REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE HIGH COURT, CAPE TOWN)

(Exercising its admiralty jurisdiction)

REPORTABLE

CASE NO: AC22/2007

In the matter between:

VIKING INSHORE FISHING (PTY) LTD Applicant

(The Plaintiff in the action)

and

MUTUAL & FEDERALINSURANCE COMPANY LTD Respondent

(The Defendant in the action)

Admiralty action *in personam*

Heard 12 September 2013

Delivered 30 October 2013

JUDGMENT

DAVIS AJ:

[1] This is an interlocutory application for a separation of issues in terms of rule 33(4) of the Uniform Rules of Court and Admiralty Rule 25. The applicant, ("Viking"), and the respondent, ("Mutual"), are the plaintiff and defendant respectively in a pending admiralty action in which Viking seeks an indemnity from Mutual in respect of loss sustained on the sinking of its vessel, the MFV Lindsay ("the Lindsay"), which was insured under a written Marine Hull Policy issued by Mutual in favour of Viking ("the policy").

[2] Viking's claim arises out of a collision alleged to have occurred on 8 May 2005 between the Lindsay and MV "Ouro do Brasil" ("the Brasil") and to have resulted in the sinking of the Lindsay off the South African coast in the proximity of Cape St. Francis.

[3] In terms of the policy the hull, machinery and equipment of Viking's fleet, which included the Lindsay, was insured against loss, damage, liability or expense in the manner provided for in the policy. Schedule B to the policy, which is attached to and expressly included as part of the policy, contains a number of terms and conditions of cover. Of particular relevance for present purposes are:

3.1. the stipulation that all sections of the policy are subject to the South African Merchant Shipping Act Warranty ("the MSA warranty");[1] and

[1]Schedule B, under the heading "Applicable to All Sections", Pleadings Bundle p 15.

3.2. the MSA warranty clause,[2] which provides that:

> *"Warranted that the provisions of the South African Merchant Shipping Act and the regulations appertaining thereto shall be complied with at all times during the currency of this policy, provided that this warranty shall be effective only to the extent of those regulations which are promulgated for the safety and/or seaworthiness of the vessel(s).*
>
> *It is understood and agreed that this warranty shall in no way be construed to nullify the 'Inchmaree' Clause, or any part thereof in the Institute Clauses attached to this Policy."*[3](Emphasis added.)

[4] Three schedules containing Institute Clauses are attached to and form part of the policy, namely the Institute Fishing Vessel Clauses ("the Vessel Clauses"), the Institute Additional Perils Clauses – Hulls ("the Perils Clauses") and the Institute Time Clauses – Hulls Disbursements and Increased Value ("the Time Clauses"). The significant clauses, for present purposes, are clauses 1.2 read with clause 3 of the Perils Clauses, and clause 6.2 of the Vessel Clauses, the relevant portions whereof read as follows:

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[2]Schedule B, under the heading "Merchant Shipping Act Warranty", Pleadings Bundle p 16. The Act referred to is the Merchant Shipping Act 57 of 1951.

[3]An Inchmaree clause is a clause extending the cover in standard marine insurance policies. The clause takes its name from the case of *Thames & Mersey Mar Ins Co v Hamilton Fraser & Co (The Inchmaree)* (1887) 12 App Cas 484, in which the House of Lords ruled that the explosion of a donkey engine due to negligence on the part of a ship engineer, which caused the vessel to sink, was not a 'peril of the sea' covered under the relevant policy. The marine insurance industry reversed the effect of the decision by inserting what became known as 'the Inchmaree Clause' in hulls insurance policies to cover additional perils. (See John Hare *Shipping Law & Admiralty Jurisdiction in South Africa* para 20-2.2, p 931 – 932.)

Perils Clauses

"1. In consideration of an additional premium this insurance is extended to cover

…

1.2 loss of or damage to the Vessel caused by any accident or by negligence, incompetence or error of judgment of any person whatsoever.

...

3. The cover provided in Clause 1 is subject to all other terms, conditions and exclusions contained in this insurance and subject to the proviso that the loss or damage has not resulted from a want of due diligence by the Assured, Owners or Managers. …"(Emphasis added.)

Vessel Clauses

"6.2 This insurance covers loss of or damage to the subject-matter insured caused by

…

6.2.3 negligence of the Master Officers Crew or Pilots

…

provided that such loss or damage has not resulted from want of due diligence by the Assured, Owners or Managers." (Emphasis Added.)

[5] Viking bases its claim on clauses 1.2 of the Perils Clauses and on clause 6.2.3 of the Vessel Clauses. It alleges in its particulars of claim that the loss of the Lindsay was caused by:

5.1. an accident, being the collision between the Lindsay and the Brasil;and/or

5.2. the negligence, incompetence and/or error of judgment of the persons on the bridge of the Brasil at the time when the collision occurred; and/or

5.3. the negligence of the master, officers and/or crew of the Lindsay.

[6] In paragraphs 18 to 25 of its plea Mutual denies that a collision occurred which caused the Lindsay to sink. Alternatively, and in the event of Viking proving the fact of the collision and the causal *nexus* between the collision and the sinking of the Lindsay, Mutual denies that the collision was an accident within the meaning of clause 1.2 of the Perils Clauses. Further alternatively, Mutual pleads that it is incumbent upon Viking to show that any accident, and any consequent loss, did not result from a want of due diligence on the part of the assured, owners or managers of the Lindsay. Mutual further denies that the persons on the bridge of the Brasil were negligent, incompetent and/or made an error of judgment, or that the master, officers and/or crew of the Lindsay were negligent, alternatively that any negligence of the master, officers and/or crew of the Lindsay was a cause of the incident.

[7] In paragraphs 26 to 35 of its plea, Mutual sets up a special defence based on an alleged breach of the MSA warranty and regulations appertaining thereto said to have been promulgated for the safety and /or seaworthiness of a vessel. On this basis it disputes liability under the policy and contends that it was entitled to reject Viking’s claim.In the further alternative, Mutual pleads that, in the event of it being

held that Mutual bears the onus of proving that there was a want of due diligence on the part of Viking or its managers, in that event it alleges such a want of due diligence based on a number of particulars set forth in its plea.

[8] The effect of the denials contained in paragraphs 18 to 25 of Mutual's plea is that Viking, who bears the overall onus of proving that its claim arises out of an insured event covered under the policy, is obliged to lead evidence in this regard. It is common cause that Viking has the duty to begin. A dispute exists, however, in relation to the question of who bears the onus of proving a want of due diligenceon the part of Viking or its managers, which would entitle Mutual to avoid liability under the policy. It is not disputed that Mutual bears the onus of proof in regard to its defence based on breach of the MSA warranty.

[9] Viking asks in this application that the following four questions be decided separately and before evidence is led, i.e., in a separate hearing in advance of the trial in the action.

9.1. What constitutes the Inchmaree Clause referred to in the second paragraph of the MSA warranty clause contained in the policy?

9.2. Does the MSA warranty have application in this matter?

9.3. Should clauses 26 to 35 of the Defendant's Plea be struck from the Defendant's Plea?

9.4. Who bears the onus to prove that the loss or damage claimed by the plaintiff has not resulted from a want of due diligence by the Assured, Owners or Managers of the vessel?

The relevant principles governing separation of issues

[10] Rules 33(4)of the Uniform Rules provides that:

> *"If, in any pending action, it appears to the court meromotu 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."* (Emphasis added.)

[11] Rule 33(4) enjoins the Court seized with an application for a separation of issues to make the necessary order *"unless it appears that the questions cannot conveniently be decided separately"*. Where the application is opposed, it is incumbent upon the party resisting the separation to satisfy the Court that the application should not be granted. (See *Braaf v Fedgen*1995 (3) SA 938 (C) at 939 G – H.)

[12] Notwithstanding the imperative wording of the rule, it remains axiomatic that the interests of expedition and finality of litigation are ordinarily best served by the disposal of the whole matter in one hearing. (*Braaf v Fedgen supra* at 941 D; see, too, *Minister of Agriculture v Tongaat Group Ltd* 1976 (2) SA 357 (D) at 362 G – H;*Sharp v Victoria West Municipality* 1979 (3) SA 510 (N) at 511 H.)

[13] Convenience in the sense used in Rule 33(4) has been held to mean not only "facility", "ease" or "expedience" but includes the notion of "appropriateness" and "fairness".(See Van Loggerenberg*et al ErasmusSuperior Court Practice* Commentary on Rule 33(4) at p B1-235 and authorities cited at footnote 7.) The convenience of all concerned, and of the Court, must be taken into account, and there should be substantial grounds to justify the exercise of the power. (*Minister of Agriculture v Tongaat Group Ltd supra* at 362 F – G.) In arriving at the decision whether or not it is appropriate to order a separation of issues, the Court will take into account factors such as the possible curtailment of proceedings through the elimination of issues or evidence, the possible delay in finalisation of the matter caused by a separate hearing before the trial proper, and the merits of the point sought to be determined prior to trial. (See *Minister of Agriculture v Tongaat Group Ltd supra* at 363 E – 364 D.) The Court is required to weigh the *pros* and *cons* of the order sought and to decide, as best it can, where the balance of convenience lies.

[14] The Supreme Court of Appeal has commented on a number of occasions on the proper application of Rule 33(4), in each case sounding a warning against the ill-considered separation of issues. In *Denel (Edms) Bpk v Vorster* 2004 (4) SA 481(SCA) Nugent JA observed (at para [3]) that:

> *"Rule 33(4) of the Uniform Rules – which entitled 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 interlinked, 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 there one issue that might readily be 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."*

[15] In *Privest Employee Solutions (Pty) Ltd v Vital Distribution Solutions (Pty) Ltd* 2005 (5) SA 276 (SCA), Mlambo JA remarked (at para [26]) that the objective of Rule 33(4) is *"to facilitate the convenient and expeditious disposal of litigation"* and that, *"A courtapproached to sanction this course has a duty to satisfy itself that the separation will achieve the desired purpose".* The learned Judge went on to sound the following warning (at para [27]) against the undesirable separation of issues:

> *"In the present case, in spite of the separation of the issues as sanctioned by the trial Court in terms of Rule 33(4), almost all causes of action and defence are still open to the parties. The underlying dispute (between the parties) has yet to be determined. For example, the defence of estoppel raised by the appellant, and which was foreshadowed in the pleadings, still awaits its day in court. Neither counsel could deny that all the litigation has thus far not resulted in the expeditious disposal thereof despite the fact that it has now gone through three Courts at monumental cost, no doubt, to the litigants. I refer to this scenario simply to voice our disquiet at yet another manifestation of a failure to ensure that a separation of issues in terms of Rule 33(4) has the potential to curtail litigation expeditiously. Courts should not shirk their duty to ensure that at all times, when approached to separate issues, there is a realistic prospect that the separation will result in the curtailment and expeditious disposal of the litigation."*

[16] In *Consolidated News Agencies (Pty) Ltd (in liquidation) v Mobile Telephone Networks (Pty) Ltd and Another* 2010 (3) SA 382 (SCA) Navsa JA and Hurt AJA commented (at para [89] – [90]) that:

> *"Piecemeal litigation is not to be encouraged. Sometimes it is desirable to have a single issue decided separately, either by way of a stated case or otherwise. If a decision on a discrete issue disposes of a major part of a case, or will in some way lead to expedition, it might well be desirable to have that issue decided first.*
> *This court has warned that in many cases, once properly considered, issues initially thought to be discrete are found to be inextricably linked. 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. A trial court must be satisfied that it is convenient and proper to try an issue separately."*

[17] With these principles in mind, I turn to consider whether it would be convenient for the four questions posed by Viking to be decided in a separate hearing held in advance of the trial in the action. Before doing so, however, it is necessary to deal with Viking's complaint regarding the tactical denial put up by Mutual.

The complaint regarding the tactical denial

[18] As I have indicated, Mutual has, in its plea, denied that a collision took place between the Lindsay and the Brasil, and that any collision found to be proved was an accident within the meaning of the policy, or that it was caused by the negligence or incompetence of any person or by the negligence of the master, officers and /or crew of the Lindsay, as contemplated in the policy. Viking objects to Mutual's denial of the collision, and of the allegation that the Lindsay sank as a result of an accident on the basis that there is no factual basis for the denials since *"it is well known and highly publicised that there was a collision between the two vessels and that the 'Lindsay' sank shortly thereafter with the loss of the lives of 14 of her crew members."*

[19] Mutual has candidly admitted that its denial of the collision is tactical one, made with the objective of forcing the plaintiff to call certain witnesses for purposes of cross-examination. Viking argues that this approach is improper and that I should disregard this denial for the purposes of deciding whether or not to order the separation of issues sought by Viking. It contends that the requested separation will, if granted, defeat the tactical denial.

[20] I am not persuaded that there is anything improper in the tactical denial put up by Mutual. It is important, I think, to distinguish between the positive assertion in a pleading of a fact which is not believed to be true by the party making the assertion, and the denial of a fact known or believed to be true by the party making the denial. (See ELewis *Legal Ethics* p134.) The former situation involves a misrepresentation on the part of the pleader, whereas the latter does not, serving only to convey that the denied fact is placed in issue.

[21] It seems to me that it is fundamental to our adversarial system of procedure that the defendant is entitled to put the plaintiff to the proof of its claim, and that there is no obligation on a defendant to “fall on its sword” in the pleadings and make admissions adverse to its case. I consider that there is nothing improper about a defendant denying a fact of which it may be aware, thereby signalling to the plaintiff that it will have to prove that fact at trial. In doing so it is merely invoking its procedural rights and is not thereby guilty of any misrepresentation or concealment of the truth. I agree with the view expressed by Dowling J in *Williams v Tunstall*1949 (3) SA (T) 835 at p 839 – 840, where he stated that:

> *"Denials which are not sworn statements may in certain cases and for tactical reasons be, without impropriety, pleaded, where the defendant is aware that the denial is unfounded. Such a method of pleading might be adopted, for example, to force the plaintiff or other witnesses into the witness box for purposes of cross-examination."*

[22] Viking's counsel referred me to the cases of *Joseph v Black and Others* 1930 (WLD) 327 (*"Joseph"*) and *Niewoudt v Joubert*1988 (3) SA 84 (SE) (*"Niewoudt"*) in support of the contention that the tactical denial in Mutual's plea is improper. It seems to me that neither case provides authority for this assertion.

[23] The objection expressed by the Court in *Joseph* was not to the fact that the defendant in a defamation case made a tactical denial in an attempt to force the plaintiff to testify, but to the fact that, when the ploy failed and the plaintiff proved his case by other means, defendant's counsel stated from the bar, without having adduced any evidence of bad character on the part of the plaintiff, that the plaintiff had not dared to face the witness box, thereby insinuating that the plaintiff had something in his past which he could not submit to scrutiny. The Court criticised this conduct on the part of counsel, which was held to be a factor in aggravation of the damages suffered by the plaintiff.

[24] In *Niewoudt*Mullins J criticised the tendency of practitioners to "play their cards close to their chests" and not to be frank and open the opposing partyprior to summons and during the course of pleadings. He also remarked (at 91 B – C) that a litigant is not entitled to conceal material allegations in order to obtain the advantage of placing the onus on his opponent, and that:

> *"The onus must be determined on genuine and not artificial allegations in the pleadings, and if the onus should be on a particular party, he must accept it. Litigation is not a game where one party may seek tactical advantages by concealing facts from his opponents and thereby occasioning unnecessary costs. Nor in my view is a party entitled to plead in such a manner as to place the onus on his opponent, if the facts as known to such party place the onus on him. If he has to bear the onus of proof, he must accept it, and not seek by devious pleadings to obtain an advantage to which he is not entitled."*

[25] The remarks of Mullins J must be understood within the context in which they were made, namely a situation where the plaintiff had deliberately concealed material facts of which he had knowledge so as not to attract an onus on the pleadings, as a result of which the defendant was misled as to the true nature of the issues, and the litigation unnecessarily protracted.

[26] There is no question, in this case, of Mutual concealing material facts or attempting to alter the incidence of the onus. The parties are *ad idem* that the overall onus rests upon Viking to prove its claim within the four corners of the policy. That requires proof not only that a collision occurred which caused the loss of the Lindsay, but also that it was an accident or caused by negligence or incompetence as contemplated in the policy. Mutual has been entirely candid about the reason for its tactical denial, namely to force Viking to call witnesses to testify as to the conditions prevailing on the bridge of the Lindsay immediately before the alleged collision, in order to cross examine them in regard to the issues of breach of the MSA warranty and want of due diligence. This is not an improper procedural advantage. It is perfectly legitimate, in my view, for Mutual to put Viking to the proof of its claim and, during cross examination of plaintiff's witnesses, to cross examine on any issues in dispute, including those on which it bears the onus – indeed this is expressly

permitted in Rule 39(15).The necessity for this course is readily apparent, to my mind, in circumstances where Viking by and large controls access to the material witnesses who were employed as its Masters, Officers and crew members.

[27] I am therefore of the view that Viking's complaint regarding Mutual's tactical denial is unfounded, and that it has no bearing on this application. The application falls to be decided with reference to the pleadings as they stand, in accordance with the legal principles referred to above.

<u>The first question: the identity of the Inchmaree Clause referred to in the proviso to the MSA warranty clause.</u>

[28] Viking relies for its claim on clause 1.2 of the Perils Clauses and clause 6.2.3 of the Vessel Clauses ("the relevant clauses"). It appears from the founding affidavit that the relief sought in respect of the first question was prompted by the fact that Mutual refused, when asked in pre-trial proceedings, to admit that the relevant clauses*"constitute the Inchmaree Clause, or any part thereof in the Institute Clauses attached to the Policy."*Mutual's response in this regard was that, *"… the Defendant maintains the stance set out in its plea."*

[29] If one has regard to the particulars of claim, it is apparent that Viking did not allege that the relevant clauses are Inchmaree clauses as contemplated in the MSA warranty clause. Mutual was therefore not called upon to admit or deny in its plea that this was the case, and it made no such denial in its plea. Questions of whether or not the relevant clauses constitute Inchmaree clauses as contemplated in the MSA warranty clause, and the relationship between the Inchmaree clause and

theMSA warranty clause, only arose once Mutual filed its plea relying on a breach of the MSA warranty. That reliance gave rise to the question of how to interpret the proviso to the MSA warranty, which states that the MSA warranty "*shall in no way be construed to nullify the 'Inchmaree' Clause, or any part thereof in the Institute Clauses attached to this Policy*" ("the proviso").

[30] Viking's stanceappears from paragraph 14 of the founding affidavit, which reads as follows:

> *"It is clear from the Defendant's Plea that a significant part of its defence to the Plaintiff's action is constituted by its reliance on the MSA Warranty and the alleged breach thereof. If, however, the MSA Warranty does not apply to the Plaintiff's cause of action by virtue of the express provisions contained in the second paragraph thereof, namely that the relevant clauses are not 'nullified' by the MSA Warranty, an important defence raised in the Defendant's Plea will fall away and the trial of the matter will be substantially shortened."*

[31] Viking contends that the effect of the proviso is that the MSA warranty does not apply where reliance is placed on an Inchmaree clause, or part thereof. It consequently contends that, once the identity of the Inchmaree clause referred to in the MSA warranty is ascertained, the applicability of the MSA warranty will be resolved.

[32] Mutual disputes Viking's interpretation of the meaning and effect of the proviso, arguing that it would be incorrect to interpret the policy in such a way that the MSA warranty does not apply simply because the MSA warranty does not "nullify" the clauses identified by Viking as Inchmaree clauses.It contends that a proper interpretation of the proviso requires that the MSA warranty clause and the

Inchmaree clauses be read together, and that meaning be given to the policy terms having regard to both. It seems to me that there is much to be said for this view.

[33] During the course of the hearing it appeared to me that Mutual did not, in fact, dispute that the relevant clauses form part of the Inchmaree Clause referred to in the proviso. My understanding in this regard was subsequently confirmed in a note furnished by Mutual's counsel in response to a number of written questions which I posed to the parties' counsel following the hearing.

[34] Given that there is no dispute that the relevant clauses are part of the Inchmaree Clause referred to in the proviso, it follows, in my view, that the relief sought by Viking in regard to the first question is superfluous. There is simply no issue to decide.

[35] Counsel for Viking argued that the concession made by Mutual (at the hearing and in the written note) that the relevant clauses were Inchmaree Clauses, represented a *volte-face,* and that it was Mutual's refusal to make this very concession which gave rise to this application in the first place.The suggestion is that Mutual was unreasonable in refusing to make the admission, and that Mutual should on that basis ordered to pay the costs of this application. Mutual, on the other hand, complains that the question posed by Viking in the pre-trial proceedings was too broadly framed as it ignored the fact that the Inchmaree clause includes other clauses in addition to the relevant clauses. Although there is some merit in this complaint, I think it not unfair to say that Mutual was somewhat obstructive in refusing to make the admission where it was quite clear what Viking was really

getting at, namely whether the relevant clauses qualify as part of the Inchmaree clause, as contemplated in the proviso to the MSA warranty.

[36] But even were I to assume, for purposes of argument, that Mutual's refusal to make this particular admission was unreasonable, I am not convinced that such unreasonableness would serve to justify Viking's approach to court for the relief sought in this application. It seems to me that it would have been more appropriate to take this issue up with the Judge who presided over the pre-trial conference held on 12 February 2013 as part of the system of case-management implemented by this Court.I have little doubt that, had the complaint been timeously aired in that *forum*, a judicial nudge would have ensured that clarity and common sense prevailed.

The second question: whether or not the MSA warranty applies in this matter.

[37] As I have already indicated, there is a dispute between the parties regarding the correct interpretation to be placed on the wording of the MSA warranty clause, in particular the proviso.

[38] Viking argues that this issue should be determined separately and prior to the trial on the merits on the basis that, if its interpretation of the proviso is correct, Mutual's reliance on a breach of the MSA warranty will be precluded and the trial therefore curtailed by the exclusion of the evidence which would otherwise have to be led by Mutual to establish a breach of the MSA warranty. I have a number of difficulties with this argument.

[39] First, it is clear that a decision on the interpretation of the MSA warranty clause would not be dispositive of the entire action as other issues would remain for determination.Viking is required, *ante omnia*, to put up sufficient evidence to establish its claim in terms of the policy. Thereafter, even were Viking's interpretation of the MSA warranty clause to prevail to the exclusion of the defence based on the MSA warranty, evidence would still have to be heard and a decision made in regard to Mutual's defence based on due diligence.

[40] Second, having regard to the pleadings it seems to me that theissues of breach of the MSA warranty and want of due diligence are closely related and that there will be a substantial overlap between the evidence in these regards.[4] The same witnesses would, in all likelihood, be called to testify in respect of both issues. Thus it cannot be said, in my view, that the elimination of Mutual's defence based on the MSA warranty will curtail the evidence in the action. In *Hotels,Inns and Resorts SA (Pty) Ltd v Underwriters at Lloyds and Others* 1998 (4) SA 466 (C) at para [10], Hlophe J, as he then was, held that it was not appropriate to grant an order for separation of issues where the evidence was such that it would substantially overlap since no purpose would be served by the order and the proceedings could be unduly protracted thereby.

[4]Mutual alleges that Viking breached the MSA warranty by failing to have an adequate system of management control to ensure the Merchant Shipping (Safe Manning) regulations 1999 were complied with or to have a certified Ships' Officer in control of the navigational watch at all relevant times. It alleges, as regards due diligence, that Viking did not act with due diligence in that it failed to ensure the employment of a competent Master and / or Officer(s) and that it failed to have in place practices or procedures to ensure that there was a duly certified or any Officer in charge of the navigational watch.

[41] Third, the Court seized with the task of interpreting the MSA warranty clause will be called upon to hear evidence pertaining to the context of the policy and the factual matrix within which it was designed to operate.[5]Viking's counsel argued that the sort of evidence which is admissible to contextualise the contract is discrete from the evidence pertaining to the merits of the action, and that such evidence could conveniently be heard as part of a separate hearing on the interpretation of the MSA warranty clause. This argument, to my mind, works against one of the main purposes of a separation of issues, which is to shorten the proceedings. It seems to me that, far from curtailing proceedings and costs, a separate hearing on the interpretational issue, complete with evidence, will have quite the opposite effect.

[42] In short, it seems to me the course proposed by Viking in regard to the second question entails the prospect of a full blown hearing on the interpretational issue, with attendant costs, for a decision on a single issue, which could give rise to an appeal[6] with yet further costs and delays, while the logically prior question of whether Viking has established a claim under the policy in the first instance, and the defence based on due diligence, still remain to be determined. Such a state of affairs seems to me to be wholly undesirable.

[43] For these reasons I am not satisfied that it would be convenient or appropriate to order that the second question posed by Viking should be determined separately in advance of the trial proper in the action.Allthings considered, I am of the view that the balance of convenience favours dealing with the matter in a single hearing.

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[5]Evidence of background, context or factual matrix is always admissible in order to put the Court 'in the armchair of the author(s)' of the document. See *Engelbrecht v Senwes Ltd* 2007 (3) SA 29 (SCA) at para [7].

[6]The decision would be final in effect and possibly appealable. See, in this regard, the remarks made by Miller J in *Minister of Agriculture v Tongaat Group Ltd* 1976(2) SA 357 (D) at 363 H – 364 B.

The third question: whether or not paragraphs 26 to 35 of Mutual's plea should be struck out.

[44] This relief is sought on the basis that it would flow consequentially from a determination that the MSA warranty does not find application in respect of Viking's claims in the action. Given my conclusion that it would not be convenient hold a separate hearing for the purposes of deciding the interpretation and application of the MSA warranty clause, the basis for this relief falls away and the question requires no further consideration.

The fourth question: which party bears the onus of proof in regard to due diligence?

[45] There is a dispute on the pleadings as to which party bears the onus of proof in relation to the question of due diligence. Mutual asserts that the onus is on Viking to show that any loss or damage did not result from a want of due diligence on the part of Viking or its managers. Viking asserts, to the contrary, that Mutual bears the onus of establishing that the loss or damage resulted from a want of due diligence.

[46] Mutual's counsel conceded that the bulk of authority by way of foreign case law and academic authority favours the proposition that the due diligence proviso in respect of an Inchmaree clause is treated as an exception, so that the onus lies upon the insurer to prove a want of due diligence on the part of the assured. In *Shipping Law and Admiralty Jurisdiction in South Africa* Professor Hare, citing foreign precedent, writes that:[7]

[7]John Hare *Shipping Law and Admiralty Jurisdiction in South Africa* 2 ed at p 932.

> *"The proviso is treated, both in the marine insurance industry and by the courts generally, as an exception. As an exception, the onus lies upon the insurer to prove a want of due diligence on the part of the assured or other party named by the Clause."*

[47] Mutual's counsel argues that considerations of fairness require that the onus to prove due diligence should rest on the insured given that the insurer does not have ready access to the means to prove a want of due diligence, since, in the nature of things, the relevant documents and witnesses are under the control of the insured.

[48] Counsel were *ad idem*that this question has not been pertinently decided by a South African court. It therefore constitutes *res nova*, which will require full argument with reference, no doubt, to a wide array of international precedents and authorities on the subject.

[49] The question which I have to ask in this case is whether it would be convenient, or appropriate, for thelegal question on the incidence of the onus on the issue of due diligence to be decided in a separate hearing in advance of the trial on the merits.

[50] In *Groenewald v Minister van Justisie*1972 (4) SA 223 (O) (*"Groenewald"*) Kumleben AJ, as he then was, was seized with an application in terms of rule 33(4) brought by the defendant (after an unsuccessful application for absolution from the instance at the close of the plaintiff's case) for the separate determination of a question of law regarding the incidence of the onus in respect of one of the issues in the case.He stated in this regard (at p225 D – F) that:

> *"Prinsipieelval 'n regsvraagoorbewyslasbinne die omvang van die sub-reël maar ditkom my voordat 'n Hof in die uitoefening van sydiskresieditselde, indienooit, virhierdiedoelsalgebruik. Die vernaamstedoel van hierdie sub-reël is om 'n regsvraagtebesliswatuitsluitsel op die helesaak mag gee of andersins 'n besparing van tyd en gedingskoste tot gevolgsalhê. … Selfsindien die kwessie van bewyslas op die gepastetydstip, d.w.s. heel aan die begin van die saak, virbeslissinggeopper word, salhierdieoogmerkniebereik word nie. Die gedingvorder, watvolgens die Hof se beslissing die bewyslasdra, saldan die nodigegetuienisaanvoer. Geengeskilpunt of onkoste word daardeuruitgeskakelnie."*

[51] The learned Judge was of the view that the question of onus falls to be decided at the end, and not the beginning, of a case. He noted, however, that that the Cape Courts were accustomed to granting rulings on the incidence of the onus at the commencement of a trial in order to determine which party had the duty to begin.He observed in this regard that Rule 39(11) of the Uniform Rules of Court ("the Uniform Rules") makes specific provision for a Court to make a ruling at the commencement of the trial on the duty to begin, and he opined that it is therefore unnecessary for a Court, at the beginning of a case, to make a finding regarding onus for that purpose. In the exercise of his discretion Kumleben AJ refused the relief sought on the grounds*, inter alia*, that it would lead to a delay in finalisation of the proceedings and that the issue in regard to which the declaration was sought might never arise (see p. 226 E and p 227 C – E).

[52] In *Intramed (Pty) Ltd v Standard Bank of South Africa Ltd* 2004 (6) SA 252 (W) (*"Intramed"*), Claassen J was asked, at the commencement of a trial, to make a ruling in terms of Rule 39(11) of the Uniform Rules regarding which party had the duty to begin as well as a ruling regarding which party bore the onus of proof on various issues raised in the pleadings. Rule 39(11) provides that:

> *"Either party may apply at the opening of the trial for a ruling by the court upon the onus of adducing evidence, and the court after hearing argument may give a ruling as to the party upon whom such onus lies: Provided that such ruling may thereafter be altered to prevent injustice."*(Emphasis added.)

[53] Claassen J referred to the remarks of Kumleben AJ in *Groenewald*(*supra*at p 226 C) to the effect that that Rule 39(11) renders it unnecessary to make a ruling as regards onus and observed, correctly in my view, that the views of the learned Judge regarding rule 39(11)[8] were *obiter*. Having considered the meaning of rule 39(11) as read with rules 39(13), 39(14) and 39(15), Claassen J concluded that rule 39(11) permits a Court to make rulings regarding both the duty to begin and the incidence of the onus of proof. He reasoning in this regard (at 256 G – 257 C) was as follows:

> *"In my view, the express inclusion of the proviso in subrule (11),*(which permits the Court to revisit and alter its initial ruling)*indicates that the Legislature intended to opt for a more liberal approach, such as that adopted by the Cape Provincial Courts, ie to allow a Court to rule at the commencement of the trial on both the duty to begin as well as the initial onus of proof on the various issues which might arise from the pleadings as they stand at that point in time. I find support for this interpretation of subrule 39(11) in the contents of subrule 39(13). Subrule 13 does not refer to the concept of the 'onus of adducing evidence' in the abstract (as is found in subrule (11)) but expressly links such concept to 'the issues'. Thus the sequence in which evidence is called is expressly linked to the onus of proof derived from the pleaded issues. In like fashion, subrule (14) also links the sequence of evidence to the incidence of the burden of proof. The plaintiff's right to call rebutting evidence after defendant has closed its case, is expressly linked to 'issues in respect of which the onus was on the defendant'. Subrule (14) provides for a caveat which restricts the plaintiff's right to call rebutting evidence to only those issues in respect of which the onus was on the defendant. Where the initial ruling burdened the plaintiff with the duty to begin adducing evidence and the plaintiff elected to call evidence on any matter on which the defendant bears the burden of proof, the plaintiff will be precluded from calling any rebutting evidence concerning such issue after defendant*

[8] As opposed to Rule 33(4).

has closed his case. The risk is extenuated by the provisions of subrule (15) which specifically provides that the plaintiff will not run the aforesaid risk provided the evidence in chief is restricted to such issues upon which the onus of proof rested with the plaintiff. Of course, under cross examination by the defendant, the ambit of the enquiry can be enlarged to matters which have to be proved by the defendant. That will, however, not deny the plaintiff his right to call rebutting evidence after the defendant has closed his case. In my view the general scheme of these subrules expands the scope and meaning of subrule (11) to include a ruling on the incidence of the burden of proof."(Emphasis added.)

[54] The learned Judge went on to say, at 257 G – H, that:

"In my view it makes good sense that the onus of adducing evidence should also include a ruling regarding the incidence of the burden of proof. Trials such as this where enormous amounts of money are at stake, are not to be regarded as a tactical game. In my view it would be in the interests of justice that a litigant should be entitled to apply for a ruling pursuant to the express provisions of Rule 39(11) regarding both the order in which evidence is to be adduced as well as a provisional ruling regarding the onus of proof on various issues. The parties need to know where they stand on these issues. Trials should be run, as far as possible, in an atmosphere of certainty. Trials by ambush are not conducive to inexpensive and expeditious judicial proceedings." (Emphasis added.)

[55] Counsel for Viking relied on these remarks of Claassen J in support of the relief sought in this application for a determination regarding the incidence of the onus on due diligence. In my view the decision in *Intramed* cannot be regarded as authority for a separate determination, prior to the trial, of a question of onus under the rubric of Rule 33(4). In *Intramed*Claassen J was dealing not with Rule 33(4) but with an application in terms of Rule 39(11) brought at the commencement of a trial. Central to his reasoning was the fact that the ruling as to onus would be provisional in nature, and capable of being altered thereafter so as to prevent injustice. He observed in this regard (at 256 E – F) that developments during a trial could have "*a*

radical effect on the incidence of proof" and give rise to a need to revisit initial rulings issued at the commencement of the trial regarding the onus of proof.

[56] By contrast what is sought in this application is the prior determination of a question of law regarding the incidence of the onus in terms of Rule 33(4). Such a decision would, in my view, be final in effect, unlike the provisional ruling as to onus contemplated in Rule 39(11). For this reason I share the doubts expressed by Kumleben AJ as to whether it would ever be appropriate to decide questions of onus under Rule 33(4).To my mind the fact that such a determination would be final in effect, and therefore appealable, lends itself to the possibility of piecemeal adjudication, which is inherently undesirable and the antithesis of the main objective of the rule, namely to save time and costs by dealing with issues which are dispositive of the case as a whole, or at least of a major part thereof. It is also undesirable, in my view, to make piecemeal decisions regarding matters - such as onus- which would bind the trial judge and trespass on his or her discretion regarding the trial proceedings.

[57] While I appreciate that, where the onus of proof on different issues falls on different parties, a ruling as to the incidence of the onus on the different issues may be necessary or desirable in order to determine the sequence of the evidence and the respective procedural rights of the parties in terms of Rules 39(13), 39(14) and 39(15), this is expressly catered for in Rule 39(11), which provides for a ruling to be given <u>at the opening of the trial</u> regarding the incidence of the onus and the duty to begin.

[58] It seems to me that, it is for the very reason given by Claassen J, namely that developments during a trial might give rise to a need to revisit initial rulings as to onus,the Uniform Rules provide for determinations regarding onus to be made by the trial judge as a provisional ruling at the commencement of the trial in terms of Rule 39(11), and not as a final decision on a question of law in terms of Rule 33(4).

[59] I therefore consider that the specific remedy created in terms of Rule 39(11) would generally serve to preclude reliance on Rule 33(4) for a determination as to onus. In my view Viking has misconceived its remedy as regards the fourth question, and that the correct course of action would be for Viking to apply in terms of Rule 39(11) at the commencement of the trial for a (provisional) ruling by the trial judge as to the incidence of the onus on the issue of due diligence.I am accordingly not satisfied that it would be convenient or appropriate to have the fourth question posed by Viking decided as a discrete issue in a separate hearing prior to the trial.

Conclusion

[60] It follows that, in my view, the application cannot succeed. I see no reason in all the circumstances to depart from the ordinary rule as to costs. In the result the application is dismissed, with costs, such to include the costs occasioned by the employment of two counsel.

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D.M. DAVIS

Acting High Court Judge

For the Applicant	: Adv R **MacWilliam** SC
Instructed by	: Webber Wentzel Bowens (A Bowley)
For the Respondent	: Adv D A **Gordon** SC (from Durban)
Instructed by	: Cox Yates (A Clark)
Date of hearing	: 12 September 2013
Date of judgment	:30 October 2013