

SOUTH AFRICA / JUDGMENT

Asande Developers CC v Toro ya Africa Consultants (Pty) Ltd and Another (800/2012) [2018] ZAGPPHC 788 (14 September 2018) [2018] ZAGPPHC 788

COURT

North Gauteng High Court, Pretoria

BEFORE

F J Erasmus

CASE / FILE NUMBER

800/2012

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IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

NOT REPORTABLE

NOT OF INTEREST TO OTHER JUDGES

REVISED

CASE NO: 800/2012

DATE DELIVERED:14/9/2018

IN THE MATTER BETWEEN

ASANDE DEVELOPERS CC

APPLICANT

AND

TORO YA AFRICA CONSULTANTS (PTY) LTD FIRST RESPONDENT

TRUZANNE PROPERTY DEVELOPERS (PTY) LTD SECOND RESPONDENT

IN RE: THE MATTER BETWEEN

TORO YA AFRICA CONSULTANTS (PTY) LTD PLAINTIFF

TRUZANNE PROPERTY DEVELOPERS (PTY) LTD FIRST DEFENDANT

ASANDE DEVELOPERS CC

SECOND DEFENDANT

JUDGMENT

ERASMUS ,AJ

INTRODUCTION:

[1] Applicant seeks a separation of trials in a pending action. Plaintiff in the main action is the First Respondent in the present

application; First Defendant in the main action is the Second Respondent in this application and Second Defendant in the main action is the Applicant in this application. To avoid confusion, I shall refer to the parties by their common names.

BACKGROUND:

[2] Toro Ya Africa Consultants (Pty) Ltd ("Toro") issued Summons during 2012 against Truzanne Property Developers (Pty) Ltd ("Truzanne") and Asande Developers CC ("Asande") for sums of R3,5 million and R16,5 million respectively.

[3] Truzanne filed an Exception to Toro's Particulars of Claim on 16 April 2012. Such Exception was enrolled for 6 July 2012, on which date Toro was ordered to file an amendment to its particulars. The amendment was not filed timeously and Truzanne re-enrolled the Exception for 4 October 2012. This led to another amendment of the Particulars of Claim on 17 October 2012. Truzanne delivered a fresh Exception on 13 March 2013. It is common cause that Truzanne's Exception has not been finalised and consequently it has not filed a plea. This implies that the pleadings have not closed and *litis contestatio* has not been reached between Toro and Truzanne.

[4] Asande served its Plea and Counterclaim to Toro's claim on 26 July 2012. Toro only pleaded to the counterclaim on 28 April 2016. In terms of Rule 29 of the Uniform Rules, *litis contestatio* occurred within 15 days thereafter, when the time elapsed for filing a replication to the Plea on the Counterclaim.

[5] Asande launched the current application in terms of Rule 10(5) of the Uniform Rules on 21 March 2017, after it had previously requested such separation via correspondence - the first correspondence as early as 7 April 2016.

[6] The current application was opposed on 31 March 2017 by Toro. Opposing and Replying Affidavits were exchanged by 16 May 2017. Truzanne had indicated on 19 April 2016 that it has no objection to a separation of the two claims.

[7] The current application was enrolled on three occasions prior to 10 September 2018. First on 11 December 2017 when the Registrar informed that no judges would be allocated for opposed motions. This necessitated a postponement. On 26 February 2018 the matter was again, on the opposed motion roll. Toro had failed to file Heads of Argument and was

consequently ordered by Van der Westhuizen J to explain its failure in an affidavit and to pay wasted costs. On 18 June 2018 the application was again set down, but had to be postponed once more because the court file was missing and the matter did not appear on the official roll.

- [8] In the meantime Truzanne had apparently been liquidated. On 19 February 2018 Roestoff Attorneys - who acted for Truzanne throughout
- filed a notice by the liquidators informing that "the said insolvent company does not persist with their defence of this action and will no longer be a party to this matter".
- [9] Mr Groenewald on behalf of Toro confirmed at the hearing of the application that Toro's action against Truzanne has not been formally withdrawn and that the liquidators of Truzanne have not formally admitted the claim of Toro either.

LEGAL PRINCIPLES INVOLVED:

- [10] Rule 10(5) stipulates that "where there has been a joinder of causes of action or of parties, the court may on the application of any party at any time order that separate trials be held either in respect of some or all of the causes of action or some or all of the parties; and the court may on such application make such order as to it seems meet."
- [11] In the decision of *De Polo v Dreyer*. 1990 (2) SA 290 (W) it was confirmed that the sub-rule confers a discretion, the exercise of which varies from case to case and depends in a large measure on the circumstances of the case. Factors that may be taken into consideration in the exercise of the discretion include:
- (i) The interests of the applicant in seeking to enforce his remedy;
 - (ii) The prejudice to the opposite party if a separation of trials is ordered;
 - (iii) The possibility of lengthy delay if the separation is refused compared with a probable minimal delay if a separation is ordered;
 - (iv) The question of costs, including the salvage of costs already incurred in the matter, as well as the additional costs that may be occasioned by a separation of trials;
 - (v) The conduct of the parties, including the bona.fides of the applicant;
 - (vi) The balance of convenience.

THE MAIN GROUNDS FOR THE APPLICATION AND OPPOSITION THERETO:

- [12] I may mention that the authority of Asande's deponent to the Founding Affidavit was challenged on the papers, but such objection was not pursued in argument and no Rule 7 Notice was filed by Toro in any event. It is therefore not necessary to decide such aspect. I discussed the main grounds for motivating the application for separation separately.

CAUSES OF ACTION DISTINCT:

- [13] For purposes hereof I briefly summarise Toro's causes of action against Asande and Truzanne respectively.
- [14] The claim against Truzanne is based on a written deed of sale concluded on August 2008 in terms of which Toro sold certain erven to it for a sum of R42 million. On 31 August 2008 Toro and Truzanne entered into a so-called "Cancellation and Option" agreement. Toro claims rates and truces of R3,5 million which it allegedly paid between August 2008 and August 2009 and for which Truzanne is allegedly liable.
- [15] Toro's claim against Asande is based on an oral appointment of Asande as building contractor on the same erven which Truzanne had purchased from Toro. Asande allegedly did not build the houses according to general accepted building practice and the banking institutions therefore refused to advance building loans to Toro. Toro consequently suffered damages in the sum of approximately R16,5 million according to the particulars.
- [16] The only allegations which can conceivably be interpreted as a link between the two claims are in paragraph 5.5 and 5.6 of the amended Particulars of Claim. Those allegations are to the effect that at the date of signing the sale agreement (August 2008) Truzanne appointed Asande as its building contractor which meant that Asande ceased to be Toro's building contractor (in terms of a prior oral agreement). Also that Truzanne accepted all liabilities that Toro might have had towards Asande arising from the first contract between Toro and Asande. Those allegations are denied by Asande in its plea. According to Asande, it was at no stage appointed by Truzanne either orally or in writing and at all relevant times continued to be the building contractor for Toro. It is significant that Toro's claims against the two Defendants do not seek joint or joint and several liability.
- [17] Toro's primary argument to the allegations that the two claims are distinct and independent is the fact that Mr Smit represented both Truzanne and Asande in their initial dealings with Toro. Mr Smit will therefore be an essential witness regarding both claims. Reference was also made to a meeting between Toro and Asande prior to commencement of the litigation. Mr Smit apparently gave certain undertakings regarding financing. The crux of Toro's submission in this regard is that Mr Smit at certain stages represented both Asande and Truzanne.
- [18] Toro's counsel could not identify any issues that will be common to both claims, apart perhaps from the disputed delegation of Toro's obligations towards Asande to Truzanne. Such issue is to my mind insufficient to justify the two claims to be heard together. It will imply that the two Defendants in question will be forced to attend a trial of which large parts of the evidence and argument will be irrelevant to an individual party.
- [19] The mere fact that the same witness would need to testify in both claims does not imply an overlapping of issues. For reasons stated in the previous paragraph, it will in my view lead to greater costs for the individual Defendants if they are forced to attend the same trial during which distinct claims against individual Defendants will be ventilated.

DELAY:

[20] Asande throughout its application stressed the fact that Toro has stalled the action until now - thereby denying it the opportunity to prove its counterclaim. It appears as if such criticism is justified for inter alia the following reasons:

[20.1] Despite the fact that the action has been pending for six years, the pleadings are still not closed and the matter can therefore not be enrolled for trial.

[20.2] The exception raised by Truzanne has been pending since 13 March

2013. Toro has apparently done precious little to have it enrolled again or to once again amend its Particulars of Claim.

DOES THE LIQUIDATION OF TRUZANNE IMPLY THAT THE CURRENT APPLICATION HAS BECOME MOOT?

[21] Toro strongly argued that the liquidation of Truzanne and the liquidators' explicit indication - that they will not pursue Truzanne's defence of the action - effectively implies that Toro's action against Truzanne has come to an end and that only the dispute between Toro and Asande remains.

[22] I am of the view that the liquidation of Truzanne per se - coupled with the liquidators' declared intention not to pursue the defence - does not by necessary implication imply that the claim of Toro against Truzanne is a thing of the past, for one or more of the following reasons:

[22.1] Truzanne is not dominus litis in the main action and Toro has not formally withdrawn its claim against it.

[22.2] Toro's claim against Truzanne has not been formally admitted by the liquidators and there is at least a theoretic possibility of Toro still pursuing it in an action in the event of rejection by the liquidators. There are other possibilities such as Toro deciding to join directors to the main action and to hold them personally liable for the debts of Truzanne.

[22.3] Even if the Legislator's intention with Section 359 of the 1973 Companies Act was that actions against the insolvent company's

co-defendants may continue unhindered, it can do no harm to clarify the position of Asande in pursuing a trial date by making the order sought.

[22.4] It was also pointed out by Asande's counsel that Truzanne has not been formally substituted for the liquidators and that the notice of February 2018 of Roestoff Attorneys is therefore of little practical value. It is also significant that at no stage did Toro formally consent to the separation despite the liquidation of Truzanne.

CONCLUSION:

[23] In the premises I am satisfied that the following factors compel me to grant the relief sought:

- (i) The interest of Asande in having its counterclaim adjudicated.
- (ii) The conduct of Toro thus far in that it dragged its feet to get the main action ripe for trial.
- (iii) The fact that Toro will not be unduly prejudiced by the order sought as opposed to Asande which has thus far been unable to have its counterclaim adjudicated.
- (iv) The fact that no significant additional costs will be caused by ordering a separation and that a major portion of the costs to date (e.g. drafting the plea and counterclaim) will not be wasted.
- (v) The balance of convenience therefore favours a granting of the order.

COSTS:

[24] In my view costs should follow the event. The application ought not to have been opposed from the outset. Toro's conduct during the application also delayed its finalisation and forced Asande to incur unnecessary costs.

ORDER:

[25] In the premises I grant the following order:

- (a) The trial on the claim that First Respondent (Toro Ya Africa Consultants (Pty) Ltd) had instituted against Asande Developers CC (Applicant) wider case number 800/2012 as well as the counterclaim that Asande Developers CC had instituted against Toro Ya Africa Consultants (Pty) Ltd in the aforesaid action, is hereby separated from any trial pertaining to the claim Toro Ya Africa Consultants (Pty) Ltd instituted against Second Respondent (Truzanne Property Developers (Pty) Ltd) under case number 800/2012.
- (b) Toro Ya Africa Consultants (Pty) Ltd is ordered to pay the costs of this application.

F J ERASMUS

ACTING JUDGE OF THE GAUTENG DIVISION, PRETORIA

HEARD ON: 13 September 2018

FOR THE APPLICANT: Mr M Verster

INSTRUCTED BY: BMV Attorneys

FOR THE RESPONDENT: Adv Groenewald

INSTRUCTED BY: Stopforth Swanepoel & Brewis

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