

REPUBLIC OF NAMIBIA



IN THE HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

RULING

Case Title: Wilke Van den Berg and Frederick Johannes Smith Nexus Civils (Pty) Ltd	Plaintiff 1 st Defendant 2 nd Defendant	Case No: HC-MD-CIV-ACT-DEL-2018/02242 Division of Court: Main Division Heard on: 2 September 2021
Heard before: Honourable Mr. Justice Usiku, J	Delivered on: 2 September 2021	
Neutral citation: <i>Van den Berg v Smith</i> (HC-MD-CIV-ACT-DEL-2018/02242) [2021] NAHCMD 389 (02 September 2021)		
Order: <ol style="list-style-type: none">1. The application for a separation of issues is refused.2. I make no order as to costs.3. The case is postponed to 29 September 2021 at 15:15 for an additional Case Management Conference Hearing (Reason: Parties to file a joint case management conference report).4. The parties are directed to file a joint case management report on or before 22 September 2021.		
Reasons for order:		
USIKU, J:		

Introduction

[1] This is an application in terms of rule 63(6) and (7), launched by the second defendant, seeking an order that:

- (a) the issues of merits and the issues of quantum (including causation) as identified in the joint status report dated 28 April 2021 be separated, and
- (b) the issues concerning the merits be heard separately and the issues concerning the quantum (including causation) stand over until the merits have been determined.

[2] The application is not opposed. The plaintiff and the first defendant support the application.

Background

[3] The plaintiff is an engineer technician. The first defendant is an engineer. The second defendant is a company with limited liability incorporated according to the laws of Namibia.

[4] According to the particulars of claim, on 19 October 2015, while the parties were in a meeting at a construction site, the first defendant grabbed the plaintiff from behind. The first defendant and the plaintiff, at some state, fell to the ground. As a result of that incident it is alleged that the plaintiff sustained certain injuries and suffered damages.

[5] On 12 June 2018, the plaintiff instituted the present action against the first and second defendants, claiming payment in the amount of N\$17 599 715.60, as damages.

[6] The plaintiff alleges that the first defendant acted in the course and scope of his employment by the second defendant and that the second defendant is vicariously liable for the actions of the first defendant.

[7] The head of damages claimed by the plaintiff include:

- (a) general damages for pain, suffering, disfigurement, discomfort, *contumelia*, disability and loss of amenities of life;
- (b) past hospital, medical and associated expenses;

- (c) past travelling expenses;
- (d) past loss of earnings;
- (e) estimated future hospital, medical and associated expenses;
- (f) future loss of income; and
- (g) miscellaneous expenses for accommodation and subsistence costs relating to medical treatment and loss of site perks.

[8] The defendants defend the action and deny liability.

[9] At the present stage of proceedings, a case management order was issued. The plaintiff amended the particulars of claim thereafter. The parties have not yet filed witness statements.

[10] The second defendant, with the concurrence of the plaintiff and the first defendant, now seek an order that the issue of liability (merits) be separated from the issues of the quantum (including causation) and that the issue of liability be heard and be determined prior to the remaining issues.

The application for separation of issues

[11] In its application for the separation of issues, the second defendant states that the plaintiff's claim against the second defendant is based on vicarious liability only. The second defendant denies that any employment relationship existed between itself and the first defendant at the time of the incident in question. The second defendant also denies that there was an assault and pleads that the first defendant, under severe provocation from the plaintiff, reached out and grabbed the plaintiff, during which incident the first defendant and the plaintiff fell to the ground. Furthermore, the second defendant denies causation in respect of alleged injuries and disputes the quantum of damages.

[12] The second defendant submits that if the plaintiff fails to prove that there was employment relationship between the first and second defendants, it would be the end of the matter, as far as it concerns the plaintiff and the second defendant. The second defendant accepts that, if the question of vicarious liability is determined in favour of the plaintiff, then there would be more than one hearing and that the entire matter would not be disposed of in one go.

[13] To deal with the issues of quantum and causation, the second defendant would need to engage several experts, first to conduct medical examination on the plaintiff and prepare expert

reports and second, to determine the correctness of the plaintiff's claim for potential loss of income. The second defendant contends that none of that evidence will be necessary for the purposes of determining the issues on the merits. For the second defendant, it may not be necessary to incur any of the costs relating to expert evidence, depending on the outcome on the merits. The second defendant thus submits that the issues on the merits to be determined between it and the plaintiff are distinct from what needs to be determined when considering causation and quantum. In particular, the second defendant argues that the parties would not need to lead any expert evidence for determining the issues on the merits.

[14] The second defendant further contends that there is a likelihood that the parties may, if the merits are determined in favour of the plaintiff, come to an agreement on the issue of quantum.

[15] The second defendant asserts that separation of issues would be a more effective use of the court's time and could reduce costs significantly for the parties especially the plaintiff and the second defendant.

[16] The second defendant submits that this is a matter which is most appropriate for a separation of issues, and that the application for the separation of issues be granted as set out in the notice of motion.

Legal principles

[17] 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 should be granted. The court may grant the order where it appears to the court that it is convenient that the issues be decided separately. 'Convenience' refers to the convenience of the court, in the first instance, and the convenience of the litigants in the second instance.¹

[18] In assessing whether it is convenient to order separation of the issue, the court weighs the advantages and disadvantages likely to follow upon the granting of the order. If it appears that the advantages would outweigh the disadvantages, the court would normally grant the application. The court should not grant the application for a separate hearing unless there appears to be a reasonable likelihood that the alleged advantages would in fact result.²

¹ *Braaf v Fedgen Insurance Limited* 1995(3) SA 938.

² *Walvisbay Salt Refiners (Pty) Ltd v Blaauw's Transport (Pty) Ltd* (I 3668/2014) [2016] NAHCMD 312 (11 October 2016) para 11.

[19] It is ordinarily desirable in the interest 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 the case, may dispose of the entire matter. 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 issues singled out, may fall away.³

[20] The Honourable Petrus T Damaseb 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 agreed on the question of quantum. A contrary approach seriously undermines the overriding objective of an expeditious disposal of a matter.'⁴

[21] 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.⁵

Analysis

[22] It appears to me that in the present case, a decision in favour of the separation of issues may be convenient only if the merits happen not to favour the plaintiff. According to *Walvisbay Salt Refiners (Pty) Ltd v Blaauw's Transport Pty Ltd* (supra), a decision to separate the issues may be granted if there is a reasonable degree of likelihood that the merits would in fact not favour the plaintiff. In the present matter, the applicant did not present, before court, evidence pointing in that direction.

[23] In the present matter, if separation of issues is granted, and if the court finds in favour of the plaintiff on the merits, then there would be a piecemeal approach to litigation and this will inevitably prolong the hearing. In such event, any ruling that the court may make in favour of the plaintiff will have the effect of a final order and could be appealed against. In such a situation, the

³ *African Bank v Soodhoo* 2008(6) SA 46 at 51 B-D.

⁴ Court Managed Civil Procedure of the High Court of Namibia at 236 para 9-087.

⁵ *Ibid.*

parties will have to wait for the outcome of the appeal, after which only the quantum may be adjudicated upon. In the meantime, the matter will be regarded as partly-heard before that particular trial judge, which does not lend itself to an ideal position for the court.

[24] Furthermore, if separation is granted, and should the second defendant be successful on the issue of liability and the first defendant is not similarly so successful, then the court would thereafter be required to adjudicate on the quantum and the issue of 'causation', as between the plaintiff and the first defendant. Thus a piecemeal approach to litigation in such circumstances is equally unavoidable.

[25] It is common cause that, in the present matter, the parties are not agreed on the question of the quantum. I am in agreement with the authority, to the effect that the separation of the merits from quantum while the quantum has not been agreed between the parties, cannot be convenient nor would it lead to an expedient disposal of litigation. Granting separation of the issues in such circumstances would entail that litigation would be conducted in stages or phases and the court would be required to adjudicate the matter in a piecemeal fashion. Conducting litigation in phases in such circumstances, with each phase having the effect of a final decision, which may be appealed against, cannot, in my opinion be convenient.

[26] In the present matter, I am not persuaded that the separation of issues as proposed by the parties, will conduce to the convenience of the court. I am of the view that, in this matter, the expeditious disposal of litigation would be best served when all parties join battle on all issue at one hearing, rather by way of a piecemeal approach.

[27] For the foregoing reasons, the second defendant's application for the separation of issues stands to be declined.

[28] In the result, I make the following order:

1. The application for a separation of issues is refused.
2. I make no order as to costs.
3. The case is postponed to 29 September 2021 at 15:15 for an additional Case Management Conference Hearing (Reason: Parties to file a joint case management conference report).
4. The parties are directed to file a joint case management report on or before 22 September 2021.

Judge's signature	Note to the parties:
B Usiku Judge	Not applicable
Counsel:	
Plaintiff:	First Defendant:
Ms Boesak Of LorentzAngula Inc. Windhoek	Ms W Horn Of W Horn Attorneys Windhoek
	Second Defendant:
	Ms N Bassingthwaighte Of Koep & Partners Windhoek