

“ANNEXURE 11”

Practice Direction 61

IN THE HIGH COURT OF NAMIBIA

Case Title: <i>Walvis Bay Plant and Tool Hire Services CC v Walvis Bay Municipal Council</i>	Case No.: HC-MD-CIV-ACT-OTH-2017/01830
	Division of Court: High Court (Main Division)
Heard/tried before: Honourable Mr Justice B Usiku J	Date of hearing: 11 August 2020
	Delivered on: 20 August 2020
Neutral citation: <i>Walvis Bay Plant and Tool Hire Services CC v Walvis Bay Municipal Council</i> (HC-MD-CIV-ACT-OTH-2017/01830) [2020] NAHCMD 364 (20 August 2020)	
The Order: Having read the pleadings and documents filed of record and having considered the heads of argument filed by the parties: IT IS ORDERED THAT: 1. The plaintiff's point in limine to the effect that the defendant did not comply with <i>rule 32 (9)</i> is dismissed with costs and such costs include costs of one instructing and two instructed counsel. Such costs are not to be limited by the provisions of <i>rule 32(11)</i> . 2. The defendant's application for the separation of issues in terms of <i>rule 63(6)</i> and <i>(7)</i> is dismissed. 3. The defendant is ordered to pay the plaintiff's costs occasioned by opposition to the	

application. It is ordered that such costs include costs of one instructing and two instructed counsel. It is further ordered that costs herein shall not be limited by the provisions of *rule 32(11)*.

4. The matter is postponed to 21 October 2020 at 15:15 for status hearing alternatively Pre-Trial Conference.

5. The parties must file a joint status report or joint Pre-Trial report on or before 14 October 2020.

Reasons: Practice Direction 61(9)

Introduction

[1] This is an application by the defendant, in terms of *rule 63(6) and (7)*. The defendant prays that all issues, other than the computation of damages as set out in paragraphs:

(a) 8 to 8.4 of the plaintiff's particulars of claim, read with paragraph 22 of the defendant's plea, and

(b) 26 of the defendant's counterclaim, read with paragraph 12 of plaintiff's plea thereto, be heard and determined first, before the issue of the quantum of the damages allegedly suffered by either of the parties is adjudicated.

[2] The plaintiff opposes the application.

Background

[3] On 31 May 2017 the plaintiff instituted an action against the defendant claiming payment of certain amounts as damages that the plaintiff allegedly suffered as result of defendant's negligence. The action arises from an incident in which the plaintiff's mobile crane was allegedly used to dismantle a marquee tent, which had been set up in front of the defendant's buildings. It appears that the crane (or parts of its components) was positioned

above an underground water-pipe. This pipe got damaged and bursted, causing the crane to topple over and sustaining damage.

[4] The plaintiff claims damages against the defendant for 'fair and reasonable' costs and expenses incurred to repair the crane to its pre-accident condition, as follows:

- (a) N\$ 359,355.30, in respect of recovery costs;
- (b) €7,950 (or its Namibia Dollar equivalent) in respect of investigative costs;
- (c) N\$ 5,974.22, in respect of accommodation costs;
- (d) € 365,772.22 (or its Namibia Dollar equivalent) in respect of costs of repair.

[5] Furthermore, the plaintiff claims for interest and costs of suit.

[6] The defendant defends the action and launched a counterclaim. In its counterclaim the defendant alleges that the underground water- pipe was damaged as a result of plaintiff's negligence. As a consequence of the damage to the underground water-pipe, the defendant alleges that:

- (a) water was wasted, at defendant's expense;
- (b) the surface of the parking area, where the accident occurred was damaged;
- (c) the defendant had to dispose of spilled-water;
- (d) the defendant had to repair the pipe and the parking area.

[7] The defendant, therefore, claims that it suffered damages in the amount of N\$ 161,943.69 which the defendant claims from the plaintiff. The defendant also claims interest and cost of suit.

[8] The case management order was made on 6 July 2018. In that order the parties were directed to file respective witness statements and expert summaries by certain dates. The matter is now at pre-trial stage.

[9] On 18 March 2020 the defendant filed its present application to separate the issues of liability and quantum of damages, for separate determination.

Defendant's application for separation of issues

[10] In its application for separation of the issues, the defendant seeks, among other things, an order directing that the issue of liability in respect of the plaintiff's claim and in respect of the defendant's counterclaim, be determined first and that the issue of the quantum of damages (in either claim) be stayed for later determination.

[11] The defendant submits that the plaintiff's claim is weak, because:

(a) it is, in substance, based on negligent omission causing damage to property. A negligent omission causing damage to property is *prima facie* lawful. To prove the element of wrongfulness, the plaintiff would have to persuade the court that the legal convictions of the public demand extension of the application of the *legis Aquiliae* to the alleged omission of the defendant. The defendant submits that the plaintiff would battle to do so in the circumstances, and that,

(b) the plaintiff has not filed expert witness statement on the duties of a crane driver. The defendant contends that it has filed expert witness statement on the duties of a crane driver, and as such defendant's evidence on that aspect would stand uncontradicted. The defendant thus argue that the plaintiff's case will probably fail on the issue of causation.

[12] The defendant submits further that the separation of the issue of liability and the issues of quantum of damages is appropriate because it would save the parties unnecessary costs. The defendant argues that, to adjudicate the issue of quantum of damages in respect to the plaintiff's claim, will involve:

(a) defendant launching an application to compel the plaintiff to produce certain documents, which the plaintiff has so far, failed to produce to the defendant;

(b) employment of experts on both sides, and,

(c) a hotly-contested trial on reasonable and necessary repairs to the crane and the reasonableness of amounts expended to repair the crane.

[13] It is the defendant's contention that the costs relating to adjudication of the issue of

quantum of damages will probably be avoided because there is a reasonable possibility that the plaintiff's case will fail on the merits.

[14] The defendant further contends that *rule 63(7)* creates a rebuttable presumption that it is always convenient in a case involving a claim for damages to separate the court's decision on the question of liability and the question of quantum of damages. The court has discretion to order the separation of issues unless the plaintiff discharges the onus of persuading the court that the order should not be granted. The defendant argues further that the disadvantages of the separation of issues outweigh the advantage thereof. As authorities for the foregoing propositions, the defendant cites the cases of *Lapperman Diamond Cutting (Pty) Ltd v MIB Group (Pty) Ltd (No.2) 1997 (4) SA 921 (W) 927A-J* and *Maritz v Louw NO and Others 2018 (4) NR 1000 HC para [8],[9],[18],[21],[25],[28] and [29]*.

[15] The defendant submits that the plaintiff has failed to show that the disadvantages of the separation of issues outweigh the advantages thereof. The defendant, therefore, contends that its application be granted with costs, including costs of one instructing and two instructed counsel and the qualifying fees and disbursements of Mr Martin Graham.¹

[16] In opposition to the separation application, the plaintiff raised a preliminary point that that the defendant did not comply with *rule 32(9)* prior to launching its separation application. The plaintiff relates that the defendant sent a letter to the plaintiff setting out its proposal to resolve the matter amicably. In response thereto, the plaintiff despatched a letter to the defendant, in which the plaintiff, among other things, made a counter-proposal to solve the matter amicably. The plaintiff argues that the defendant had ignored the plaintiff's counter-proposal. The plaintiff thus contends that the defendant did not comply with *rule 32(9)* and that its application for the separation of issues be struck from the roll.

[17] The defendant responds to the preliminary point, to the effect that, the plaintiff in its replying letter did not leave room for compromise. The defendant avers that the plaintiff had

¹ Mr Martin Graham is the defendant's expert witness who deposed to an accompanying confirmatory affidavit

indicated that unless the defendant agreed to pay interest to the plaintiff on its damages claim in the interval between the court's decision on the question of liability and the question of damages, the plaintiff is not prepared to consent to the separation of issues application. In addition, the defendant argues that the court order dated 20 February 2020 prescribed the procedure the parties should follow towards compliance with rule 32(9) and the defendant had followed such procedure.

[18] In regard to the merits of the separation application, the plaintiff contends that the defendant's perception of the merits and de-merits of the plaintiff's claim is irrelevant in deciding the application.

[19] Insofar as the issue of the costs in regard to the calling of expert witnesses to testify on the question of quantum of damages is concerned, the plaintiff argues that the costs of bringing expert witnesses from Germany to testify on reasonable costs of repair, will be incurred by the plaintiff.

[20] The plaintiff contends that the defendant bears the onus to show that a separation of issues is convenient. The plaintiff submits that the defendant has failed to show that separation of issues is convenient and that the application must be dismissed with costs, including costs of one instructing and two instructed counsel and that such costs not be limited by rule 32(11).

Legal principles

[21] *Rule 32(9)* read as follows:

'(9) In relation to any proceeding referred to in this rule, a party wishing to bring such proceeding must before launching it, seek an amicable resolution thereof with the other party or parties and only after the parties have failed to resolve their dispute may such proceeding be delivered for adjudication by court.'

[22] *Rule 63(6)* and *(7)* read 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.'

'(7) If a cause or matter referred to in subrule (6) involves an action for damages the court may on application of a party order that question of liability and the amount of damages be decided separately, unless it appears to the court that the questions cannot conveniently be so decided.'

[23] Rule 63(6) and (7) grant the court discretion to make an order separating the questions where an application is brought, unless the court is of the view that the questions cannot be conveniently decided separately. An applicant for separation of the questions must satisfy the court the order should be granted.²

[24] The Honourable Petrus T Damaseb states the following on the subject:
*'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 agreed on the question of quantum. A contrary approach seriously undermines the overriding objective of an expeditious disposal of a matter.'*³

[25] It is ordinarily desirable in the interests of expedition and finality of litigation to have one hearing only at which all the issues are canvassed so that the court at the conclusion of

² Rule 63(7).

³ Court Managed Civil Procedure of the High Court of Namibia, First Edition, para 9-087.

the case may dispose of the entire matter.⁴ In some instances the interests of the parties and the ends of justice are better served by disposing of a particular issue or issues before considering other issues which, depending on the result of the issue singled out, may fall away.⁵

[26] Piecemeal litigation is not encouraged.⁶

Analysis

[27] In regard to the preliminary point raised by the plaintiff, the parties did file separate draft orders on 19 February 2020 for consideration of the court. Both parties proposed compliance with *rule 32(9)* by way of exchange of letters. This proposal was adopted and made an order of court. In compliance with the order, the parties exchanged the letters. The parties did not reach amicable resolution of the dispute through the exchange of their letters. I do not find substance in the contention by the plaintiff that *rule 32(9)* was not complied with. I am of the view that the defendant did comply with the court order dated 20 February 2020 and has complied with the provisions of *rule 32(9)* and (10). The plaintiff's preliminary point, therefore, stands to be dismissed with costs.

[28] In regard to the application for the separation of the questions, it is common cause that the parties are not agreed on the question of quantum. Furthermore, it is not the defendant's case that, once the requested separation of issues is granted and the issue of liability is determined, the issue of quantum of damages, in the whole case, will become academic or superfluous. In other words, this is not a case where it may be argued that should either of the parties be successful on the issue of liability, the matter is over, obviating the necessity of a further trial on any other issue.

[29] Rather, the defendant contends, among other things, that once the separation of issues is granted and should the defendant be successful on the issue of liability or its

⁴ *African Bank v Soodhoo* 2008 SA 46 D at 51 B-D.

⁵ *Ibid.*

⁶ Court Managed Civil Procedure of the High Court of Namibia (*supra*).

counterclaim, then the second phase of the trial will be restricted to proving the quantum of the defendant's damages. Put differently, should the plaintiff fail to establish its case on the question of liability, the question of the quantum of the plaintiff's damages will become superfluous, however, the court would thereafter be required to adjudicate on the quantum of damages incurred by the defendant.

[30] In the circumstances of this case, I do not see how the separation of issues would materially shorten the proceedings, if, in the event of whichever party succeeds on the issue of liability, there would still be a second phase of trial to consider the quantum of damages sustained by the winning party at the first phase.

[31] I am of the opinion that, in this matter, the expeditious disposal of litigation would be best served by ventilating all issues at one hearing, rather than by method of piecemeal litigation.

[32] I am not persuaded that the separation of issues in this matter will materially shorten the proceedings nor that the separation will be convenient. If granted, the separation of issues will result in two phases of trial, with the first phase for the determination of the question of liability and the second phase for determining the quantum of damages for the successful party in the first phase. The aforesaid process amounts to a piecemeal adjudication of the case and would delay bringing the dispute between the parties to a final determination. For the foregoing reasons, the defendant's application for the separation of issues, stands to be dismissed.

[33] The court was addressed at length on the defendant's prospects of success on the question of liability. The defendant maintained that the plaintiff has little prospects of success on the question of liability and that this factor should be considered in this application. I cannot make such a finding in this application since there is dispute of fact on the question of liability of either party, which can only be determined after oral evidence is heard.

[34] As far as costs of suit are concerned, both parties have argued that the costs to be granted in this matter be costs including one instructing and two instructed counsel and that the costs be permitted to be in excess of the limit imposed by *rule 32(11)*. I believe a costs order in those terms is justifiable in the circumstances of this case and I shall make an order in those terms.

[35] In the result I make the following order:

1. The plaintiff's point in limine to the effect that the defendant did not comply with *rule 32(9)* is dismissed with costs and such costs include costs of one instructing and two instructed counsel. Such costs are not to be limited by the provisions of *rule 32(11)*.
2. The defendant's application for the separation of issues in terms of *rule 63(6)* and (7) is dismissed.
3. The defendant is ordered to pay the plaintiff's costs occasioned by opposition to the application. It is ordered that such costs include costs of one instructing and two instructed counsel. It is further ordered that costs herein shall not be limited by the provisions of *rule 32(11)*.
4. The matter is postponed to 21 October 2020 at 15:15 for status hearing alternatively Pre-Trial Conference.
5. The parties must file a joint status report or joint Pre-Trial report on or before 14 October 2020.

Judge's signature	Note to the parties:
	Not applicable
Counsel:	
Plaintiff	Defendant
Advocate SJ Jacobs	Advocate HH Steyn assisted by Advocate LC

Instructed by Van der Merwe-Greef Andima Inc. Windhoek	Botes with Ms Meyer Instructed by the Office of the Government Attorney Windhoek
---	--