THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case No:602/2023

In the matter between:

HEROLD GIE & BROADHEAD INC	**APPELLANT**
and	
RICHARD TIMOTHY HARRIS N O	**FIRST RESPONDENT**
PHYLLIS MARY EARLY	**SECOND RESPONDENT**
OSCAR WALTER & ALAN LEAONARD	**THIRD RESPONDENT**
HARVIE BROADHURST N O	**FOURTH RESPONDENT**
ANNELISIE JANSEN VAN RENSBURG-HATTINGH N O	**FIFTH RESPONDENT**
MICHELE ANN WALLIS N O	**SIXTH RESPONDENT**
SANTAM LIMITED	**THIRD PARTY**

Neutral citation:	*Herold Gie & Broadhead Inc v Harris N O and Others* (602/2023) [2024] ZASCA 125 (13 September 2024)
Coram:	DAMBUZA, NICHOLLS and MABINDLA-BOQWANA JJA, and TOLMAY and MBHELE AJJA
Heard:	03 May 2024
Delivered:	13 September 2024

Summary: Statutory interpretation – s 6(4) of the Housing Development Schemes for Retired Persons Act 65 of 1988 (HDSA) does not provide basis for a claim by a purchaser of a housing interest in a development scheme, to claim refund of purchase price entrusted to a legal practitioner under s 6(3)*(a)* of the HDSA, where the practitioner has disbursed the entrusted amount to the developer of the scheme, prior to the developer's insolvency.

ORDER

On appeal from: Western Cape Division of the High Court, Cape Town: (Le Grange ADJP, sitting as a court of first instance):

1 The appeal is upheld with costs.

2 Save for the decision on the second question, the order of the high court is set aside and replaced with the following:

'2.1 The first question is decided in favour of the defendant.

2.2 The third question is referred back to the high court for determination.

2.3 The costs stand over for determination together with the remaining issues.'

3 The case is referred back to the high court for determination of the remaining issues.

JUDGMENT

Dambuza JA (Nicholls and Mabindla-Boqwana JJA, and Tolmay and Mbhele AJJA concurring)

Introduction

[1] This appeal is against a judgment of the Western Cape Division of the High Court, Cape Town (the high court), given in six consolidated actions. Each action relates to cancellation of a life rights agreement concluded by each of the respondents as purchasers, with the St Leger Trust No IT 953/2008 (the developer or the trust)[1], as the developer and seller of the life rights. The main issue is whether on insolvency of the developer, the purchasers had a claim in terms of s 6(4) of the Housing Development Schemes for Retired Persons Act 65 of 1988

[1] also described in the agreement as the 'grantor' or 'nominee'.

(the HDSA), for repayment of the purchase price by the appellant, Herold Gie and Broadhead Incorporated (HGB). This, in circumstances where HGB, into whose trust account the purchase price for the life rights was paid, had disbursed the purchase price to the trust before it became insolvent. The high court determined this issue in favour of the purchasers. It found that the purchasers had a valid claim in terms of s 6(4) of the HDSA for refund of the purchase price by HGB, and that the assertions made in their summons supported such a claim. HGB appeals against the high court judgment with the leave of that court.

The background

[2] Each of the six purchasers bought a 'life right' or a 'housing interest' in respect of a specific suite in the St Leger Retirement Hotel located in Muizenberg, Cape Town.[2] Some of the life rights included garages. All the purchasers were retired persons as contemplated in the HDSA.[3] Save for the different purchase prices paid by the purchasers, and the sizes of the properties to which each life right related, the facts pertaining to the conclusion and cancellation of the life rights agreements are similar.

[3] The developer established the retirement hotel as a 'development scheme' as envisaged in s 1 of the HDSA. Under that section, read with s 1 of the Sectional Titles Act 95 of 1986 (Sectional Titles Act), a 'development scheme':

'means a scheme in terms of which a building or buildings situated or to be erected on land within the area of jurisdiction of a local authority is or are, for the purposes of selling, letting or otherwise dealing therewith, to be divided into two or more sections, or as contemplated in the proviso to section 2 (a) [of the Sectional Titles Act]'.

[2] In the life rights agreements a life right is defined as: 'the housing interest as defined in the Act [the HDSA], and in this agreement is the right of the occupant and occupant's spouse where applicable, to occupy the Suite and use the Garage, mentioned in the Covering Schedule, for the remainder of the life of the occupant, and subject to the provisions of Section 7 of the Act, for the life of the Occupant's Spouse and in any event subject to the terms and conditions of this agreement.'

[3] In s 1 of the HDSA a retired person is a person who is 50 years of age or older.

[4] In addition to payment of the purchase price, the purchasers had to pay to the developer a specified monthly service fee or levy.[4] The levy was payable until termination of the life right. On termination of the agreement a portion of the purchase price would be repaid by the developer to the purchaser, or to the purchaser's estate, subject to certain conditions.[5] Clause 16.4 of the agreement specified the formula for computation of the amount of the purchase price refundable to each purchaser or the executor of their estate, on termination of the agreement. The purchasers would also be entitled to 50% of the interest earned on the re-sale of their life rights.

[5] On payment of the purchase price the purchasers took occupation of their units during the period June 2009 to November 2011. During June and July 2009, the purchasers authorised HGB, in writing, to pay to the developer all the moneys that had been entrusted to it as the purchase price in respect of the life rights. HGB released the funds to the developer accordingly.

[6] In a letter dated 24 October 2014, the purchasers cancelled their life rights agreements and each demanded a refund of their purchase price. They alleged that they had not been furnished with the certificates of compliance contemplated under s 6(1)*(a)* of the HDSA[6] and s 14(1)*(a)* of the National Building Regulations

---

[4] Clause 7.1 of the Life Right Agreement.

[5] Clauses 15.1 and 15.2. P27 In terms of Clause 15.2 the first condition for repayment was the return of the Certificate of Life Rights to the trust or an affidavit furnished by the purchaser or the executor of purchaser's estate stating that: *(a)* the deponent is the legal holder of the Certificate of Life Rights, *(b)* the certificate got lost or destroyed, and that *(c)* despite a diligent search for the certificate, it had not been found.
The second condition was vacation of the suite by the occupant and by his/her spouse where applicable. The third was that (to the satisfaction of the trust) the suite had been reinstated to the same condition it was in when the occupant (and spouse) took occupation. The last condition was resale of the suite and the purchase price and all amounts payable prior to occupation of the suite by the new purchase had been paid to and received by the trust.

[6] Section 6(1)(*a*) of the HDSA provides that:
(1) Subject to subsection (3) and notwithstanding any other law, no developer may by virtue of a contract receive any consideration or any part thereof, unless—
(*a*) an architect or a quantity surveyor has issued a certificate that the housing development scheme concerned has been erected substantially in accordance with any applicable officially approved building plans and town planning scheme and applicable local authority by-laws, and is sufficiently completed for the purposes of utilization of the housing interest concerned;

Standards Act 103 of 1977 (the NRBA)[7]. They alleged that the developer failed to inform them, prior to the conclusion of the agreement, that use and occupation of the retirement hotel, as contemplated in the agreement, would not be 'legally possible', despite being aware that the required certificates could not be issued.

[7] On 17 February 2016, the developer was placed under provisional sequestration, and an order of final sequestration was granted on 9 March 2016.[8] The purchasers duly lodged their claims for refund of the purchase price with the trustees of the insolvent developer's estate. They received concurrent dividends.[9] In October 2017, they instituted action proceedings against HGB, claiming a refund of the purchase prices which had been paid into HGB's trust account.

Proceedings in the high court

[8] The purchasers' claims for reimbursement of the purchase prices was founded on the provisions of s 6(4) of the HDSA. This section entitles a purchaser in a scheme developed in terms of the same Act, to a refund of the purchase price held in a legal practitioner's trust account, where the developer of the scheme becomes insolvent.

[9] In addition to pleading that when the developer became insolvent it had not met its obligation to furnish them with the s 6(1)*(a)* certificates, the purchasers

[7] This section provides that:
(1) A local authority shall within 14 days after the owner of a building of which the erection has been completed, or any person having an interest therein, has requested it in writing to issue a certificate of occupancy in respect of such building—
(a) issue such certificate of occupancy if it is of the opinion that such building has been erected in accordance with the provisions of this Act and the conditions on which approval was granted in terms of section 7, and if certificates issued in terms of the provisions of subsection (2) and, where applicable, subsection (2A), in respect of such building have been submitted to it.

[8] The high court stated that the trust was provisionally sequestrated on 17 February 2016. However, it was not in dispute that the application for sequestration was filed in court on 10 December 2015.

[9] Mrs Parry-Davies whose estate is represented by the first respondent, her executor, received R988 836.15. The second respondent, Mrs Phyllis Early received R R433 384.61, the third respondent, Mr Oscar Walter and Alan Leonard Harvey Boadhurst NO – R390 495.60, the fourth respondent Mr Jansen van Rensburg-Hatting – R278 756 50, Mr Clifford Keet (now represented by the fourth respondent, Ms Michelle Ann Wallis NNO, and the sixth respondent, Mr Edgar Grondel received R397 036.07.

also pleaded that they cancelled their life rights agreements as communicated in the letter dated 24 October 2014 from their attorneys, Biccari Bollo Mariano Incorporated. In their replication the purchasers contended that they were not 'bound' by the written authority to release the funds which each of them had signed. They maintained that HGB was not entitled to rely on the authorisations.

[10] HGB filed a special plea asserting that the purchasers' claims had prescribed. This was because the purchasers instructed HGB to pay the purchase prices to the developer during June and July 2009. HGB had immediately acted on the instructions. However, the summons were served on HGB on 4 October 2017, more than three years after the claimed debts had arisen. Furthermore, Mrs Parry-Davies[10] died on 18 June 2013, resulting in full discharge from exercise of rights and performance of obligations under the life rights agreements. Therefore, the executor of her (Mrs Davies') estate had no locus standi to claim refund of moneys under the agreement, HGB contended.

[11] Of relevance in this appeal is the plea by HGB, that s 6(4) of the HDSA finds no application in this case because by the time the trust became insolvent they had paid to the developer all the moneys that had been entrusted to them by the purchasers. There were therefore no moneys 'kept in trust' as specified in s 6(4) of HDSA.

[12] Pursuant to a request by the parties, the high court separated three questions for anterior determination as points of law in terms of Rule 33(4) of the Uniform Rules of Court. The first point of law was formulated as follows:

'"Whether Section 6(4) of the Housing Development Schemes for Retired Persons Act 65 of 1988 (the 'HDSA') can found an action by a purchaser of a '*housing interest'* from a

[10] The estate of the late Mrs Parry-Davies is represented in these proceedings by the first respondent in his capacity as the executor of Mrs Davies' estate. Her husband Dr Davies predeceased her.

'*developer'* for repayment by a *'practitioner'* of an amount entrusted as contemplated in Section 6(3)*(a)* of the HDSA, by the purchaser to such *'practitioner'* by virtue of a *'contract',* where, in the absence of compliance with the provisions of Section 6(1) of the HDSA and prior to the *'developer'* having become an insolvent, as it subsequently did, the *'practitioner'* disbursed, to or for the account of the *developer',* from the trust account of such *'practitioner',* an amount equivalent to the amount so entrusted to the *'practitioner',* as purported released to the *'developer'* of the amount so entrusted to the *'practitioner".'*

[13] The second point of law was:

'"Whether Section 6(4) of the HDSA can found an action by a purchaser of [a] '*housing interest'* from a *developer'* of an amount entrusted as contemplated in Section 6(3)*(a)* of the HDSA, by the purchaser to such '*practitioner'* by virtue of [a] '*contract'* where, prior to the *'developer'* having become insolvent, as it subsequently did, the purchaser cancelled the '*contract'".'*

[14] The third question was:

'"Whether, if Section 6(4) of the HDSA does not apply, the averments in the particulars of claim, read with the averments in the Defendant's plea that are admitted by the Plaintiff(s), are sufficient to sustain an action".'

[15] The high court determined all three questions in favour of the purchasers. It found that the argument made by HGB, that the purchasers could not rely on s 6(4) in the circumstances, was inconsistent with the purpose for which s 6 of HDSA was enacted, i.e. the protection of elderly persons against 'possible exploitation or misfortune by a developer'. The conclusion reached by the high court was also premised on s 78 of the Attorneys Act 53 of 1979, relating to regulation of attorneys' trust accounts. The court found that the purchasers were the trust creditors of HGB. Consequently, by releasing to the developer the entrusted moneys that were the equivalent of the purchase prices entrusted to it by purchasers, HGB had 'violated an entrustment under s 6(3)*(a)* of the HDSA'.

The court held that s 6(4) confers a statutory right of action on the purchasers to claim reimbursement of the purchase price in the circumstances.

[16] Thus, the high court held that s 6(4) of the HDSA confers a right of action on a purchaser who had entrusted purchase price funds to a practitioner, where such funds or an equivalent of the funds are released to the developer prior to compliance with s 6 (1) of that Act.

Discussion

(i) The issues referred for separate determination

[17] Rule 33(4) provides that:

'Special cases and adjudication upon points of law. —

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.'

[18] The purpose of this rule is to determine the plaintiff's claim without the costs of delays of a trial. The rule facilitates convenient and expeditious disposal of litigation.[11] Against this background, this Court has warned on many occasions that a decision under Rule 33(4) must be considered carefully.[12] The issue(s) which are to be decided separately must be clearly defined. This is because in many cases, at first sight, there might appear to be discrete issues that may be considered separately. However, when properly considered, the issues will be

[11] *Denel (Edms) Bpk v Vorster* 2004 (4) SA 481 (SCA); 25 ILJ 659; [2005] 4BLLR 313 para 3.
[12] *The City of Tshwane Metropolitan Municipality v Blair Atholl Homeowners Association* [2018] ZASCA 176; [2019] 1 All SA 291 (SCA); 2019 (3) SA 398 (SCA) para 15.

found to be inextricably linked with the rest of the issues that arise in a particular case.[13]

'And even where the issues are discrete the expeditious disposal of the litigation is often served by ventilating all the issues at one hearing, particularly where there is more than one issue that might be readily dispositive of the matter. It is only after careful thought has been given to the anticipated course of the litigation as a whole that it will be possible properly to determine whether it is convenient to try the issue separately'.[14]

Therefore the trial court must give careful consideration to whether a contemplated separation of issues will result in a convenient, expeditious disposal of the case before it. Where it appears that separation of issues will not result in a convenient and prompt finalisation of litigation the court must refuse to order separate adjudication.[15]

[19] In this case, as stated, HGB filed a special plea of prescription that remains undetermined. Furthermore, the purchasers pleaded their cancellation of the life rights agreements. In addition HGB sought to repel the claim for repayment by relying on the authorisations to release the purchase price. It seems to me that the separated questions might be inextricably linked to these issues. Furthermore, the first question is framed in a complicated manner. Apart from this, the factual context and the legal framework within which the identified points of law arise in this case are complex, and have not received much consideration by our courts. It would have been more convenient to have all the issues fully ventilated in the same hearing. Nevertheless, we are constrained to considering the appeal on the issues determined by the high court.

---

[13] *Denel supra para 3*.
[14] Ibid.
[15] *Denel (Pty) Ltd v Vorster* [2004] ZASCA 4; [2005] 4 BLLR 313 (SCA); 2004 (4) SA 481 (SCA); (2004) 25 ILJ 659.

(ii) Whether s 6(4) of the HDSA is applicable

[20] In the summonses the purchasers set out the salient terms of the life agreements. They also pleaded the provisions of ss 6(1) and *(b)*, 6(3)*(a)* and *(b)*, and 6(4) of the HDSA. Their cause of action was framed in the following terms:

'15 No certificate in terms of s 6(1)(*a*) of the HDSA was ever furnished to [the purchasers], nor was any guarantee of the kind mentioned in s 6(3)(*b*) of the HDSA ever furnished to [the purchasers].

16 [HGB] was at all times aware that the SLRH was a 'development scheme' as contemplated in s 1 of the HDSA and that the payments into its said trust account mentioned in 10 above were payments contemplated in s 6(3)(a) of the HDSA.

16A By letter dated 24 October 2014 from attorneys Biccari Bollo Mariano Inc. to SLT, a copy of which is annexure "Y" to the defendant's plea, the plaintiff lawfully cancelled the LRA on the grounds set out in the letter, including non-compliance with the provisions of s 6(1) of the HDSA, and demanded reimbursement of the purchase price paid under the LRA.

17 Through attorneys Biccari Bollo Mariano Inc., the plaintiff demanded payment from the defendant by 24 October 2016 of the amount of R2,4 million, being the sum of the amounts mentioned in 10 above, with interest on R220,000 thereof from 8 May 2009 and on R2,18 million thereof from 2 June 2009.

18 The defendant has refuted liability to make such payment'.

[21] The HDSA regulates sales of life rights in housing development schemes built for retired persons. A right of occupation is defined in s 1 of the HDSA as:

'the right of a purchaser of a housing interest-

(*a)* which is subject to the payment of a fixed or determinable sum of money by way of a loan or otherwise, payable in one amount or instalments in addition to or in lieu of a levy, and whether or not such a sum is in whole or in part refundable to the purchaser or any other person or to the estate of the purchaser or of such other person; and

(b) which confers the power to occupy a portion in a housing development scheme for the duration of a lifetime of the purchaser or, subject to section 7, any other person mentioned in the contract in terms of which the housing interest is acquired, but without conferring the power to claim transfer of ownership of the portion to which the housing interest relates.'

[22] Section 6(4) of the HDSA, on which the purchasers' claims are founded, must be interpreted within the context of the other provisions of s 6. Section 6(1) restricts the developer's entitlement to receipt of the purchase price as follows:

'6 **Restriction on receipt of consideration**

(1) Subject to subsection (3) and not withstanding any other law, no developer may by virtue of a contract receive any consideration or any part thereof, unless-

(a) An architect or a quantity surveyor has issued a certificate that the housing development scheme concerned has been erected substantially in accordance with any applicable officially approved building plans and town planning scheme and applicable local authority by-laws, and is sufficiently completed for the purposes of utilization of the housing interest concerned;

(b) A copy of that certificate has been furnished to the purchaser concerned;

(c) In the case where a housing interest includes a right of occupation, a practitioner has issued a certificate that the title deed of the land to which the right of occupation has been endorsed as contemplated in section 4 C, in so far as endorsement is required by that section, and a copy of that certificate has been furnished to the purchaser concerned.'

[23] In relation to this appeal s 6(1)*(a)* therefore prohibited receipt by the developer of moneys paid as the purchase prices for the life rights, under the HDSA, until two conditions had been met. First, an architect or estate agent had to furnish a certificate that guaranteed that the housing development scheme had been built substantially in accordance with applicable, approved building plans, the town planning scheme, and the applicable local authority by-laws. In addition, the certificate had to confirm that the housing unit to which the life right related, was suitable for the purposes of utilisation of the housing interest.[16] Secondly, a copy of the certificate had to be furnished to the purchaser.

[24] Section 6(2) is not relevant for determination of this appeal. Section 6(3) excludes the restriction on release of the purchase price to the developer (imposed

[16] Subsections 6(1)*(a)* and *(b)* of the HDSA.

in terms of s 6(1)) in circumstances where the purchase price is paid to a legal practitioner, an estate agent or the developer. The section reads as follows:

'Subsection (1) shall not apply to the receipt of any amount-

(a) which the purchaser by virtue of a contract entrusts to a practitioner or an estate agent in his capacity as such, to be kept, for the benefit of a developer, in the trust account of the practitioner or estate agent until the provisions of subsection (1) have been complied with; or

(b) which by virtue of a contract is paid to the developer if, before such payment, the purchaser was furnished with an irrevocable and unconditional guarantee by a banking institution registered otherwise than provisionally under the Banks Act, 1965 (Act No 23 of 1965), a mutual building society registered otherwise than provisionally under the Mutual Building Societies Act, 1965 (Act No 24 of 1965), a building society registered otherwise than provisionally under the Building Societies Act, 1986 (Act No 82 of 1986), or a registered insurer as defined in s 1 of the Insurance Act, 1943 (Act No 27 of 1943 (Act No 27 of 1943), in terms of which the banking institution, mutual, building society, building society or insurer undertakes to repay the said amount - to the purchaser, if the provisions of subsection (1) are not being complied with.'

[25] The exclusion under s 6(3) is premised on the purchase price being kept in a practitioner's account, for the benefit of the developer, until the provisions of subsection 1 have been complied with. It is not in dispute that in this case the purchasers entrusted the moneys to HGB on this basis.

[26] Section 6(4) empowers a practitioner to immediately repay to the purchaser the moneys entrusted and kept by him or her as provided in s 6(3). The section provides that:

'If, in the circumstances contemplated in subsection (3), the developer becomes an insolvent before the provisions of subsection (1) have been complied with, any amount kept in a trust account in terms of paragraph *(a)* of subsection (3) or the repayment of which was guaranteed in terms of paragraph *(b)* of that subsection, shall immediately become payable to the purchaser concerned by the practitioner, estate agent, banking institution, mutual building society, building society or insurer concerned.'

[27] The meaning and purpose of s 6(4) within the context of s 6 is clear. It is the protective measure provided to safeguard the interests of elderly purchasers in instances where a developer of a retirement home becomes insolvent before the guarantees on the suitability of the life right housing unit are in place as provided in s 6(1). Section 6(4) empowers the practitioner or estate agent to immediately release to the elderly purchaser, the purchase price that is kept in the trust account, thus protecting the purchaser from having to compete in the concursus creditorum. The section is triggered by the developer's insolvency, in the circumstances where the purchase price, or a portion of the price, that was entrusted to the practitioner or an estate agent is '*. . . kept, . . . in the trust account of the practitioner . . . '* as provided under s 6(3)*(a)*.[17]

[28] The facts of this case are comparable to those in *Cierenberg en Andere v Rorich, Wolmarans*[18] *& Luderitz*. In that case too, the applicants in the high court were retired persons who had bought life rights in terms of the HDSA. The purchase prices were paid into trust accounts of two firms of attorneys, to be kept on behalf of the seller. When the seller was liquidated the applicants claimed a refund from the attorneys of the purchase price funds. Their claims for refund were founded on s 6(4), the practitioner having released the purchase in the absence of the s 6(1) certificates. It was not in dispute that the purchasers had been aware for more than three years that the attorneys had paid the moneys to the seller. And the court applications in terms of which the refunds were claimed, were served on the attorneys more than three years after the seller was liquidated. There the high court upheld the plea of prescription on the basis that the cause of action was complete because, pending the fulfilment of the s 6(1) conditions there was a statutory obligation on the attorneys to refund the purchase price to the

[17] Section 6(3)*(a)* of HDSA.
[18] *Cierenberg en Ander v Rorich, Wolmarans & Luderitz* 2003 (1) SA 40.

applicants upon the seller's insolvency. The period of prescription was completed before service of the application on the practitioners.

[29] It does not appear to me that the court in *Cierenberg* undertook a deliberate interpretative exercise of s 6(4), perhaps because it was clear on all accounts that the claims by the purchasers had prescribed. And the court in that case considered directly, the issue of prescription. On a proper interpretation, s 6(4) is not an open-ended statutory foundation for claims of repayment to purchasers, of moneys entrusted to practitioners under the HDSA. It is confined to instances where the developer becomes insolvent while there are moneys held in trust by a practitioner, for the developer's benefit.

[30] The high court's conclusion, that the purchasers were HGB's trust creditors, is inconsistent with the language of s 6(3)*(a)*. Under that section the purchase price is entrusted to the practitioner, 'to be kept for the benefit of the developer . . .'. Consequently, under ss 6(3) and (4), it is the developer rather than the purchaser, that is the practitioners' trust creditor. Ordinarily, on sequestration of the developer, the purchase price funds would become part of the developer's insolvent estate. Had this not been the case it would have been unnecessary to protect the purchasers from the concursus creditorum as provided in s 6(4).

Are the averments in the particulars of claim, read with the averments in the Defendant's plea that are admitted by the Plaintiff(s), sufficient to sustain an action?

[31] The high court did not consider this point because, in its view, the purchasers could validly claim refund in terms of s 6(4). The issue whether a pleading lacks averments which are necessary to sustain an action or defence, is regulated under Rule 23 of the Uniform Rules of Court, under the heading 'Exceptions and applications to strike out'. Under this Rule an excipient bears the

responsibility of establishing that, upon any construction of the particulars of claim, no cause of action is disclosed. Exceptions are not to be dealt with in an over-technical manner, and as such a court looks benevolently instead of over-critically at a pleading.[19] In addition a court has the power to defer consideration of an exception to the trial, particularly where the issue raised in the exception appears 'interwoven' with the evidence that will be led at the trial.[20] These are some of the guiding principles that were not ventilated in the high court in relation to the pleading in this case because of the manner in which the issues were dealt with in the high court. It would be improper to decide this issue on appeal. The decision of the high court on this issue must, also be set aside, and the issue must properly considered together with the rest of the contested issues.

[32] Consequently:

1 The appeal is upheld with costs.

2 Save for the decision on the second question, the order of the high court is set aside and replaced with the following:

'2.1 The first question is decided in favour of the defendant.

2.2 The third question is referred back to the high court for determination.

2.3 The costs stand over for determination together with the remaining issues.'

3 The matter is referred back to the high court for determination of the remaining issues.

_____

N DAMBUZA

JUDGE OF APPEAL

[19] *Erasmus and Van Loggerenberg; Superior Court Practice;* Vol 2 D1-294.

[20] *Ibid* at D1-301 including the authorities referred to therein.

Appearances:

Counsel for the appellant:	S Olivier SC with him JP White
Instructed by:	Clyde & CO, Cape Town
	Lovius Block Inc, Bloemfontein.
Counsel for the respondents:	J Rogers
Instructed by:	Biccari Bollo Mariano Inc, Cape Town
	McIntyre Van Der Post Inc, Bloemfontein.