appeal be successful. I am not persuaded that this constitutes a valid reason not to order separation in this matter where the upholding of a special plea would be dispositive of the entire case against Esorfranki and possibly curtail the proceedings against Santam. If this is a bar against a separation of issues, then a court would have to conclude in virtually all separation applications that it would not be convenient to make such an order. There may be matters

where it may be of relevance but not much weight would, in any event, be attached to this consideration.

- [29] The other concerns raised by Eskom were not persuasive. It was argued that Esorfranki's special pleas have little to no prospects of success and it is a waste of time, incurring unnecessary legal expense, for the parties to have these issues determined in a separate hearing. It is not for this Court, at this stage, to make a finding on the prospects of success of the special pleas. What I can find is that there exists legal argument in support of and against the question around prescription of Eskom's claim, as well as the time bar argument and an invalid payment certificate. It should be noted that a decision on the validity of IPC96 would have an impact on the prescription issue, as it is Eskom's case that prescription only started to run from the date of the issuance of this certificate. These issues are not straightforward, and it certainly cannot be held at this stage that Esorfranki has little to no prospects of success on its special pleas being upheld.
- [30] A further defense against separation which was raised relates to the claim instituted by Eskom against Santam. This claim was consolidated to be heard together with the claim against Esorfranki. It was argued that by granting a separation of issues order pertaining to the claim against Esorfranki, the claim against Santam would be delayed indefinitely. This may possibly happen, but this came about because of the consensual consolidation of the two separate actions instituted by Eskom against Esorfranki and Santam. Moreover, the upholding of the special pleas may curtail the proceedings against Santam.
- [31] To conclude, it is the finding of this Court that the issues raised in the special pleas are discrete and pleaded as separate issues. A finding on the separated issues will have no bearing on the merits of the matter if not upheld. Consequently, there is no scope for concern that evidence would overlap, presenting unintended consequences in dealing with the matter on the merits. If any one of the special pleas are upheld, it would be dispositive of the matter against Esorfranki.
- [32] In my view it would be convenient for all parties concerned, including the Court, to order the separation of the special pleas.
- [33] Costs should follow the result which should include the costs of two counsel. All parties made use of the services of two counsel.
- [34] The following order is made:
- (a) The following special pleas shall be determined as separated issues:
 - (i) The special plea of prescription, as set out in paragraphs 1 to 9 of the plea,
 - (ii) The special plea of time bar, as set out in paragraphs 10 to 18 of the plea,
 - (iii) The special plea of invalid payment certificate, as set out in paragraphs 25 to 32 of the plea.

- (b) The reminder of the issues in the action shall be stayed until the special pleas have been dispensed with.
- (c) The plaintiff is ordered to pay the costs of this application, including the costs of two counsel, appointed on behalf of the First and Second Defendants.

R. STRYDOM

JUDGE OF THE HIGH COURT

GAUTENG DIVISION, JOHANNESBURG

Heard on: 30 May 2025

Delivered on: ____ June 2025

Appearances:

For the Plaintiff:

Adv William La Grange SC

Adv. C. Humphries

Instructed by:

MMMG Attorneys

For the First Defendant: Adv. A.J. Daniels SC

with:

Adv. B. Brammer

Instructed by:

Goodes & Co. Attorneys

For the Second Defendant: Adv. K. Trisk SC

with:

Adv. J.M. Hoffman

Instructed by:

Thomson Wilks Inc

[1] Minister of Agriculture v Tongaat Group (Ltd) 1976 (2) SA 357 (D) at 363D

[2] 2004(4) SA 481 (SCA) at 485 A-B

[3] 1976(2) SA 357 362F. See also: Blair Athol v The City of Tshwane Metropolitan Municipality v Blair Athol Homeowners Association 2019 93) SA 398 (SCA) at paragraphs 51-53

[4] 2017 JDR 0341 (GJ)

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