

IN THE HIGH COURT OF SOUTH AFRICA

(TRANSVAAL PROVINCIAL DIVISION)

NOT REPORTABLE

DATE: 13/4/2006

Case No: 16436/98

IN THE MATTER BETWEEN:

TIGER OATS LIMITED

First Applicant/Defendant

TIGER FOOD INDUSTRIES LIMITED

Second Applicant/Defendant

UNIVERSAL FOODS LIMITED

Third Applicant/Defendant

and

MAIZE BOARD

Respondent / Plaintiff

JUDGEMENT

MOLOPA AJ:

The Applicants have launched this application against the Respondent in which they seek the following relief in the notice of motion:

1. Directing, in terms of the provisions of Rule 33(4) of the High Court Rules, that the following questions of law and the fact are to be decided separately from and prior to the remaining questions in the matter:

- 1.1 The questions of law and fact raised in paragraph 6 of the Defendant's special plea, Annexure "FA2" to the founding affidavit.
 - 1.2 The questions of law and fact raised in paragraph 2 of the Plaintiffs' replication, Annexure "FA5" to the founding affidavit.
2. Directing the Plaintiff to deliver its reply to paragraphs 1.1 to 1.7 and 2.1 to 2.6 of the Defendants' request for further particulars for trial dated 14 August 2003 within ten (10) days of notice of the order of Court given in this application.
3. Granting the Defendant leave to apply to Court on the same papers for an order for dismissal of the Plaintiff's action in the event of the Plaintiff failing to deliver its further particulars for trial within the time period contemplated in paragraph 2 above.
4. Ordering the Plaintiff to pay the costs of this application.
5. Further and / or alternative relief.

The Respondent on the other hand launched a counter-application in terms whereof it seeks relief in the following terms:

- 1. That the following question be decided separately as agreed between the parties on 28 August 2003, and that all further proceedings be stayed until such question has been finally determined:**

"Whether on an interpretation of the provisions of the Marketing Act, the Summer Grain Scheme and the various proclamations and Government notices referred to in the Plaintiff's particulars of claim, the levies, general and special levies imposed, constitute a taxation which falls within the ambit of the provisions of section 11 (a) (iii) of the Prescription Act 68 of 1969".

- 2. That the Defendants be ordered, jointly and severally, to pay the costs of the counter-application, including costs of two Counsel**

The Applicants in this instance are the Defendants in an action instituted by the Respondent as Plaintiff in the main action. The parties will be referred to herein as "*Applicants*" (The Defendants) and Respondent (The Plaintiff).

The issues set out in the papers enunciated as the basis of this application are as follows:

The Respondent has sued the Applicants for payment of certain levies imposed in respect of Maize produced and sold by producers thereof to Second and Third Applicants. The Applicants resist the Respondent's claim, inter alia, on the grounds of a special plea of prescription.

The Applicants have applied in terms of Rule 33(4) for a separation of issues, and that all the issues raised by the Applicants in the special plea of prescription and the Respondent's replication thereto be determined. On the other hand the Respondent also applied for separation of the issues in terms of Rule 33(4), however it seeks a separation on the question of whether the levies imposed in terms of the Marketing Act 59 of 1968 ("*the Act*"), the Summer Grain Scheme and various proclamations and Government notices constitute a taxation in respect of which a 30 year prescriptive period applies.

In addition, the Applicants seek an order compelling the Respondent to furnish and deliver its reply to the Defendants' request for further particulars for trial dated 18 August 2003 within a period of ten (10) days of delivery to it of the Court order.

In July 1998 the Respondents instituted an action against the Applicants (*"the main action"*) for payment of certain amounts alleged to have been due and payable as levies in terms of sub-ordinate legislation promulgated under the Act. According to the Applicants, the relevant levies became due and payable by no later than May 1998, i.e, at least two (2) months prior to the institution of the action by the Respondent. On the 27th August 1998 the Applicants delivered a plea containing a special plea of prescription.

On 10 September 1998 the Respondent delivered an exception to the Applicants' special plea of prescription, contending that the special plea was bad in law in that the levies sued for by the Respondent constituted a *"tax"* within the meaning of section 11(a) of the Prescription Act No. 68 of 1969 as amended (*"The Prescription Act"*). The exception was argued before the Honourable Mr. Justice Spoelstra on 16 November 1999 and such exception was dismissed with costs, including the costs of two (2) Counsel, based amongst others on the Nyambirai principles.

See Nyambirai v National Social Security Authority
and Another, 1996 (1) SA 636 (ZSC)

On 4 July 2000 the Respondent delivered a replication to the Applicants' plea and special plea stating that the levies referred to in its particulars of claim constitutes *"a debt in respect of taxation imposed or levied within the ambit of the provisions of section 11(a) of the Prescription Act, and that therefore in terms of the provisions of section 11(a)(iii) of the Prescription Act, the claim only prescribes after a period of thirty (30) years"*.

Alternatively, that in the event the Court does not find that the provisions of section 11(a)(iii) of the Prescription Act are not applicable, that the Respondent avers that the Plaintiffs' claim has not prescribed due to the provisions of section 12(3) of the Prescription Act in that Respondent did not have knowledge of the identity of the Defendants nor the fact that gave rise to the claim prior to the period of three (3) years before summons was served.

Further alternatively, that the Applicants intentionally prevented the Respondent from becoming aware of the existence of the debt in that it was represented to the Respondent that the quantities of Maize referred to in particulars of claim originated from an area outside the production area whereas it was in fact produced within the production area, which representations were made with the aim of inducing the Respondents to

believe that the Maize was exempt from levies and only later, within a period of three (3) years before issuing the summons did the Respondents become aware that levies were due and owing by the Applicants to the Respondent.

Based amongst others, on the alternative allegations set out in the Respondent's replication on the question of the misrepresentation, and also on the Nyambirai principles the Applicants requested further particulars for trial on 14 August 2003 on issues raised by the Respondent in its replication. On 23 August 2000 the Respondent sought to appeal against the dismissal of the exception by Spoelstra J, together with an application for condonation, the application for condonation was dismissed thereby refusing Respondent leave to appeal. Subsequently the Respondent brought another application for leave to appeal to the Supreme Court of Appeal against the refusal of the application for condonation, which leave was granted by Spoelstra J.

The Respondent, amongst others, sought to have the question as to whether the levies sought to be recovered by the Plaintiffs constitutes "a tax" within the meaning of section 11(a) of the Prescription Act. The appeal was dismissed, the Supreme Court of Appeal finding that the dismissal of the Respondent's exception did not finally dispose of the issue raised by the exception and was

therefore not appealable, the decision of Spoelstra J was accordingly confirmed.

Hence the issue of whether the Respondent's claim for payment of the levies raised in terms sections 23 and 24 of the Summer Grain Scheme constituted "*a tax*" which formed the subject matter of the judgement of Spoelstra J remains on the pleadings for determination, together with the other issues raised by the Respondent in its replication.

The issues relevant for separation in a broader sense are:

whether the levy and special levy forming the subject matter of the Respondent's claim were imposed upon the public as whole or a substantial sector thereof,

Whether the revenue derived from the said levies were to be utilised for the public benefit and to provide a service in the public interest,

Whether the Respondent had knowledge of the identity of the Applicants and the facts giving rise to Respondent's claim prior a period of three (3) years before summons were issued, and

whether the Applicants misrepresented and / or prevented the Respondent from becoming aware of the existence of the debt forming the subject matter of the claim.

It was contended on behalf of the Applicants that factual evidence is required in order to determine whether the levies in question were imposed on a substantial sector of a public as a whole and whether the revenue to be derived from such levies was to be utilised for public benefit and to provide a service in the public interest.

Various correspondence was exchanged between the parties in relation to the issues for separation and on the question of the provision of further particulars for purposes of trial by the

Respondent. I shall not deal specifically with the various correspondence between the parties, they are attached to the application and form part of the record of proceedings before this Court. However what emerges from the

correspondence aforesaid is that the parties could not agree on issues that were to be separated for determination in terms of Rule 33 (4).

Further, it is clear from correspondence that the Applicants are not happy with the response to the further particulars provided by the Respondent annexed to the application as Annexure "FA19" (paginated pages 105 to 197).

Looking at Annexure 'FA19" clearly the Respondent declined to respond to the Applicant's request for further particulars for purposes of trial on the basis that the parties had already agreed that in terms of Rule 33(4) of the Rules of Court the issue to be determined separately is *"whether on an interpretation of the provisions of Marketing Act, the Summer Grain Scheme and the various proclamations and Government notices referred to in the Respondent's particulars of claim, the levies, general and special levies imposed, constitutes a taxation which falls within the ambit of the provisions of section 11(a)(iii) of the Prescription Act 68 of 1969"*.

Further, that the question for determination according to the Respondent is accordingly a question of interpretation of legislation and legislative in respect of which evidence would be inadmissible and that the further particulars sought constitutes the seeking of evidence.

As already stated above, the Applicants contend that the whole issue of prescription, including the issues raised by the Respondent in its replication should be separated in terms of Rule 33(4) for determination, which in effect would mean that the whole issue of prescription will be dealt with and / or determined separately from the merits of the case.

The Respondent on the other hand wants a piece-meal separation of issues, relating only to the interpretation of levies in terms of section 11 (a) (iii) of the Prescription Act, and leaving out all the other issues raised in its replication, including whether the Respondent did not have knowledge of the identity of the Applicants nor the facts giving rise to the claim prior to a period three (3) years before the summons were served, and / or whether the Applicants had made misrepresentations to the Respondent preventing the Respondent from becoming aware of the existence of the debt, which representation was aimed at inducing the Respondent to believe that the Maize was exempt from levies.

The separation sought by the Respondent is based on an alleged agreement between the parties that the separation be in terms as set out by the Respondent in its counter-application. It is clear that the parties are definitely not ad idem in so far as this is concerned.

The Court cannot be bound by the so-called agreement between the parties, when the parties clearly could not agree in the terms of reference, hence this application.

Rule 33(4) provides 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 be stayed until such question has been disposed of, and the Court shall on the application of any party make such order unless it appears that the questions cannot conveniently be decided separately".

Rule 33(4) clearly provides that on application by any party for separation of issues the Court shall be obliged to grant the application for separation unless it appears that the questions cannot be conveniently decided separately.

See : Erasmus: Superior Court Practice B I-236A.

Edward L Bateman Ltd v Brand Projects (Pty) Ltd

1995 (4) SA 128 (T) at 132 D

Braaf v Fedgen Insurance Ltd 1995 (3) SA 938

(C) AT 939 G

The question to be asked is whether the issues raised by the Applicant for separation, which will dispose of the whole question of prescription once and for all, can be conveniently decided separately, or whether the issue raised by the Respondent as an issue to be separated for determination can be conveniently decided apart from all the other issues raised in the Applicants' prescription defence read with the Respondent replication.

If one has regard to the history of the matter, it is in my view, both convenient and fair to both parties that the defence of prescription as a whole, together with the Respondent's replication be separated and both be fully, properly and finally determined. If the approach suggested by the Respondent on the question of separation were to be followed, it would mean that all the other issues raised in the replication would still remain and that in my view cannot be in the interest of both parties nor can it be said to be just and convenient for the whole process.

There is, in my view, ample justification to order that all issues raised in the prescription defence, read with Respondent's replication be separated and be dealt with finally. The parties are entitled to prepare fully on all issues including on issues raised in the Applicants' request for further particulars.

It can only be appropriate and fair that all issues relating to the prescription defence raised by the Applicant and the replication by the Respondents in so far as it relates to the prescription defence be dealt with as a whole in the interest of both parties.

See : *Minister of Agriculture v Tongaat Group Limited*
1976 (2) SA 357 (D) at 363 D.

State v Malinde and Others 1990 (1) SA 57(AD) at
67J – 68E.

It is clear that the issue for separation as required by the Respondent is an issue which was argued before Spoelstra J in the exception application alluded to hereabove. It can be only be fair and just that all issues around the prescription defence be dealt with.

It is the practice of our Courts that special pleas are often heard separately

See : *O/pen v Administrator, Cape 1995 (4) SA 850 (C)*

What is of importance is whether the preliminary hearing will substantially shorten the proceedings.

See : *Tshabala/a v Miinister of Van Veiligheid*
En Sekuriteit [2001] 3 ALL SA 620 (W)

It was further contended that for the Applicants that the Courts are enjoined constitutionally to separate issues along the broader lines as proposed by the Applicants rather than along the narrow separation as proposed by the Respondent. That this would entail the Court not to decide constitutional issues which may be irrelevant to the dispute between the parties, therefore that if the Court were to look at the narrow separation of issues AS suggested by the Respondent, i,e the interpretation of section 11(a)(iii) of the Prescription Act in so far as it relates to the levies which are the subject matter of the main action, then the effect of the constitution on this interpretation will be irrelevant to the dispute between the parties, and that therefore the Court must consider the factual issues before reaching the

interpretative question and cannot countenance the separation of issues which will oblige it to determine the interpretative question first.

See : *Zantsi v Council of State, Ciskei and Others* 1995 (4)
SA 615(CC)

I agree with the contention that the separation of issues as already indicated above should be along broader lines as proposed by the Applicants and not in the narrow sense as proposed by the Respondent.

The crux of the separation of issues in my view is that it would be appropriate, just and convenient to both parties. In the result, the Respondent's counter application cannot hold water.

It is clear from Annexure "FA19" that the Respondent has declined and / or refused to provide answers to the Applicants' request for further particulars on the basis that in its view the only issue that would be separated would be the question of whether the levies can be regarded as tax as envisaged in section 11(a)(iii). I find the approach and conduct of the Respondent to be unreasonable and unacceptable. As already indicated it is my view that all the issues relating to the defence of prescription together with issues raised in the

Respondent's replication should be separated and be fully determined separately from the merits. I therefore find that it would be appropriate for the Respondent to provide proper particulars as requested by the Applicants in its request for further particulars.

In the light of the foregoing the Respondent's counter- application is dismissed with costs, and I grant an order in terms of prayers 1,2,3 of the Applicants' Notice of Motion and order that the Respondent pays the costs of the application, such costs to include the costs of two (2) Counsel.

The parties may approach the Registrar for a preferential date for the hearing of the issues.



LM MOLOPA AJ