REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA,
MAIN DIVISION, WINDHOEK

JUDGMENT IN TERMS OF PRACTICE DIRECTIVE 61

Case Title: Socotra Island Investments (Pty) Ltd V The Commissioner of Inland Revenue	**Case No:** HC-MD-CIV-ACT-DEL-2020/01448
	Division of Court: High Court (Main Division)
Heard before: Honourable Justice Ueitele	**Date of hearing:** 29 June 2022
	Date of order: 16 August 2022
Neutral citation: *Socotra Island Investments (Pty) Ltd v The Commissioner of Inland Revenue* (HC-MD-CIV-ACT-DEL-2020/01448) [2022] NAHCMD 416 (16 August 2022)	
Results on the merits: Merits not considered.	

Having heard **REINHARD TOTEMEYER** assisted by **PHILLIP BARNARD**, on behalf of the plaintiff and **HERMAN STEYN**, on behalf of the defendant and having read the pleadings and all other documents filed of record, in respect of case number **HC-MD-CIV-ACT-DEL-2020/01448**:

IT IS HEREBY ORDERED THAT:

1. The plaintiffs' application for separation of issues is refused.

2. The plaintiffs must pay the defendants' costs in the application for separation, as between party and party, occasioned by the employment of one instructed and one instructing counsel, limited in terms of rule 32(11).

3. The case is postponed to **19 September 2022 at 08h30** for pre-trial conference hearing.

UEITELE J:

Introduction and Background

[1] The first applicant is Socotra Island Investments (Pty) Ltd, a private company with limited liability, and a grape producer in Namibia. The second applicant is C H Heydt Civils CC, a close corporation operating as a construction company, with its registered address situated in Keetmanshoop, Namibia. The first respondent is the Commissioner of Inland Revenue, sued in his official capacity, and the second respondent is the Minister of Finance, a minister of state, duly appointed as such and cited in his official capacity.

[2] The applicants (who are also the two plaintiffs in the main action) seek an order separating one issue in terms of rule 63. The respondents (who are also the two defendants in the main action) oppose the application. I will for ease of reference refer to the parties as they are cited in the main action, namely as the first and second plaintiffs and first and second defendants.

[3] The brief facts which gave rise to this application are that: the first plaintiff is, as I said earlier, a producer of grapes. Between the period 2018 and 2020, the first plaintiff enlisted the services of the second plaintiff for the latter to construct buildings at its grape producing site at Komsberg Farm, next to the Orange River in Namibia. The buildings were allegedly to be used solely for residential purposes and to be occupied by employees of the first plaintiff.

[4] During August and September 2019, the first defendant decided that the rendering of the construction services by the second plaintiff to the first plaintiff amounted to a supply taxable at the standard rate in terms of the provisions of the Value Added Tax Act 10 of 2000[1], ("the VAT Act"). The second defendant accordingly levied and charged value added tax at the standard rate of 15 percent VAT on all the invoices rendered by the second plaintiff to the first plaintiff. The first plaintiff paid these invoices (inclusive of the value added tax) to the second plaintiff. The total value added tax so paid amounts to N$35 859 111.69.

[5] The plaintiffs alleging that the supply in the form of the services (that is the construction and extension of buildings at Farm Komsberg) rendered by the second plaintiff was for buildings to be used solely for residential purposes contended that the services ought to have been zero rated for value added tax purposes as contemplated in section 2*(y)(ii)* of schedule III to the VAT Act. The plaintiffs accordingly, further, contend that the second plaintiff should not have levied value added tax at the standard rate of 15 percent on the services so rendered and the second plaintiff was thus not liable to pay that amount of value added tax to the second defendant.

[6] As a consequence of that contention the plaintiffs, on 06 April 2020, issued summons against the defendants in terms of which the plaintiffs claim payment in the amount of N$30 175 442.49 and costs of suit. In addition, the plaintiffs also claim a declarator to the effect that the decisions by the first defendant dated 16 August 2019 and 26 September 2019, that the rendering of the construction services by the second plaintiff to the first plaintiff amounted to a taxable supply at the standard rate in terms of the value added tax, be declare *ultra vires* and set aside.

The separation application

[7] The parties exchanged pleadings and at the stage of preparing for a pre-trial

[1] Value Added Tax Act, 2000 (Act No.10 of 2000).

conference the parties amongst other matters recorded in their draft pre-trial order that the 'the interpretation of the provisions of section 2(y)(ii) of schedule III to the VAT Act is central to this matter' and that:

'30. The parties have agreed that testimony and opinions by witnesses on the proper interpretation of the VAT Act is inadmissible as irrelevant, interpretation VAT ACT (sic) being a legal question for the court to decide and not for witnesses to testify on.'

[8] In view of what is contained in the proposed draft pre–trial order, the plaintiffs launched this application seeking an order that the interpretation of the provisions of section 2*(y)(ii)* of schedule III to the the VAT Act be decided before any evidence is led and separate from any other issue. The defendants oppose the application launched by the plaintiffs.

[9] Mr Ward who deposed to the affidavit in support of the separation application advanced the reasons for the separation as follows:

(a) If the interpretation of section 2*(y)(ii)* of schedule III to the the VAT Act as contended for by the defendants is correct, the plaintiffs may well not proceed with further litigation. Time and expenses will be limited to argument to be finalized in one day.

(b) If the interpretation by the defendants is correct, it would be appropriate that this be determined upfront and not after the costs occasioned by a ten day trial have been incurred and a court occupied for ten days. All such costs and time will then be wasted.

(c) If the interpretation by the plaintiffs is correct, the defendants will probably no longer need to lead the evidence of Mr Francois Cameron Kotze on his evaluation of the financial statements of the first plaintiff. It will no longer be necessary to *subpoena* Mr Heydt and lead his evidence. It will no longer be necessary to cross-examine the witnesses of the plaintiff to establish the purpose for the erection of the buildings.

(d) Either way, a separate hearing will bring about a substantial saving of costs and court time.

[10] In the answering affidavit the deponent, Mr Shivute (who is the Commissioner for Inland Revenue) amongst other matters submitted that:

'(10) The VAT Act in section 1 thereof defines 'taxable supply' as meaning the supply of goods and services in the course or furtherance of a taxable activity, other than an exempted supply, and in section 1, read with section 4(1), thereof circumscribe 'taxable activity' in substance as meaning any activity carried on continuously or regularly by any person in Namibia, whether or not for a pecuniary profit, that involves or is intended to involve, in whole or in part, the supply of goods or services to any other person for consideration. The second plaintiff carries on business as a building contractor in Namibia, and the first plaintiff's business is the production and sale of grapes at its farm, Komsberg, next to Orange River in Namibia.'

(11) As from February 2018 to February 2020 the second plaintiff constructed buildings for the first plaintiff at Komsberg.

(12) The first plaintiff claims that 84.15% of the supply of these services (the supply of the services) comprises the supply of accommodation in dwellings for its employees employed to work at Komsberg, and that it should, therefore, be zero-rated for VAT purposes by virtue of paragraph 2(y)(ii) of Schedule III to the VAT Act, which provides that a supply of goods or services comprising the erection or extension of a building used or to be used **solely** for residential purposes is to be so rated.

(13) There are two distinct supplies that should be kept apart:

13.1 One: the supply of the dwellings by the second plaintiff to the first plaintiff.

13.2 Two: the supply of the use of the dwellings by the first plaintiff to its employees.

(14) The focus in this case is on the purpose (intention) for which the first plaintiff received the dwellings from the second plaintiff.

(15) The defendants deny that the first plaintiff received the supply of the services solely for the purpose of supplying accommodation to its employees as described, and puts the first plaintiff to the proof thereof. The defendants say that, on a conspectus of all the facts and circumstances of this case, the first plaintiff received the supply of the services not solely for the supply of residential accommodation for its employees, but, in addition, for other purposes

including, but not limited to:

15.1. One: the supply of the use of the dwellings concerned to its employees in order to use their services for the purpose of the production and selling of grapes at a profit.

15.2 Two: the supply of the use of these dwellings to its employees as part payment for their services.

15.3 Three: the supply of the use of these dwellings to persons other than its employees in consideration for rent. (the additional purposes).

(16) Thus, the **pivotal issue** in this case is one of fact. The fact is the state of mind of those, who were in control of the first plaintiff, when it received the supply of the services from the second plaintiff.

(17) By the nature of things, the defendants can only expose that the first plaintiff received the supply of the services for the additional purposes with circumstantial evidence in the possession or under the control of the plaintiffs in general, and the first plaintiff in particular, such as the first plaintiff's financial statements, accounting records, and the minutes of the meetings of its members and directors.

(18) Sweeping aside smoke and mirrors, the purpose of this application is, at its core, an attempt by the plaintiffs at preventing the defendants from putting evidence before this Court, which will uncover that the first plaintiff received the supply of the services for the additional purposes. The plaintiffs' request to separate the interpretation of paragraph 2(y) of Schedule Ill to the VAT Act is, in substance, a request that this Court rule on the admissibility of evidence on account of relevance in advance prior to the trial.'

[11] The defendants, furthermore, contend that firstly the plaintiffs are asking for the separation of the interpretation of section 2*(y)(ii)* of schedule III to the the VAT Act, without demarcating the competing interpretations. As such the plaintiffs' request for a separation of that issue is too vague to be of any value. They further contend that secondly the plaintiffs are fundamentally asking the court to rule in advance of the trial on the admissibility of evidence on account of relevance. This the defendants argue, is not competent under rule 63(6), interlocutory by nature, and not binding on the trial court.

[12] Having set out the basis on which the plaintiffs seek the separation and the basis on which the defendants oppose the separation. I will proceed to discuss whether or not to grant the order sought by the plaintiffs.

Discussion

[13] Rule 63(6) provides as follows:

'(6) Where it appears to the court mero motu or on the application of a party that there is in any pending action 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 trial of that question in such manner as it considers appropriate and may order that all further proceedings be stayed until the question has been disposed of.'

[14] This court in *Van den Berg v Smith*[2], relying on the South African case of *Braaf v Fedgen Insurance Ltd*[3], held that in an application for the separation of issues, the *onus* is on the applicant to satisfy the court that the order for the separation of issues must be granted. My reading of the *Braaf v Fedgen Insurance Ltd,* matter is, however, that that case held that the *onus* is on the respondent to persuade the court that a separation should not be granted. In that matter King J said:

'… the defendant sought in terms of Rule 33(4) separation of the issues of liability and quantum of damages. Plaintiff opposed the application. Rule 33(4) enjoins the Court to accede to the application and make the necessary order 'unless it appears that the questions cannot conveniently be decided separately'. Thus it is incumbent on the plaintiff to satisfy the Court that the application should not be granted.'

[15] The South African Supreme Court of Appeal, in the matter of *Denel (Edms) Bpk v Vorster*[4], explained the purpose of rule 33(4) (which is the equivalent of our rule 63(6)) and how it must be applied, as follows:

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2 *Van den Berg v Smith (*HC-MD-CIV-ACT-DEL-2018/02242) [2021] NAHCMD 389 (02 September 2021).

3 *Braaf v Fedgen Insurance Ltd* 1995 (3) SA 938 (C) at 939G-H.

4 *Denel (Edms) Bpk v Vorster* 2004 (4) SA 481 (SCA) at para [3].

'Rule 33(4) of the Uniform Rules – which entitles a Court to try issues separately in appropriate circumstances – is aimed at facilitating the convenient and expeditious disposal of litigation. It should not be assumed that that result is always achieved by separating the issues. In many cases, once properly considered, the issues will be found to be inextricably linked, even though, at first sight, they might appear to be discrete. And even where the issues are discrete, the expeditious disposal of the litigation is often best served by ventilating all the issues at one hearing, particularly where there is more than one issue that might be readily dispositive of the matter. 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.'

[16] Approximately ten years later the Supreme Court in the matter of *Molotlegi and Another v Mokwalase*[5] said:

'It follows that a court seized with such an application has a duty to carefully consider the application to determine whether it will facilitate the proper, convenient and expeditious disposal of litigation. The notion of convenience is much broader than mere facility or ease or expedience. Such a court should also take due cognizance of whether separation is appropriate and fair to all the parties. In addition the court considering an application for separation is also obliged, in the interests of fairness, to consider the advantages and disadvantages which might flow from such separation. Where there is a likelihood that such separation might cause the other party some prejudice, the court may, in the exercise of its discretion, refuse to order separation. Crucially in deciding whether to grant the order or not the court has a discretion which must be exercised judiciously.'

[17] Deputy Chief Justice Damaseb[6] states as follows on the separation of issues, generally:

'It often happens in practice that the parties ask the court to separate merits from *quantum* while *quantum* has not been agreed. This approach is to be discouraged, as it unduly prolongs proceedings and drives up costs considering that the party aggrieved by the decision on the merits may appeal against it. In that situation, the parties must await the outcome of the appeal, after which only the *quantum* may be adjudicated. Managing judges must be loath to allow the separation of *quantum* from the merits unless the parties are

5 *Molotlegi and Another v Mokwalase* [2010] 4 All SA 258 (SCA) at para [20].

6 Damaseb T Petrus: *Court Managed Civil Procedure of the High Court of Namibia* at 236 para 9-087.

agreed on the question of *quantu*m. A contrary approach seriously undermines the overriding objective of an expeditious disposal of a matter'

[18] The learned Deputy Chief Justice continues and argue that piecemeal litigation, in relation to the separation of *quantum* from the merits, where the parties are not agreed on the question of *quantum*, is not encouraged.

[19] I am therefore of the view that, irrespective of which party bears the "burden of persuasion" the court is nonetheless enjoined to apply its mind properly and judiciously to whether a separation must or must not be granted. The Court must furthermore be guided by the overriding objectives of the rules which are, to facilitate the resolution of the real issues in dispute justly and speedily, efficiently and cost effectively as far as practicable. It is thus clear that, it is incumbent on both parties to place all relevant information before the court to enable it to exercise its discretion.

[20] From what I have stated in the preceding paragraphs, it is clear that when determining the question of whether or not to grant separation of issues I associate myself with the reasoning of the Deputy Chief Justice that piecemeal litigation must not to be encouraged; and that the expeditious disposal of litigation is often best served by ventilating all the issues at one hearing. The Supreme Court of South Africa has adopted the view that the convenient and expeditious disposal of litigation is not always achieved by separating the issues[7].

[21] There are certain guiding principles that may be gleaned from the case law on the question of separation of issues. The guiding principles were usefully summarised in the matter of *Copperzone 108 (Pty) Ltd v Gold Port Estates (Pty) Ltd*[8]*,* as follows:

(a) Whether the hearing on the separated issues will materially shorten the proceedings: if not, this militates against a separation. In the *Braaf matter*[9] the Court

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7 See *Privest Employee Solutions (Pty) Ltd v Vital Distribution Solutions (Pty) Ltd* 2005 (5) SA 276 (SCA) paras [26] and [27]; *Consolidated News Agencies (Pty) Ltd (in liquidation) v Mobile Telephone Networks (Pty) Ltd and Another* 2010 (3) SA 382 (SCA) paras [89] – [91]; *Absa Bank Ltd v Bernert* 2011 (3) SA 74 (SCA) para [21].

8 *Copperzone 108 (Pty) Ltd v Gold Port Estates (Pty) Ltd* 2019 JDR 0587 (WCC) para [25].

9 *Supra* footnote 3 at 941D.

stated that despite the wording of the sub rule, it remains axiomatic that the interests of expedition and finality are better served by disposal of the whole matter in one hearing.

(b) Whether the separation may result in a significant delay in the ultimate finalisation of the matter: such a delay is a strong indication that separation ought to be refused.[10] The granting of the application, although it may result in the saving of many days of evidence in court, may nevertheless cause considerable delay in reaching a final decision in the case because of the possibility of a lengthy interval between the first hearing at which the special questions are canvassed and the commencement of the trial proper;[11]

(c) Whether there are prospects of an appeal on the separated issues, particularly if the issues sought to be separated are controversial and appear to be of importance: if so, an appeal will only exacerbate any delay and negate the rationale for a separation;[12]

(d) Whether the issues in respect of which a separation is sought are discrete, or inextricably linked to the remaining issues: if after careful consideration of the pleadings, the relevant issues are found to be linked, even though at first sight they might appear to be discrete, it would be undesirable to order a separation.[13]

(e) 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 a separation where it is apparent that such an overlap will occur. Such a situation will result in witnesses having to be recalled to cover issues which they had already testified about.[14] Where there is such a duplication of evidence, a court will not grant a separation because it will result in the lengthening of the trial, the wasting of costs, potential conflicting findings of fact and credibility of witnesses, and it will also hinder the opposing party in cross-

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[10] *Netherlands Insurance Co of SA Ltd v Simrie* 1974 (4) SA 287 (C) at 289B-C.
[11] Erasmus Superior Court Practice at D1-437.
[12] *Hollard Insurance Co Ltd v S A Coetzee and Others* (24120/2011) [2015] ZAWCHC 57 (6 May 2015) at para [15].
[13] See *Denel* (*supra*) at para [3]; *Consolidated News Agencies* (*supra*) para [89].
[14] See *Internatio (Pty) Ltd v Lovemore Brothers Transport CC* 2000 (2) SA 408 (SECLD) at 411G-I.

examination.[15]

[22] If I apply the guiding principles and the legal principles that I have set out in the preceding paragraphs to this matter, I am not persuaded that the hearing of the interpretation of the provisions of section 2*(y)(ii)* of schedule III to the VAT Act before any evidence is led and separately from any other issue will justly and speedily, efficiently, and cost effectively resolve the real dispute between the parties. I am of the view that rather than materially shortening the proceedings, a separation will unduly prolong finalisation.

[23] The defendants finding success in their resistance to the separation seek costs occasioned by the opposition, and which costs must be capped in terms of rule 32(11); I see no reason why the defendants must not be indemnified for the opposition, as such, the costs in the interlocutory follow the event.

[24] In the circumstances, I make the following order:

1. The plaintiffs' application for separation of issues is refused.

2. The plaintiffs must pay the defendants' costs in the application for separation, as between party and party, occasioned by the employment of one instructed and one instructing counsel, limited in terms of rule 32(11).

3. The case is postponed to **19 September 2022 at 08h30** for pre-trial conference hearing.

Judge's signature	**Note to the parties:**
Ueitele J	Not applicable.
Counsel:	
Plaintiff	**Defendant**
R Totemeyer SC assisted by Phillip Barnard	H Steyn On the instructions of the office of the

[15] See *Hollard Insurance Co* (*supra*) para 15.7.

On the instructions of Ellis Shilengudwa Inc. Windhoek	Government Attorney Windhoek