

SOUTH AFRICA / JUDGMENT

Fourie v Campbell N.O and Others (879/2019) [2021] ZAFSHC 23 (10 February 2021) [2021] ZAFSHC 23

COURT

Free State High Court, Bloemfontein

BEFORE

Van Zyl

CASE / FILE NUMBER

879/2019

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IN THE HIGH COURT OF SOUTH AFRICA

FREE STATE DIVISION, BLOEMFONTEIN

Case no.: 879/2019

In the matter between:

FRITZ FOURIE

Applicant

and

MALCOM NEIL CAMPBELL N.O.

1st Respondent

VRYSTAAT MUNISIPALE PENSIOENFONDS

2nd Respondent

(Registration no.: 12/8/412)

ELANA STEENKAMP

3rd Respondent

EURIKA POOLMAN

4th Respondent

IN RE:

MALCOM NEIL CAMPBELL N.O.

1st Plaintiff

VRYSTAAT MUNISIPALE PENSIOENFONDS

2nd Plaintiff

FRITZ FOURIE

1st Defendant

ELANA STEENKAMP

2nd Defendant

EURIKA POOLMAN

3rd Defendant

CORAM:

VAN ZYL, J

DELIVERED ON: 10 FEBRUARY 2021

- [1] This is an application in terms of the provisions of Rule 33(4). The applicant [first defendant] is seeking an order that the issues contained in the two special pleas pertaining to prescription and the dispute regarding the locus standi of the first respondent [first plaintiff] be separated from the remainder of the issues pertaining to the merits of the main action, which are to stand over for later adjudication. The applicant is also seeking an order that costs of the application be costs in the main action, alternatively, and in the event that any of the respondents oppose the application, then and in that instance that such respondent(s) pay the costs of the application.

Summarised

background:

- [2] The first and second respondents [first and second plaintiffs] instituted action (the main action) against the applicant [first defendant] and the third and fourth respondents [second and third defendants] in which the first and second respondents [first and second plaintiffs] allege that over the period from July 2014 – July 2017, the applicant [first defendant] authorised payments from the second respondent [second plaintiff] to the erstwhile Manager: Administration, Ms Schutte, on condition that such money be channelled through her bank account to the third and fourth respondents [second and third defendants], with the result that the amounts of R336 000.00 and R371 000.00 were paid to the third and fourth respondents [second and third defendants] respectively in this manner.

- [3] The third and fourth respondents [second and third defendants] are the daughters of the applicant [first defendant].
- [4] The first respondent instituted the action as first plaintiff acting in his nominal capacity as curator appointed for the second respondent (second plaintiff) in terms of section 5(10) of the Financial Institutions (Protection of Funds) Act, 28 of 2001 (“the Act”).
- [5] In terms of the particulars of claim in the main action the following allegations are made regarding the applicant (first defendant in the main action):

“8. The first defendant was at all material times a member of the Board of Trustees as contemplated in s 7A of the Pension Funds Act as well as the Principal Officer as contemplated in s 8 thereof, of the second plaintiff.”

- [6] The action against the applicant [first defendant] is based on a breach of his legal duties; alternatively, intentional unlawful conduct; alternatively, negligent conduct.
- [7] The action against the third and fourth respondents [second and third defendants] is based on unjustified enrichment.
- [8] In paragraph 25 of the particulars of claim the first and second respondents (first and second plaintiffs) aver as follows:

“25. The facts from which the claims set out below arise only recently and (came) to the knowledge of the plaintiffs after the appointment of the first plaintiff as curator during September 2017, which led to a forensic investigation into the affairs of the second plaintiff. Until his resignation during July 2017, the first defendant wilfully prevented the second plaintiff from coming to know of the existence of such facts.”

- [9] Only the first and second respondents [first and second plaintiffs] are opposing the application.
- [10] I will henceforth refer to the parties as described in the application.

Locus standi:

- [11] In his plea to the first and second respondents’ particulars of claim filed in the main action, the applicant denies the first respondent’s locus standi.
- [12] The denial of the first respondent’s locus standi is premised on the appointment of the first respondent being ab initio void, for want of a procedurally correct appointment, which appointment was not in line with the Act, nor in line with the Rules of the second respondent.
- [13] In their replication to the applicant’s plea, the first and second respondents did not reply to this issue. (I`m not finding that they should have replied thereto.)

- [14] In the answering affidavit, the first and second respondents note and admit the statements made by the applicant in his founding affidavit in as far as such accurately reflect the applicant's special plea in relation to the locus standi of the first plaintiff.

Prescription:

- [15] The applicant raises two special pleas of prescription in his plea to the first and second respondents' particulars of claim filed in the main action.
- [16] In the first special plea of prescription it is alleged that the first and second respondents' claim is based on a decision taken by the executive committee of the second respondent on 5 June 2013 and that the claim therefore fell due on that date. Since the summons was only served on the applicant on 1 March 2019, the first and second respondents' claim has prescribed.
- [17] According to the first and second respondents the aforesaid allegation is incorrect. The first and second respondents' claim is not based on the decision, but on the wrongful conduct of the applicant by having authorised and instructed payment of money to Ms Schutte on condition that the said money be channelled to his daughters. According to the first and second respondents the claims therefore arose when the respective payments were authorised and paid, namely during the period from July 2014 – July 2017. It is accordingly only claims in respect of payments made before 28 February 2016 that would notionally have prescribed.
- [18] The second special plea of prescription is indeed based on the fact that the alleged irregular payments, authorised by the applicant, were paid during the period July 2014 - 2017. In this regard the applicant alleges in his special plea that the claims fell due on the dates the alleged unlawfully paid payments were made and in view of the fact that the summons was served on the applicant on 1 March 2019, all payments made on or before 1 March 2016 has prescribed.
- [19] In the first and second respondents' replication to the applicant's plea, the first and second respondents plead that the first respondent only acquired knowledge of the identity of the debtors and of the facts from which the debts arose after the appointment of the first respondent as curator for the second respondent on 8 September 2017. It is further pleaded that the first and second respondents could not have reasonably acquired knowledge thereof earlier than such date. I already mentioned that in paragraph 25 of the particulars of claim the first and second respondents also aver that until the resignation of the applicant during July 2017, the applicant wilfully prevented the second respondent from coming to know of the existence of such facts.

Applicable legal principles:

- [20] Rule 33(4) and (5) read as follows:

“(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 shall be stayed until such question has been disposed of, and the court shall on application of any party make such an order unless it appears that the questions cannot conveniently be decided separately.

- (5) When giving its decision upon any question in terms of this rule, the court may give such judgment as may upon such decision be appropriate and may give any direction with regard to the hearing of any other

issues in the proceedings which may be necessary for the final disposal thereof.”

- [21] In *Erasmus: Superior Court Practice*, DE van Loggerenberg, Jutastat, at RS 13, 2020, D1 – 436 the following is stated:

“The entitlement to seek the separation of issues was created in rules so that an alleged lacuna in the plaintiff’s case can be tested; or simply so that a factual issue can be determined which can give direction to the rest of the case and, in particular, to obviate the leading of evidence. The purpose is to determine the plaintiff’s claim without the costs and delays of a full trial.”

See also *Tshwane City v Blair Atholl Home Owners Association* 2019 (3) SA 398 (SCA) at 414 F – G.

- [22] Rule 33(4) refers to a “question of fact or a question of law” in a pending action. This refers to an issue(s) which arises from the pleadings. See *Firststrand Bank Ltd v Clear Creek Trading 12 (Pty) Ltd* 2018 (5) SA 300 (SCA) at 305 C – D.

- [23] The learned author of *Erasmus: Superior Court Practice*, supra, further states, with reference to applicable case law, the following at RS 13, 2020, D1-437:

“The procedure is aimed at facilitating the convenient and expeditious disposal of litigation. The word ‘convenient’

within the context of the subrule 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 of the parties or of the court, but the convenience of all concerned that must be taken into consideration.”

- [24] In this Division the purpose of Rule 33(4) was held to be to avoid unnecessary proceedings and render litigation more cost effective. See *Raubex Construction (Pty) Ltd h/a Raumix v Armist Wholesalers (Pty) Ltd* 1998 (3) SA 116 (O) at 119 G – H.

- [25] In *Absa Bank Bpk v Botha* 1997 (3) SA 510 (O) at 513 it was held by Hancke, J that Rule 33(4) compels the court to order separation, except if the balance of convenience does not favour separation. Convenience, as intended in Rule 33(4), does not only pertain to expediency, efficacy and desirability, but also to fairness, justice and reasonableness.

[26] In Erasmus: Superior Court Practice, *supra*, the following relevant considerations are also referred to at RS 13, 2020, D1-438 – 439:

1. An important consideration is whether or not a preliminary hearing for the separate specified issues will materially shorten the proceedings. If the grant of the application may cause considerable delay in the reaching of a final decision in the case because of the possibility of a lengthy interval between the first hearing and the commencement of the trial proper, this would

militate against granting of the application.

2. The question as to whether there are prospects of appeal on the separated issue is another consideration as an appeal may exacerbate any delay and negate the rationale for separation. This is particularly so if the issues sought to be separated are controversial and appear to be of importance.
3. Another consideration is whether the evidence required to prove any of the issues in respect of which a separation is sought will overlap with the evidence required to prove any of the remaining issues. A court will not grant separation where such an overlap will occur, since it will result in a lengthening of the trial, the wasting of costs and potential conflicting findings of fact and credibility of witnesses.

See also Copperzone 108 (Pty) Ltd v Gold Port Estates (Pty) Ltd (7234/2013)

[2019] ZAWCHC 34 (27 March 2019) at para [25].

[27] In Braaf v Fedgin Insurance Ltd 1995 (3) SA 938 (C) the defendant sought an order of separation in terms of Rule 33(4) and the plaintiff opposed the application; hence, similar to the present matter. The court found at 939G that it was incumbent on the plaintiff to satisfy the court that the application should not be granted. This principle was followed and applied in the Botha-judgment, *supra*, at 513D.

Discussion and

conclusion:

Locus standi:

[28] With regard to the dispute regarding the locus standi of the first respondent, I have to agree with the contention by Mr Snellenburg, appearing on behalf of the applicant, that the first and second respondents failed to advance any fact-specific reasons why it would not be convenient to adjudicate the dispute regarding the first respondent's locus standi separately. I have already dealt with the case law in terms whereof it was incumbent on the first and second respondents to satisfy the court that the question sought to be separated cannot be conveniently decided separately.

- [29] Mr Snellenburg correctly submitted that the high-water mark of the first and second respondents' opposition to a separation of this dispute from the remaining issues, is their attempt to rely on the general consideration that the prospects of an appeal on the issue of locus standi should be considered, since such an appeal could cause a delay which will negate the rationale for a separation. However, in my view, whichever finding the court hearing this dispute may make, the prospects of an appeal on the issue of locus standi is remote, since the determination of locus standi of the first respondent ought to be a fairly uncomplicated matter in the circumstances of this case.
- [30] In this Division there would also not be the possibility of a lengthy interval between the hearing on the locus standi issue and the commencement of the trial proper, as the current time period for the allocation of trial dates is in general very short.
- [31] Mr Joubert, appearing on behalf of the first and second respondents, submitted that potentially quite a number of witnesses will have to testify for purposes of the adjudication of the issue of locus standi. However, no averments are contained in the answering affidavit which indicate that the evidence of those potential witnesses will overlap or even probably overlap with the evidence which stands to be presented on the merits of the main action.
- [32] A very important factor indicative of the convenience, as intended in Rule 33(4), with which the issue of locus standi can be decided separately, is that a finding in favour of the applicant regarding the locus standi of the first respondent, will be dispositive of the action against the applicant. Mr Joubert conceded this. He however pointed out that it will not be dispositive of the action against the third and fourth respondents. Although this is true, the third and fourth respondents will have no need to participate in the proceedings regarding the adjudication of the locus standi of the applicant. Contrary thereto, should a separation regarding the issue of locus standi not be ordered, it will compel the applicant to participate in a lengthy trial in circumstances where there may be a lacuna in the first and second respondents' claim against him.

Should the finding regarding the locus standi of the first respondent be against the applicant, it will in all probability give direction to the rest of the case.

- [33] I am consequently satisfied that the convenience of all concerned dictates that the dispute regarding the locus standi of the first respondent be adjudicated separately.
- [34] The first and second respondents advance the following reasons in their answering affidavit as to why a separation regarding the issue of prescription ought not to be granted. In this regard they rely, inter alia, on the following:
1. Even if the special plea of prescription is to be upheld, it would not dispose of the action since only payments made before 28 February 2016 would be affected thereby.

2. The merits of the main action will be relatively uncomplicated to adjudicate. Should it be found that money of the second respondent had indeed been paid to the third and fourth respondents, such payments would clearly have been irregular and unlawful since it is common cause that the third and fourth respondents were not employed by the second respondent. The only question would therefore be whether the alleged payments were indeed paid to them through the bank account of Ms Schutte.
 3. There will be some overlap between the plea of prescription and the merits of the action, in that it will have to be determined, for both purposes, what payments were made to the third and fourth respondents, as well as when and for what purpose such payments were made.
- [35] In my view it is evident that evidence which stands to be presented by the first and second respondents on the issue of prescription will overlap with evidence which they will have to present in support of their claims against the third and fourth respondents. This will not only result in a duplication of evidence with potential conflicting findings of fact and credibility of witnesses, but also lead to a lengthening of the trial and a concomitant duplication of costs.
- [36] In the circumstances the balance of convenience does not favour the special pleas of prescription to be adjudicated separately from the merits of the main action.

Costs:

- [37] Although the applicant is to be only partly successful with his application, the subject matter of such success constitutes an independent and substantive issue in the main action and in this application. The first and second respondents did not at any stage before the hearing of the application explicitly concede to this part of the relief which the applicant is seeking. The applicant was therefore obliged to have approached court for relief in this regard.
- [38] There is consequently no reason why the first and second respondents should not to be ordered to pay the costs of the application.
- [39] Mr Snellenburg requested that such costs are to include the costs of two counsel. Considering the nature and extent of this application the services of two counsel, in my view, were not necessary.

Order:

- [40] The following order is made:

1. The applicant's [first defendant's] application to separate the hearing of his special plea of prescription as contained in his plea to the first and second respondents' [first and second plaintiffs'] particulars of claim filed in the main action, is dismissed.

2. The applicant's [first defendant's] application to separate the hearing of the dispute pertaining to the locus standi of the first respondent [first plaintiff] as contained in paragraph 3 of the applicant's [first defendant's] plea, read with paragraphs 1, 2 and 3 of the first and second respondents' [first and second plaintiffs'] particulars of claim filed in the main action, from the remainder of the issues, is granted.
3. It is ordered that the adjudication of the special pleas of prescription, as well as the remainder of the issues pertaining to the merits of the main action, are stayed pending the final adjudication of the dispute regarding the locus standi of the first respondent [first plaintiff].
4. The first and second respondents [first and second plaintiffs] are ordered to pay the costs of the application, jointly and severally, payment by the one the other to be absolved.

C. VAN ZYL, J

On behalf of applicant:

Adv. N Snellenburg SC

Assisted by:

Adv GSJ van Rensburg

Instructed by:

EG Cooper Majiedt Inc

BLOEMFONTEIN

On behalf of 1st and 2nd respondents: Adv. DC Joubert SC

Symington & De Kok

On behalf of 3rd and 4th respondents: NO OPPOSITION

Wessels & Smith Attorneys

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