

### 33 Special cases and adjudication upon points of law

RS 22, 2023, D1 Rule 33-1

(1) The parties to any dispute may, after institution of proceedings, agree upon a written statement of facts in the form of a special case for the adjudication of the court.

(2)(a) Such statement shall set forth the facts agreed upon, the questions of law in dispute between the parties and their contentions thereon. Such statement shall be divided into consecutively numbered paragraphs and there shall be annexed thereto copies of documents necessary to enable the court to decide upon such questions. It shall be signed by an advocate and an attorney on behalf of each party or, where a party sues or defends personally, by such party.

(b) Such special case shall be set down for hearing in the manner provided for trials or opposed applications, whichever may be more convenient.

[Paragraph (b) as inserted by GN R2021 of 5 November 1971.]

(c) If a minor or person of unsound mind is a party to such proceedings the court may, before determining the questions of law in dispute, require proof that the statements in such special case so far as concerns the minor or person of unsound mind are true.

(3) At the hearing thereof the court and the parties may refer to the whole of the contents of such documents and the court may draw any inference of fact or of law from the facts and documents as if proved at a trial.

(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.

[Subrule (4) substituted by GN R2164 of 2 October 1987, by GN R2642 of 27 November 1987 and by GN R1883 of 3 July 1992.]

(5) When giving its decision upon any question in terms of this rule the court may give such judgment as may upon such decision be appropriate and may give any direction with regard to the hearing of any other issues in the proceeding which may be necessary for the final disposal thereof.

(6) If the question in dispute is one of law and the parties are agreed upon the facts, the facts may be admitted and recorded at the trial and the court may give judgment without hearing any evidence.

#### Commentary

**General.** Rule 33 makes provision for the following distinct procedures:

- (a) a special case in the form of a written statement of facts agreed upon by the parties to any dispute after institution of proceedings (subrules (1)-(3));
- (b) the separation of a question of law or fact which may conveniently be decided either before any evidence is led or separately from any question at the instance of the court or on application of any party (subrule (4));
- (c) the disposal of a question of law without hearing any evidence where the facts are, by agreement between the parties, admitted and recorded at the trial (subrule (6)).

RS 22, 2023, D1 Rule 33-2

When giving its decision upon any question in terms of rule 33, the court may give such judgment as may upon such decision be appropriate and may give any direction with regard to the hearing of any other issues in the proceeding which may be necessary for the final disposal thereof.<sup>1</sup>

Rule 33, it is submitted, is aimed at facilitating the expeditious disposal of litigation.

**Subrule (1): General.** In *Mtokonya v Minister of Police*<sup>2</sup> the Constitutional Court discussed rule 33(1), (2)(a), (3), (5) and (6) for purposes of understanding the adjudication of a special case submitted to court for adjudication. The Court stated:<sup>3</sup>

'[13] Rule 33(1) contemplates that parties to pending proceedings may submit to the court "a special case for the adjudication of the court". That means that the parties submit to the court the case that they want the court to adjudicate. Rule 33 tells us that the statement agreed to between the parties by way of which the special case is submitted to court "shall set forth the facts agreed upon, the questions of law in dispute between the parties and their contentions thereon".'

[14] From rule 33(1) and (2)(a) it is clear that what is contemplated in a special case is that there must be a question of law that the parties require the court to decide on the agreed facts and in the light of their contentions which must be set forth in the agreed statement. Rule 33(2)(a) provides that the parties may annex to the statement "copies of documents necessary to enable the court to decide upon such questions". The reference to "such questions" in rule 33(2)(a) is a reference to "the questions of law in dispute between the parties" which one finds early in the provision. That, in turn, is a reference to the question or questions of law identified by the parties as the questions that they are asking the court to decide.

[15] Rule 33(5) proceeds from this understanding when it says:

"When giving its decision upon any question in terms of this rule the court may give such judgment as may upon such decision be appropriate . . . ."

From rule 33(5) it is clear that the decision of the court is required to be "upon any question in terms of this rule". As I have said, the reference to the "question in terms of this rule" in rule 33(5) is a reference to the question or questions of law that the parties have submitted to the court for a decision. A court that is called upon to decide a special case under rule 33 is required to decide the question of law presented to it and has no right to travel outside the four corners of the agreed statement and decide a different question that it wishes the parties had submitted to it to decide, but did not, or that it may wish the parties had included as one of the questions of law they had submitted to it to decide, but did not.

[16] There is a good reason for this. In terms of rule 33 parties to pending proceedings agree upon a certain set of facts in the light of what the question is that the court is called upon to decide and in the light of the particular contentions that both parties will pursue. So, if a court were to change the question to be decided from the one that the parties had agreed upon, there would be prejudice to one or both of the parties because, for the different questions, one or both may have wished to add certain facts to the case or withdraw their agreement to certain facts. It would, therefore, be fundamentally unfair to at least one of the parties, but, possibly, to both, if, in a special case, the court were to change the question to be decided. It would be both a serious misdirection and a gross irregularity for

RS 22, 2023, D1 Rule 33-3

a court to do so. It is, therefore, important that the court should study the agreed statement carefully to identify the question of law that the parties are asking it to decide, so that it should not decide a different question from the question the parties asked it to decide.'

**'The parties to any dispute may.'** The parties may proceed under this subrule as of right and the court is obliged to hear the special case as formulated by the parties in terms thereof.<sup>4</sup> This is in contrast with the procedure under subrule (4) where the court must be satisfied that it will be convenient to decide a question of fact or law separately before such order is granted. See the notes to subrule (4) below.

**'Agree upon a written statement of facts.'** This subrule (and subrule (2)) provides a means of disposing of a case without the necessity of leading evidence.<sup>5</sup> There must be actual agreement between the parties on the stated facts, at least for the purposes of the special case.<sup>6</sup> The subrule makes it clear that the resolution of a stated case proceeds on the basis of a written statement of *agreed facts*.<sup>7</sup> A case drafted on the basis of factual 'assumptions' is contrary to the basic object of the subrule.<sup>8</sup>

An appeal court will not entertain anything beyond that contained in the statement of agreed facts.<sup>9</sup>

**'A special case for the adjudication of the court.'** This subrule, read with subrule (2), makes provision for a procedure whereby the whole dispute which exists between the parties (its totality as determined by the pleadings) is to be adjudicated upon in the manner prescribed in the subrule.<sup>10</sup> In other words, this subrule is invoked when the entire dispute is to be dealt with; if the parties wish to select one issue for separate treatment, they must make use of the procedure under subrule (4).<sup>11</sup>

The aforesaid also applies to disputes defined by a special plea. In other words, where the procedure under subrule (1) is invoked, the entire dispute defined by the special plea must be dealt with. Where only the issues raised by the special plea are dealt with in terms of the subrule, it is not necessary to go further and to include in the stated case other issues which may have been raised needlessly in an unnecessary plea over.<sup>12</sup>

**Subrule (2)(a): 'The facts agreed upon, the questions of law in dispute between the parties.'** The agreement contemplated by subrules (1) and (2)(a) relates primarily to the facts and not to the questions of law in dispute between the parties. As regards questions of law, this subrule requires that the written statement shall set forth the questions of law in dispute between the parties and their contentions thereon. If the parties were to overlook a question of law arising from the facts agreed upon, a question fundamental to the issues they have discerned and stated, the court is not confined to the issues of law explicitly raised in the stated case.<sup>13</sup>

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RS 22, 2023, D1 Rule 33-4

A court faced with a request to determine a special case where the facts are inadequately stated should decline the request.<sup>14</sup>

**Subrule (2)(b): 'Set down . . . convenient.'** The manner of set down of trials is not uniform and is dealt with in the local rules or practice directives of the various divisions of the High Court.<sup>15</sup> The manner of set down of opposed motions is dealt with in rule 6(5)(f) and the notes thereto above.<sup>16</sup> The test in respect of the manner of set down is one of convenience.

**Subrule (2)(c): 'A minor or person of unsound mind is a party to such proceedings.'** This subrule is not, it is submitted, intended to do away with the necessity for appointing a *curator ad litem* to a minor or person of unsound mind in those cases where it is the practice to do so. If necessary, the court may appoint a *curator ad litem* to represent the interests of minors and unborn issue.<sup>17</sup>

**Subrule (3): 'The court may draw any inference of fact.'** This subrule does not have the effect of altering the onus which rests on a party, normally the plaintiff, to prove his case on a balance of probabilities.<sup>18</sup>

**Subrule (4): General.** The entitlement to seek the separation of issues was created in the rules so that an alleged *lacuna* in the plaintiff's case can be tested; or simply so that a factual issue can be determined which can give direction to the rest of the case and, in particular, to obviate the leading of evidence. The purpose is to determine the plaintiff's claim without the costs and delays of a full trial.<sup>19</sup> It has been held<sup>20</sup> that this procedure is so important that an attorney should as soon as pleadings have closed make a strategic assessment of the real trial needs of the case bearing in mind the duty to eliminate avoidable delays and costs.

The trial court is entitled to reconsider the separation order, and if it is satisfied that it would not be convenient for the issues identified in the separation order to be determined separately from and before the other issues in dispute between the parties, to rescind the order.<sup>21</sup>

**'If, in any pending action.'** This subrule applies only to a pending action between the parties concerned.<sup>22</sup> A pending action is one in which the issues between the parties have not yet been finally decided or disposed of.<sup>23</sup> The subrule does not apply to applications.<sup>24</sup>

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RS 23, 2024, D1 Rule 33-5

The subrule does not apply to the Supreme Court of Appeal.<sup>25</sup>

**'It appears to the court *mero motu*'** It is only after careful thought has been given to the anticipated course of the litigation as a whole that it will be possible for the court, either *mero motu* or on application by any party to the action, to properly determine whether it is convenient to try an issue separately.<sup>26</sup> Thus, the court should only *mero motu* make such an order once it has properly determined whether it is convenient to try an issue separately. See further the notes to this subrule s v 'Which may conveniently be decided' below.

**'A question of law.'** This refers to an issue which arises from the pleadings.<sup>27</sup> To an extent the procedure envisaged by the subrule and the procedure of exceptions may overlap, but it does not seem to have been contemplated that questions of law arising from the pleadings and capable of being resolved on exception should be the subject of the rather more cumbersome procedure of an application under the subrule.<sup>28</sup> A party who failed to raise an exception at the stage when he could have done so and at the trial invokes the procedure under this subrule may be mulcted in costs. In *Allen and Others NNO v Gibbs*<sup>29</sup> the defendants were awarded only the costs of an opposed exception, such costs being in fact the costs of the argument on the point raised under this subrule and which should have been raised by way of exception at a much earlier stage in the proceedings.

Although in principle a question of law regarding onus of proof falls within the scope of the subrule, a court in the exercise of its discretion will seldom, if ever, use the rule to decide the question of onus at the opening of a case.<sup>30</sup>

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RS 23, 2024, D1 Rule 33-6

**'Or fact.'** This refers to an issue which arises from the pleadings.<sup>31</sup> The subrule is applicable to any question of fact and not only to a question of fact which is of very narrow compass and scope.<sup>32</sup>

**'Which may conveniently be decided.'** The procedure is aimed at facilitating the convenient and expeditious disposal of litigation.<sup>33</sup> The word 'convenient' within the context of the subrule conveys not only the notion of facility or ease or expedience, but also the notion of appropriateness and fairness.<sup>34</sup> It is not the convenience of any one of the parties or of the court, but the convenience of all concerned that must be taken into consideration.<sup>35</sup>

It should not be assumed that the aim of the procedure is always achieved by separating the issues. In *Denel (Edms) Bpk v Vorster*<sup>36</sup> the Supreme Court of Appeal stated:

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RS 23, 2024, D1 Rule 33-7

'In many cases, once properly considered, the issues will be found to be inextricably linked, even though, at first sight, they might appear to be discreet. And even where the issues are discreet, the expeditious disposal of the litigation is often best 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 an issue separately.'

The function of the court in an application under the subrule is to gauge to the best of its ability the nature and extent of the advantages which would flow from the granting of the order sought and of the disadvantages.<sup>37</sup> If it appears that the advantages would outweigh the disadvantages, the court would normally grant the order.<sup>38</sup>

An important consideration will usually be whether or not a preliminary hearing for the separate decision of specified issues will materially shorten the proceedings,<sup>39</sup> though the nature of a particular case may be such that proper consideration of overall convenience may involve factors other than those relating only to the actual duration of a hearing.<sup>40</sup> The grant of the application, although it may result in the saving of many days of evidence in court, may nevertheless cause considerable delay in the reaching of a final decision in the case because of the possibility of a lengthy interval between the first hearing at which the special questions are canvassed and the commencement of the trial proper.<sup>41</sup>

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Another consideration would be that the plaintiff's case does not appear to be strong and the defendant's prospects of recovering costs poor.<sup>42</sup> In fact, it has been suggested that a plaintiff, as *dominus litis*, will rarely be able to persuade the court, contrary to the wishes of the defendant, to grant an application under the subrule for the very reason that the weaker the plaintiff's case the better his prospects of obtaining a separation of issues.<sup>43</sup>

A further consideration is whether there are prospects of an appeal on the separated issues, particularly if the issues sought to be separated are controversial and appear to be of importance: if so, an appeal will only exacerbate any delay and negate the rationale for a separation.<sup>44</sup> Another consideration is whether the evidence required to prove any of the issues in respect of which a separation is sought will overlap with the evidence required to prove any of the remaining issues: a court will not grant a separation where it is apparent that such an overlap will occur. Such a situation will result in witnesses having to be recalled to cover issues which they had already testified about. Where there is such a duplication of evidence, a court will not grant a separation because it will result in the lengthening of the trial, the wasting of costs, potential conflicting findings of fact and credibility of witnesses, and it will also hinder the opposing party in cross-examination.<sup>45</sup>

The convenience must be demonstrated and sufficient information must be placed before the court to enable it to exercise its discretion in a proper and meaningful way.<sup>46</sup> The relief is not a mere formality and the convenience must be demonstrated.<sup>47</sup> If grave prejudice may result for the opposing party should separation be ordered, it would be a further factor, which the court will take into account when considering a separation.<sup>48</sup> Ultimately, the court must be satisfied that it is convenient and proper to try an issue separately.<sup>49</sup> If so, the court is obliged to order separation.<sup>50</sup>

RS 23, 2024, D1 Rule 33-9

**'The court may make an order.'** The purpose of this subrule is to confer on the court the power of shortening the duration, or facilitating the final determination of actions.<sup>51</sup> The court has a wide discretion under the subrule and it can decide any question of law or fact separately from any other question in the dispute in a case if it is convenient to do so.<sup>52</sup> There is no room in the rule for a court, on ordering of separation of issues, to make an order in respect of what evidence may or may not be relevant.<sup>53</sup> The fashioning of an order assists in defining the precise ambit of the enquiry to be undertaken.<sup>54</sup> Unless an order is made, the court is required to deal with the action as a whole.<sup>55</sup>

Where a judge presides in a matter wherein an application for consolidation of two actions had previously been granted and, in one of the matters there had been a separation of issues and judgment given by the same judge, that judge is entitled to make credibility findings on the basis of the evidence that he had heard in the previous matter.<sup>56</sup>

**'Directing the disposal of such questions.'** It is imperative at the start of a trial that there should be clarity on the questions that the court is being called upon to answer. If separate issues are to be determined, the questions to be determined must be expressed by the court with clarity and precision in its order.<sup>57</sup> A failure by the court to specify an issue with clarity (combined with a failure to make an order) would impact on the ability of the court to arrive at a proper decision on the issue.<sup>58</sup> The Supreme Court of Appeal has repeatedly lamented the failure of trial courts to make orders specifying precisely which issues are to be dealt with separately and initially.<sup>59</sup>

RS 23, 2024, D1 Rule 33-10

**'That all further proceedings be stayed.'** This was done in, for example, *Glass v Santam Insurance Co Ltd*.<sup>60</sup>

**'Until such question has been disposed of.'** Leave has been granted under s 20 of the (now repealed) Supreme Court Act 59 of 1959 to appeal against a decision of an issue reserved for determination under this subrule where such decision had been definitive of the rights of the parties and had the effect of disposing of a portion of the relief claimed in the main action.<sup>61</sup> In some cases the decisions in question were interpreted as declaratory orders and appealable as such.<sup>62</sup> See further the notes to s 16 of the Superior Courts Act 10 of 2013 in Volume 1 third edition, Part D.

Where a court has made an order on an issue reserved for determination under this subrule and such decision had a final and decisive effect on the litigation between the parties, the party in whose favour such decision was made is, as a successful party, entitled to its costs in terms of the general principles applicable to awards of costs.<sup>63</sup>

**'The court shall on the application of any party make such order.'** Under this subrule in its present form<sup>64</sup> the court is obliged to grant the application of a party for separation unless it appears that the questions cannot be conveniently decided separately.<sup>65</sup> It is incumbent on the party who opposes the application to satisfy the court that such order should not be granted.<sup>66</sup> Agreement between the parties does not entitle them to adopt the procedure provided by the subrule as of right.<sup>67</sup> A court approached to sanction a separation of issues has a duty to satisfy itself that the separation will serve the purpose of the subrule before making an order of separation.<sup>68</sup> See further, in this regard, the notes s v 'Which may be conveniently decided' above.

RS 23, 2024, D1 Rule 33-11

The application may be brought on notice in the usual way before the trial.<sup>69</sup> Ordinarily an application for an order under the subrule will be made orally at the beginning of the trial, but an order in terms thereof can be made at any time up to judgment.<sup>70</sup>

It is not acceptable that the parties adopt, and the court sanction, an informal procedure based on rule 33(4).<sup>71</sup>

**'Unless it appears that the questions cannot conveniently be decided separately.'** It is incumbent on the party who opposes an application for separation made under this subrule to satisfy the court that the questions sought to be separated cannot conveniently be decided separately and, accordingly, that the application should not be granted.<sup>72</sup>

**Subrule (5): 'The court may give such judgment.'** It has been held that the effect of an order that the merits and

*quantum* be decided separately, is that the issues on the pleadings would be resolved in two separate and self-contained trials, and that an order made by the court after the first trial (for example issues other than *quantum*) was a final decision, definitive of the rights of the parties and appealable, in respect of which the court was *functus officio*.<sup>73</sup> The court could therefore not thereafter grant an amendment of the pleadings which related to that trial.<sup>74</sup> In *Road Accident Fund v Krawa*<sup>75</sup> the full court expressed its concern about this approach. The full court had to decide, in a claim for damages for loss of support by a defendant, whether, having conceded the merits of the plaintiff's claim at a pre-trial conference, the defendant (i.e. the Road Accident Fund) was nevertheless entitled, via an amendment to its plea, to dispute the plaintiff's assertion that the deceased had been under a duty to support the plaintiff. In giving leave to the Road Accident Fund to amend its plea, the full court, *inter alia*, held that:

- (i) in the procedural context of a separation of issues on the pleadings for trial, the nature of those issues had in the first place to be determined from the pleadings;
- (ii) in this context the enquiry relating to *quantum/damages* was not always limited to a mere calculation, but could also (unless admitted by the defendant) include matters relevant to the *existence* of patrimonial loss or damage;
- (iii) since an essential feature of the defendant's action was his right to support by the deceased, a failure to prove a duty of support would mean a failure to prove patrimonial loss requiring compensation;
- (iv) the existence of a legal duty and concomitant right to support were therefore inexplicably bound up with the question of damages, as the term was understood in the context of a separation of issues for trial;
- (v) in conceding the merits of the case, the Road Accident Fund did not, given the ordinary meaning of the term in this context, concede that the plaintiff had suffered patrimonial loss, and accordingly matters pertaining to the deceased's duty of support remained in issue despite the concession;
- (vi) the application to amend its plea by the Road Accident Fund had to be granted in so far as it related to the plaintiff's allegation that the deceased had been under a legal duty to support him.

RS 23, 2024, D1 Rule 33-12

In *Faiga v Body Corporate of Dumbarton Oaks*,<sup>76</sup> a case in which the merits and *quantum* had been separated, the court, on giving judgment on the merits, declined to reserve the costs of that part of the proceedings until the eventual determination of the *quantum*.

**Subrule (6): 'The question in dispute is one of law.'** This subrule is designed to meet the case where the facts are not in issue but are agreed upon, and the only question is as to what the legal consequences are that flow from them. The procedure under the subrule differs from both that provided for in subrule (1) and that in subrule (4). It differs from the procedure provided for in subrule (1) in that the agreed facts are admitted and recorded at the trial. It differs from the procedure provided for in subrule (4) in that it does not require an application to court nor an order of court.

Although it is permissible to raise a point of law *in limine* at the trial, the procedure should not be adopted where it would be appropriate to raise an exception to a pleading under rule 23<sup>77</sup> unless proper notice of the point *in limine* is given.<sup>78</sup>

**'The facts may be admitted . . . and the court may give judgment without hearing any evidence.'** This subrule postulates that the facts admitted and recorded at the trial are the true facts and that they are admitted seriously for the purpose of shortening the trial.<sup>79</sup> The court is confined to the agreed facts and cannot take cognizance of the allegations made by a party or his attorney during argument on the stated facts.<sup>80</sup> This does not mean, however, that tacit provisions which necessarily flow from the expressly agreed facts, as in the case of any other written agreement, cannot and should not be read into the stated case.<sup>81</sup> A court faced with a request to determine a stated case where the facts are inadequately stated should decline the request.<sup>82</sup>

<sup>1</sup> Rule 33(5).

<sup>2</sup> [2018 \(5\) SA 22 \(CC\)](#).

<sup>3</sup> At 31C–32B.

<sup>4</sup> *Sibeka v Minister of Police* [1984 \(1\) SA 792 \(W\)](#) at 795B. In *Minister of Police v Mboweni* [2014 \(6\) SA 256 \(SCA\)](#) it was, however, held (at 261H) that a court faced with a request to determine a special case where the facts are inadequately stated should decline the request.

<sup>5</sup> *Bane v D'Ambrosi* [2010 \(2\) SA 539 \(SCA\)](#) at 543E–F; *Mighty Solutions t/a Orlando Service Station v Engen Petroleum Ltd* [2016 \(1\) SA 621 \(CC\)](#) at 638B; *Mtakonya v Minister of Police* [2018 \(5\) SA 22 \(CC\)](#) at 30D–33B.

<sup>6</sup> *Montsisi v Minister van Polisie* [1984 \(1\) SA 619 \(A\)](#) at 631A–F; *Minister of Police v Mzingeli* (unreported, SCA case no 115/202 dated 5 April 2022) at paragraphs [8]–[10].

<sup>7</sup> *Bane v D'Ambrosi* [2010 \(2\) SA 539 \(SCA\)](#) at 543E–F; *Mighty Solutions t/a Orlando Service Station v Engen Petroleum Ltd* [2016 \(1\) SA 621 \(CC\)](#) at 637G–638B; *Minister of Police v Mzingeli* (unreported, SCA case no 115/202 dated 5 April 2022) at paragraphs [8]–[10].

<sup>8</sup> *Bane v D'Ambrosi* [2010 \(2\) SA 539 \(SCA\)](#) at 543D–H; *Minister of Police v Mzingeli* (unreported, SCA case no 115/202 dated 5 April 2022) at paragraphs [8]–[10].

<sup>9</sup> *Mighty Solutions t/a Orlando Service Station v Engen Petroleum Ltd* [2016 \(1\) SA 621 \(CC\)](#) at 638D–F.

<sup>10</sup> *Sibeka v Minister of Police* [1984 \(1\) SA 792 \(W\)](#) at 795B.

<sup>11</sup> *Sibeko v Minister of Police* [1985 \(1\) SA 151 \(W\)](#) at 158I–159A.

<sup>12</sup> *Sibeko v Minister of Police* [1985 \(1\) SA 151 \(W\)](#) at 159B–C.

<sup>13</sup> *Paddock Motors (Pty) Ltd v Iglesund* [1976 \(3\) SA 16 \(A\)](#) at 24C.

<sup>14</sup> *Minister of Police v Mboweni* [2014 \(6\) SA 256 \(SCA\)](#) at 261.

<sup>15</sup> See [Volume 3](#), Parts F–N.

<sup>16</sup> Various divisions of the High Court have their own requirements for the set down of applications. See, in this regard, [Volume 3](#), Parts F–N.

<sup>17</sup> See, for example, *Ex parte Sadie* [1940 AD 26](#) at 30.

<sup>18</sup> See *Shell South Africa (Pty) Ltd v Alexene Investments (Pty) Ltd* [1980 \(1\) SA 683 \(W\)](#) at 689C–D, as explained in *Moni v Mutual & Federal Versekeringsmaatskappy Bpk* [1992 \(2\) SA 600 \(T\)](#) at 604G–605A.

<sup>19</sup> *Rauff v Standard Bank Properties* [2002 \(6\) SA 693 \(W\)](#) at 703I–J; *Tshwane City v Blair Atholl Homeowners Association* [2019 \(3\) SA 398 \(SCA\)](#) at 414F–G; *NK v KM* [2019 \(3\) SA 571 \(GJ\)](#) at 574B–577G; *Iveco South Africa (Pty) Ltd v Centurion Bus Manufacturers (Pty) Ltd* (unreported, SCA case no 183/2019 dated 3 June 2020) at paragraph [26]; *Transnet SOC Ltd v Regiments Capital (Pty) Ltd In re: Transnet SOC Ltd v Regiments Capital (Pty) Ltd; In re: Transnet SOC Limited v Trillian Asset Management (Pty) Ltd; In re: Transnet SOC Ltd v Trillian Capital Partners (Pty) Ltd; In re: Transnet SOC Ltd v Regiments Capital (Pty) Ltd* (unreported, GJ case nos 2018/41666; 2018/44041; 2018/44043; 2018/44359 dated 19 September 2022) at paragraph 12; *Murray & Roberts Limited v Energy Fabrication (Pty) Ltd* (unreported, GJ case no 12729/2021 dated 9 October 2023) at paragraph [12].

<sup>20</sup> *Rauff v Standard Bank Properties* [2002 \(6\) SA 693 \(W\)](#) at 703I–J; *Tshwane City v Blair Atholl Homeowners Association* [2019 \(3\) SA 398 \(SCA\)](#) at 414G–H; *NK v KM* [2019 \(3\) SA 571 \(GJ\)](#) at 574B–577G.

<sup>21</sup> *NCS Resins (Pty) Ltd v Allan* (unreported, ECGq case no 2708/2016 dated 30 August 2022) at paragraphs [8] and [15].

<sup>22</sup> *Transvaal Canoe Union v Butgereit* [1990 \(3\) SA 398 \(T\)](#) at 410I.

23 *King v King* 1971 (2) SA 630 (O) at 634G; *Groenewald v Minister van Justisie* 1972 (4) SA 223 (O) at 225B; *Harvey Tiling Co (Pty) Ltd v Rodomac (Pty) Ltd* 1977 (1) SA 316 (T) at 329D.

24 *Louis Pasteur Holdings (Pty) Ltd v Absa Bank Ltd* 2019 (3) SA 97 (SCA) at 106C-J, where it was also held that the High Court may deal with separate issues in *limine* and in its inherent jurisdiction apply to them a procedure similar to the one in the subrule. This must, however, be done with circumspection. See also *Tau v Mashaba* 2020 (5) SA 135 (SCA) at paragraphs [13]–[15]. In *Koch & Kruger Brokers CC v Financial Sector Conduct Authority* 2023 (11) BCLR 1329 (CC) the Constitutional Court (per Rogers J), at paragraph [29] footnote [14], passed over ‘the question whether a separation of issues is permissible in motion proceedings’, referring to the fact that ‘[t]his was questioned in one of the judgments in *Ascendis Animal Health (Pty) Limited v Merck Sharpe Dohme Corporation* [2019] ZACC 41; 2020 (1) SA 327 (CC); 2020 (1) BCLR 1 (CC) at para 77, on the basis that rule 33(4) only applies to actions’.

25 *Pharmaceutical Society of South Africa v Tshabalala-Msimang; New Clicks South Africa (Pty) Ltd v Minister of Health* 2005 (3) SA 238 (SCA) at 252B n 11.

26 *Denel (Edms) Bpk v Vorster* 2004 (4) SA 481 (SCA) at 485B-C. See also *Transalloys (Pty) Ltd v Mineral-Loy (Pty) Ltd* (unreported, SCA case no 781/2016 dated 15 June 2017) at paragraphs [6] and [7]; *Tshwane City v Blair Atholl Homeowners Association* 2019 (3) SA 398 (SCA) at 414I–415F; *NK v KM* 2019 (3) SA 571 (GJ) at 574B–577G; *Bonnievale Piggery (Pty) Ltd v Van der Merwe* (unreported, WCC case no A96/2019 dated 4 February 2020) at paragraph [32]; *Iveco South Africa (Pty) Ltd v Centurion Bus Manufacturers (Pty) Ltd* (unreported, SCA case no 183/2019 dated 3 June 2020) at paragraph [25]; *Investec Bank Ltd v O’Shea NO* (unreported, WCC case no 10038/2014 dated 31 July 2020) at paragraphs [32]–[33] and [36]–[41]; *Nel v Merchant Commercial Finance (Pty) Ltd t/a M Factors* (unreported, GP case no 9733/2009 dated 14 September 2021) at paragraphs [13]–[19]; *Transnet SOC Ltd v Regiments Capital (Pty) Ltd In re: Transnet SOC Ltd v Regiments Capital (Pty) Ltd*; *In re: Transnet SOC Limited v Trillian Asset Management (Pty) Ltd*; *In re: Transnet SOC Ltd v Trillian Capital Partners (Pty) Ltd*; *In re: Transnet SOC Ltd v Regiments Capital (Pty) Ltd* (unreported, GJ case nos 2018/41666; 2018/44041; 2018/44043; 2018/44359 dated 19 September 2022) at paragraph 12.

27 *FirstRand Bank Ltd v Clear Creek Trading 12 (Pty) Ltd* 2018 (5) SA 300 (SCA) at 305C–D; *Phakula v Minister of Safety and Security* (unreported, SCA case no 454/19 dated 23 September 2020) at paragraph [13].

28 *Minister of Agriculture v Tongaat Group Ltd* 1976 (2) SA 357 (D) at 362H–363A; *Red Tree Capital (Pty) Ltd v Oosthuizen* (unreported, WCC case no 20121/2021 dated 19 February 2024) at paragraph [34]. In *Imprefed (Pty) Ltd v National Transport Commission* 1990 (3) SA 324 (T) the court upon an application of the defendant under the subrule heard and decided a plea of prescription and three exceptions to different claims in the summons.

29 1977 (3) SA 212 (E).

30 *Groenewald v Minister van Justisie* 1972 (4) SA 223 (O) at 225D–226C. See also *Avex Air (Pty) Ltd v Borough of Vryheid (2)* 1972 (4) SA 676 (N).

31 *FirstRand Bank Ltd v Clear Creek Trading 12 (Pty) Ltd* 2018 (5) SA 300 (SCA) at 305C–D; *Phakula v Minister of Safety and Security* (unreported, SCA case no 454/19 dated 23 September 2020) at paragraph [13].

32 *Vermeulen v Phoenix Assurance Co Ltd* 1967 (2) SA 694 (O) at 697C.

33 *Bank van die Oranje Vrystaat Bpk v OVS Kleiwerke (Edms) Bpk* 1976 (3) SA 804 (O); *Denel (Edms) Bpk v Vorster* 2004 (4) SA 481 (SCA) at 485A–E; *Privest Employee Solutions (Pty) Ltd v Vital Distribution Solutions (Pty) Ltd* 2005 (5) SA 276 (SCA) at 282G; *Transalloys (Pty) Ltd v Mineral-Loy (Pty) Ltd* (unreported, SCA case no 781/2016 dated 15 June 2017) at paragraphs [6] and [7]; *Allied Steelrode (Pty) Ltd v Dreyer* (unreported, SCA case no 1120/2022 dated 21 December 2023) at paragraph [18]; *Secona Freight Logistics CC v Samie* (unreported, SCA case no 1074/2022 dated 22 December 2023) at paragraph [29]; and see *Mohuba v University of Limpopo* (unreported, SCA case no 730/2022 dated 27 October 2023) at paragraph [19].

34 *Minister of Agriculture v Tongaat Group Ltd* 1976 (2) SA 357 (D) at 363D; *Mota v Moloantoa* 1984 (4) SA 761 (O) at 786D–787E; *S v Malinde* 1990 (1) SA 57 (A) at 67J–68E; *Braaf v Fedgen Insurance Ltd* 1995 (3) SA 938 (C) at 940C; *Tudoric-Ghemo v Tudoric-Ghemo* 1997 (2) SA 246 (W) at 251B; *ABSA Bank Bpk v Botha* 1997 (3) SA 510 (O) at 513D–I; *Optimprops 1030 CC v First National Bank of Southern Africa Ltd* [2001] 2 All SA 24 (D) at 26f–g; *Tshwane City v Blair Atholl Homeowners Association* 2019 (3) SA 398 (SCA) at 414F–G; *NK v KM* 2019 (3) SA 571 (GJ) at 574B–577G; *Penguin Random House South Africa (Pty) Limited v Nexor 312 (Pty) Limited* (unreported, KZD case no D3159/2010 dated 28 February 2022) at paragraph [6]; *Gometis (Pty) Ltd v Fountainhead Property Trust* (unreported, GJ case no 2021/16959 dated 27 July 2022) at paragraph [9]; *Murray & Roberts Limited v Energy Fabrication (Pty) Ltd* (unreported, GJ case no 12729/2021 dated 9 October 2023 at paragraph [13]; *Eskom Rotek Industries SOC Ltd v Geo-X (Pty) Ltd* (unreported, GJ case no 2021/41489 dated 11 October 2023) at paragraph [6]; *Kaxu Solar One (RF) (Proprietary) Limited v Santam Limited* (unreported, WCC case no 1301/2020 dated 1 November 2023) at paragraph [13].

35 *Minister of Agriculture v Tongaat Group Ltd* 1976 (2) SA 357 (D) at 362F; *S v Malinde* 1990 (1) SA 57 (A) at 67F–G; *Braaf v Fedgen Insurance Ltd* 1995 (3) SA 938 (C) at 939H; *Pharmaceutical Society of South Africa v Tshabalala-Msimang; New Clicks South Africa (Pty) Ltd v Minister of Health* 2005 (3) SA 238 (SCA) at 252C–E; *Minister of Health and Another NO v New Clicks South Africa (Pty) Ltd and Others (Treatment Action Campaign and Another as Amici Curiae)* 2006 (2) SA 311 (CC) at 354J–355C; *African Bank Ltd v Covmark Marketing CC; African Bank Ltd v Soodhoop* 2008 (6) SA 46 (D) at 51G–H; *Huang v Bester NO* 2012 (5) SA 551 (GSJ) at 559A and 559E–F; *Tshwane City v Blair Atholl Homeowners Association* 2019 (3) SA 398 (SCA) at 414F–G; *NK v KM* 2019 (3) SA 571 (GJ) at 574B–577G; *Penguin Random House South Africa (Pty) Limited v Nexor 312 (Pty) Limited* (unreported, KZD case no D3159/2010 dated 28 February 2022) at paragraph [6]; *Transnet SOC Ltd v Regiments Capital (Pty) Ltd In re: Transnet SOC Ltd v Regiments Capital (Pty) Ltd; In re: Transnet SOC Limited v Trillian Asset Management (Pty) Ltd; In re: Transnet SOC Ltd v Trillian Capital Partners (Pty) Ltd; In re: Transnet SOC Ltd v Regiments Capital (Pty) Ltd* (unreported, GJ case nos 2018/41666; 2018/44041; 2018/44043; 2018/44359 dated 19 September 2022) at paragraph 12; *Murray & Roberts Limited v Energy Fabrication (Pty) Ltd* (unreported, GJ case no 12729/2021 dated 9 October 2023) at paragraph [12]; *Eskom Rotek Industries SOC Ltd v Geo-X (Pty) Ltd* (unreported, GJ case no 2021/41489 dated 11 October 2023) at paragraph [6]; *Kaxu Solar One (RF) (Proprietary) Limited v Santam Limited* (unreported, WCC case no 1301/2020 dated 1 November 2023) at paragraph [10].

36 2004 (4) SA 481 (SCA) at 485A–B. See also *Privest Employee Solutions (Pty) Ltd v Vital Distribution Solutions (Pty) Ltd* 2005 (5) SA 276 (SCA) at 282I; *Consolidated News Agencies (Pty) Ltd (In Liquidation) v Mobile Telephone Networks (Pty) Ltd* 2010 (3) SA 382 (SCA) at 408H; *Absa Bank Ltd v Bernert* 2011 (3) SA 74 (SCA) at 79B–C; *Adlem v Arlow* 2013 (3) SA 1 (SCA) at 3E–F; *FirstRand Bank Ltd v Clear Creek Trading 12 (Pty) Ltd* 2018 (5) SA 300 (SCA) at 404G–305C; *Copperzone 108 (Pty) Ltd v Gold Port Estates (Pty) Ltd* (unreported, WCC case no 7234/2013 dated 27 March 2019) at paragraphs [23], [24] and [25]; *Tshwane City v Blair Atholl Homeowners Association* 2019 (3) SA 398 (SCA) at 414I–415F; *NK v KM* 2019 (3) SA 571 (GJ) at 574B–577G; *Coppermoon Trading 13 (Pty) Ltd v Government, Eastern Cape Province* 2020 (3) SA 391 (ECB) at paragraphs [18]–[20]; *Iveco South Africa (Pty) Ltd v Centurion Bus Manufacturers (Pty) Ltd* (unreported, SCA case no 183/2019 dated 3 June 2020) at paragraphs [27]–[31]; *Investec Bank Ltd v O’Shea NO* (unreported, WCC case no 10038/2014 dated 31 July 2020) at paragraphs [32]–[33] and [36]–[41]; *Nel v Merchant Commercial Finance (Pty) Ltd t/a M Factors* (unreported, GP case no 9733/2009 dated 14 September 2021) at paragraphs [13]–[19]; *Penguin Random House South Africa (Pty) Limited v Nexor 312 (Pty) Limited* (unreported, KZD case no D3159/2010 dated 28 February 2022) at paragraph [7]; *Transnet SOC Ltd v CRRC E-Loco Supply (Pty) Ltd* (unreported, GJ case no 11645/2021 dated 12 April 2022) at paragraph [19]; *Gometis (Pty) Ltd v Fountainhead Property Trust* (unreported, GJ case no 2021/16959 dated 27 July 2022) at paragraph [9]; *Eskom Rotek Industries SOC Ltd v Geo-X (Pty) Ltd* (unreported, GJ case no 2021/41489 dated 11 October 2023) at paragraph [7]; *Kaxu Solar One (RF) (Proprietary) Limited v Santam Limited* (unreported, WCC case no 1301/2020 dated 1 November 2023) at paragraphs [13]–[14]; *Allied Steelrode (Pty) Ltd v Dreyer* (unreported, SCA case no 1120/2022 dated 21 December 2023) at paragraph [18].

37 *Minister of Agriculture v Tongaat Group Ltd* 1976 (2) SA 357 (D) at 364D; *Grindrod Cotts Stevedoring v Brock’s Stevedoring Services* 1979 (1) SA 239 (D) at 241A; *Sharp v Victoria West Municipality* 1979 (3) SA 510 (NC) at 512A; *Internatio (Pty) Ltd v Lovemore Brothers Transport CC* 2000 (2) SA 408 (SE) at 410J–411A; *Berman & Falkov v Lumb* 2003 (2) SA 674 (C) at 618A–B; *African Bank Ltd v Covmark Marketing CC; African Bank Ltd v Soodhoop* 2008 (6) SA 46 (D) at 51H–I; *Kaxu Solar One (RF) (Proprietary) Limited v Santam Limited* (unreported, WCC case no 1301/2020 dated 1 November 2023) at paragraph [16]. If, for example, evidence is such that it would substantially overlap if issues were to be separated, no purpose would be served in separating such issues (*Hotels, Inns and Resorts SA (Pty) Ltd v Underwriters at Lloyds* 1998 (4) SA 466 (C) at 472H; *Transnet SOC Ltd v Regiments Capital (Pty) Ltd In re: Transnet SOC Ltd v Regiments Capital (Pty) Ltd; In re: Transnet SOC Limited v Trillian Asset Management (Pty) Ltd; In re: Transnet SOC Ltd v Trillian Capital Partners (Pty) Ltd; In re: Transnet SOC Ltd v Regiments Capital (Pty) Ltd; In re: Transnet SOC Ltd v Regiments Capital (Pty) Ltd* (unreported, GJ case nos 2018/41666; 2018/44041; 2018/44043; 2018/44359 dated 19 September 2022) at paragraph 39).

38 *S v Malinde* 1990 (1) SA 57 (A) at 68C–E.

39 See *Santam Versekeringsmaatskappy Bpk v Ntshona* 1974 (4) SA 290 (C); *Canadian Superior Oil Ltd v Concord Insurance Co Ltd* 1992 (4) SA 263 (W) at 266F–H; *Optimprops 1030 CC v First National Bank of Southern Africa Ltd* [2001] 2 All SA 24 (D) at 26f–g; *Copperzone 108 (Pty) Ltd v Gold Port Estates (Pty) Ltd* (unreported, WCC case no 7234/2013 dated 27 March 2019) at paragraph [25]; *Allied Steelrode (Pty) Ltd v Dreyer* (unreported, SCA case no 1120/2022 dated 21 December 2023) at paragraph [19]. In *Braaf v Fedgen Insurance Ltd* 1995 (3) SA 938 (C), it is said (at 941D) that despite the wording of the subrule, it remains axiomatic that the ‘interests of expedition and finality’ are better served by disposal of the whole matter in one hearing (*Sharp v Victoria West Municipality* 1979 (3) SA 510 (NC) at 511H).

40 *Minister of Agriculture v Tongaat Group Ltd* 1976 (2) SA 357 (D) at 363C.

41 *Minister of Agriculture v Tongaat Group Ltd* 1976 (2) SA 357 (D) at 363E; *Grindrod Cotts Stevedoring v Brock’s Stevedoring*

Services [1979 \(1\) SA 239 \(D\)](#) at 241B–D; Copperzone 108 (Pty) Ltd v Gold Port Estates (Pty) Ltd (unreported, WCC case no 7234/2013 dated 27 March 2019) at paragraph [25]; Kaxu Solar One (RF) (Proprietary) Limited v Santam Limited (unreported, WCC case no 1301/2020 dated 1 November 2023) at paragraph [15]. See also *Netherlands Insurance Co of SA Ltd v Simrie* [1974 \(4\) SA 287 \(C\)](#) at 289B–C.

[42](#) *Santam Versekeringsmaatskappy Bpk v Ntshona* [1974 \(4\) SA 290 \(C\)](#); *Sharp v Victoria West Municipality* [1979 \(3\) SA 510 \(NC\)](#) at 512B.

[43](#) *Sharp v Victoria West Municipality* [1979 \(3\) SA 510 \(NC\)](#) at 512C–D.

[44](#) *Copperzone 108 (Pty) Ltd v Gold Port Estates (Pty) Ltd* (unreported, WCC case no 7234/2013 dated 27 March 2019) at paragraph [25]; *Kaxu Solar One (RF) (Proprietary) Limited v Santam Limited* (unreported, WCC case no 1301/2020 dated 1 November 2023) at paragraph [17].

[45](#) *Copperzone 108 (Pty) Ltd v Gold Port Estates (Pty) Ltd* (unreported, WCC case no 7234/2013 dated 27 March 2019) at paragraph [25]; *Transnet SOC Ltd v Regiments Capital (Pty) Ltd*; *In re: Transnet SOC Ltd v Regiments Capital (Pty) Ltd*; *In re: Transnet SOC Limited v Trillian Asset Management (Pty) Ltd*; *In re: Transnet SOC Ltd v Trillian Capital Partners (Pty) Ltd*; *In re: Transnet SOC Ltd v Regiments Capital (Pty) Ltd* (unreported, GJ case nos 2018/41666; 2018/44041; 2018/44043; 2018/44359 dated 19 September 2022) at paragraph 39.

[46](#) *Sibeka v Minister of Police* [1984 \(1\) SA 792 \(W\)](#) at 795H; *Internatio (Pty) Ltd v Lovemore Brothers Transport CC* [2000 \(2\) SA 408 \(SE\)](#) at 411A–B; *African Bank Ltd v Covmark Marketing CC*; *African Bank Ltd v Soodhoo* [2008 \(6\) SA 46 \(D\)](#) at 51G–H; *CC v CM* [2014 \(2\) SA 430 \(GJ\)](#) at 436E–G; *Copperzone 108 (Pty) Ltd v Gold Port Estates (Pty) Ltd* (unreported, WCC case no 7234/2013 dated 27 March 2019) at paragraph [24]; *Coppermoon Trading 13 (Pty) Ltd v Government, Eastern Cape Province* [2020 \(3\) SA 391 \(ECB\)](#) at paragraphs [18]–[20]; *Nel v Merchant Commercial Finance (Pty) Ltd t/a M Factors* (unreported, GP case no 9733/2009 dated 14 September 2021) at paragraph [13].

[47](#) *Sibeka v Minister of Police* [1984 \(1\) SA 792 \(W\)](#) at 795H; *Internatio (Pty) Ltd v Lovemore Brothers Transport CC* [2000 \(2\) SA 408 \(SE\)](#) at 411B; *Coppermoon Trading 13 (Pty) Ltd v Government, Eastern Cape Province* [2020 \(3\) SA 391 \(ECB\)](#) at paragraphs [18]–[20]; *Nel v Merchant Commercial Finance (Pty) Ltd t/a M Factors* (unreported, GP case no 9733/2009 dated 14 September 2021) at paragraph [13].

[48](#) *Internatio (Pty) Ltd v Lovemore Brothers Transport CC* [2000 \(2\) SA 408 \(SE\)](#) at 411C–D; *Nel v Merchant Commercial Finance (Pty) Ltd t/a M Factors* (unreported, GP case no 9733/2009 dated 14 September 2021) at paragraph [13].

[49](#) *Osmann Tyres and Spares CC v ADT Security (Pty) Ltd* [2020] 3 All SA 73 (SCA) at paragraphs [45]–[46].

[50](#) *Tshwane City v Blair Atholl Homeowners Association* [2019 \(3\) SA 398 \(SCA\)](#) at 414F–G; *Kaxu Solar One (RF) (Proprietary) Limited v Santam Limited* (unreported, WCC case no 1301/2020 dated 1 November 2023) at paragraph [11].

[51](#) *King v King* [1971 \(2\) SA 630 \(O\)](#) at 634F.

[52](#) *Vermeulen v Phoenix Assurance Co Ltd* [1967 \(2\) SA 694 \(O\)](#) at 697A–B.

[53](#) *Van der Burgh v Guardian National Insurance Co Ltd* [1997 \(2\) SA 187 \(E\)](#) at 189J–190A; *Red Tree Capital (Pty) Ltd v Oosthuizen* (unreported, WCC case no 20121/2021 dated 19 February 2024) at paragraph [34].

[54](#) *FirstRand Bank Ltd v Clear Creek Trading 12 (Pty) Ltd* [2018 \(5\) SA 300 \(SCA\)](#) at 305H. See also *East Asian Consortium BV v MTN Group Ltd* [2023 \(3\) SA 77 \(GJ\)](#) at paragraphs [2] and [7] (a case where the parties agreed to separate issues in terms of rule 33(4) for determination prior to the commencement of the trial and the issues agreed upon were made an order of court. The court consequently approached the matter on a basis similar to a stated case).

[55](#) *FirstRand Bank Ltd v Clear Creek Trading 12 (Pty) Ltd* [2018 \(5\) SA 300 \(SCA\)](#) at 305G–H.

[56](#) *Customs Tariff Consultants CC v Mustek Ltd* [2002 \(6\) SA 403 \(W\)](#). In terms of paragraph 22 of the *Practice Manual: Natal* (see [Volume 3, Part 12](#)) a matter will be regarded as partly heard before a judge who granted an order for separation of issues in terms of rule 33(4). Should that judge not be available at the resumed hearing of the trial, and provided the parties agree thereto in writing, the matter may proceed before another judge. Should the latter judge, however, not be satisfied that his decision will not depend on the credibility of any witness whose credibility was also in issue at the first hearing, the second hearing will have to proceed before the first judge. It is submitted that the aforesaid practice should, as a general rule, be followed in other divisions of the High Court. It accords with the principles relating to part-heard matters in general (see, for example, *P Lorillard Co v Rembrandt Tobacco Co (Overseas) Ltd* [1967 \(4\) SA 353 \(T\)](#) at 355A). See also (2005) 122 SALJ 44.

[57](#) *Denel (Edms) Bpk v Vorster* [2004 \(4\) SA 481 \(SCA\)](#) at 485C–E; *Absa Bank Ltd v Bernert* [2011 \(3\) SA 74 \(SCA\)](#) at 79C; *Adlem v Arlow* [2013 \(3\) SA 1 \(SCA\)](#) at 3E–G; *Nel v Merchant Commercial Finance (Pty) Ltd t/a M Factors* (unreported, GP case no 9733/2009 dated 14 September 2021) at paragraph [20]; *Allied Steelrode (Pty) Ltd v Dreyer* (unreported, SCA case no 1120/2022 dated 21 December 2023) at paragraph [20].

[58](#) *FirstRand Bank Ltd v Clear Creek Trading 12 (Pty) Ltd* [2018 \(5\) SA 300 \(SCA\)](#) at 306C–E. In the *FirstRand Bank* case evidence of relevant and admissible context, including the circumstances in which an agreement came into being, was crucial. However, the parties failed to place agreed facts before the court (by way of rule 33(1)) or to lead any evidence. At the commencement of the trial they merely agreed to deal with the question whether the National Credit [Act 34 of 2005](#) was applicable to their agreement. No order was made separating the issues, and the issue to be determined was not stated at all nor raised in the pleadings. On appeal it was held (at 307H–I) that the issue could not have been properly decided on the basis it was dealt with in the court *a quo*. Consequently, the eventual order of the court *a quo* was set aside and substituted by the following (at 308B):

'No order is made on the separated issue, save that the costs arising from the separated issue shall be costs in the cause.'

[59](#) See, *inter alia*, *Denel (Edms) Bpk v Vorster* [2004 \(4\) SA 481 \(SCA\)](#) at paragraph [3]; *Absa Bank Ltd v Bernert* [2011 \(3\) SA 74 \(SCA\)](#) at paragraph [21]; *MEC for Health and Social Development, Gauteng v MM on behalf of OM* (unreported, SCA case no 697/2020 dated 30 September 2021) at paragraph [3] footnote 1.

[60](#) [1992 \(1\) SA 901 \(W\)](#).

[61](#) *Van Streenen & Germs (Pty) Ltd v Transvaal Provincial Administration* [1987 \(4\) SA 569 \(A\)](#); *Marsay v Dilley* [1992 \(3\) SA 944 \(A\)](#). See, however, *Elida Gibbs (Pty) Ltd v Colgate Palmolive (Pty) Ltd* (2) [1988 \(2\) SA 360 \(W\)](#); *David Hersch Organisation (Pty) Ltd v ABSA Insurance Brokers (Pty) Ltd* [1998 \(4\) SA 783 \(T\)](#).

[62](#) *SA Eagle Versekeringsmaatskappy Bpk v Harford* [1992 \(2\) SA 786 \(A\)](#) at 791H–792H. See also *Constantia Insurance Co Ltd v Nohamba* [1986 \(3\) SA 27 \(A\)](#) at 35H–J where the proceedings were brought before the court by way of a stated case under subrule (1) of this rule.

[63](#) *Baptista v Stadsraad van Welkom* [1996 \(3\) SA 517 \(O\)](#).

[64](#) The subrule was cast in its present form by GN R1883 of July 1992.

[65](#) *Braaf v Fedgen Insurance Ltd* [1995 \(3\) SA 938 \(C\)](#) at 939G; *Edward L Bateman Ltd v C A Brand Projects (Pty) Ltd* [1995 \(4\) SA 128 \(T\)](#) at 132D.

[66](#) *Berman & Fialkov v Lumb* [2003 \(2\) SA 674 \(C\)](#) at 680H–I.

[67](#) *Sibeka v Minister of Police* [1984 \(1\) SA 792 \(W\)](#) at 794H; *Sibeko v Minister of Police* [1985 \(1\) SA 151 \(W\)](#) at 159A; and see the notes to this subrule s v 'Which may be conveniently decided' above. However, both *Kroon v J L Clark Cotton Co (Pty) Ltd* [1983 \(2\) SA 197 \(E\)](#) at 199E and *Chisnall and Chisnall v Sturgeon and Sturgeon* [1993 \(2\) SA 642 \(W\)](#) at 647F–H seem to proceed from the assumption that parties may by agreement submit a separate issue to the court for consideration under the subrule.

[68](#) *Minister of Agriculture v Tongaat Group Ltd* [1976 \(2\) SA 357 \(D\)](#) at 362F; *S v Malinde* [1990 \(1\) SA 57 \(A\)](#) at 68C–E; *Braaf v Fedgen Insurance Ltd* [1995 \(3\) SA 938 \(C\)](#) at 939H; *Hotels, Inns and Resorts SA (Pty) Ltd v Underwriters at Lloyds* [1998 \(4\) SA 466 \(C\)](#) at 472H; *Martin NO v Road Accident Fund* [2000 \(2\) SA 1023 \(W\)](#) at 1033A; *Berman & Fialkov v Lumb* [2003 \(2\) SA 674 \(C\)](#) at 680I; *Pharmaceutical Society of South Africa v Tshabalala-Msimang; New Clicks South Africa (Pty) Ltd v Minister of Health* [2005 \(3\) SA 238 \(SCA\)](#) at 252C–E; *Minister of Health and Another NO v New Clicks South Africa (Pty) Ltd (Treatment Action Campaign as Amicus Curiae)* [2006 \(2\) SA 311 \(CC\)](#) at 354J–355C; *African Bank Ltd v Covmark Marketing CC; African Bank Ltd v Soodhoo* [2008 \(6\) SA 46 \(D\)](#) at 51G–H; *Tshwane City v Blair Atholl Homeowners Association* [2019 \(3\) SA 398 \(SCA\)](#) at 414F–G; *NK v KM* [2019 \(3\) SA 571 \(GJ\)](#) at 574B–577G; *Penguin Random House South Africa (Pty) Limited v Nenor 312 (Pty) Limited* (unreported, KZD case no D3159/2010 dated 28 February 2022) at paragraph [6]; *Transnet SOC Ltd v Regiments Capital (Pty) Ltd* *In re: Transnet SOC Ltd v Regiments Capital (Pty) Ltd; In re: Transnet SOC Limited v Trillian Asset Management (Pty) Ltd; In re: Transnet SOC Ltd v Trillian Capital Partners (Pty) Ltd; In re: Transnet SOC Ltd v Regiments Capital (Pty) Ltd* (unreported, GJ case nos 2018/41666; 2018/44041; 2018/44043; 2018/44359 dated 19 September 2022) at paragraph 12.

[69](#) See, for example, *Sibeka v Minister of Police* [1984 \(1\) SA 792 \(W\)](#) at 795G–H; *McLellan v Hulett* [1992 \(1\) SA 456 \(D\)](#) at 463B–H.

[70](#) *Harvey Tiling Co (Pty) Ltd v Rodomac (Pty) Ltd* [1977 \(1\) SA 316 \(T\)](#) at 329D; *Sibeka v Minister of Police* [1984 \(1\) SA 792 \(W\)](#) at 794H.

[71](#) *Adlem v Arlow* [2013 \(3\) SA 1 \(SCA\)](#) at 3C.

[72](#) *Braaf v Fedgen Insurance Ltd* [1995 \(3\) SA 938 \(C\)](#) at 939G.

[73](#) *David Hersch Organisation (Pty) Ltd v ABSA Insurance Brokers (Pty) Ltd* [1998 \(4\) SA 783 \(T\)](#) at 787c–g; *Schmidt Plant Hire (Pty) Ltd v Pedrelli* [1990 \(1\) SA 398 \(D\)](#); *Tolstrup NO v Kwapa NO* [2002 \(5\) SA 73 \(W\)](#) at 771–J and 78A.

[74](#) *Tolstrup NO v Kwapa NO* [2002 \(5\) SA 73 \(W\)](#) at 771–J and 78A.

[75](#) [2012 \(2\) SA 346 \(ECG\)](#) at 359C–360B and 366E–370B.

[76](#) [1997 \(2\) SA 651 \(W\)](#) at 669E–I. See also *Grootboom v Graaff-Reinet Municipality* 2001 (3) SA 381 (E) at 373H–382E and *Brauns v Shoppie Checkers (Pty) Ltd* [2004 \(6\) SA 211 \(E\)](#) at 221B–222A. In *Van der Spuy v Minister of Correctional Services* [2004 \(2\) SA 463 \(SE\)](#) the

court held (at 477G–H) that the facts of each case must be taken into account and that in the case before it the plaintiff's injuries were not so severe that he would undoubtedly recover costs on the High Court scale, notwithstanding that the amount of his claim was far in excess of the jurisdiction of the magistrate's court. The question of costs was, therefore, reserved for final determination once the *quantum* had been resolved. In *Maguru v Road Accident Fund* [2020 \(3\) SA 225 \(LT\)](#) it was held (at paragraphs [16]–[19]) that the issue whether the costs in a damages claim against the Road Accident Fund should be on the High Court or magistrates' courts scale was best suited to be argued during *quantum* proceedings. The danger of awarding costs on a High Court scale after only the merits had been settled, was that it might happen that at the *quantum* stage the award might be on a magistrates' courts scale, and it could be found that it was unreasonable or unnecessary of the plaintiff to have instituted proceedings in the High Court. In that situation the taxing master would have no discretion up to when the merits were settled but to tax the plaintiff's bill on a High Court scale, as that would be by virtue of the order of court made pursuant to the settlement, despite the court's finding in the *quantum* proceedings that the action should have been instituted in the lower court.

[77 Kriel v Hochstetter House \(Edms\) Bpk 1988 \(1\) SA 220 \(T\)](#) at 230G–231D. A legal issue in an action should be addressed by means of an exception or as a separate issue in terms of rule 33(4). A party should refrain from calling witnesses who cannot give evidence relevant to such an issue. If necessary, a properly formulated request for particulars for trial and a request for admissions at a pre-trial conference could be made (MEC, Western Cape Department of Social Development v BE obo JE [2021 \(1\) SA 75 \(SCA\)](#) at paragraph [49]).

[78 Imprefed \(Pty\) Ltd v National Transport Commission](#) [1990 \(3\) SA 324 \(T\)](#) at 332I–332A.

[79 Cf Minister of Police v Mbowneni](#) [2014 \(6\) SA 256 \(SCA\)](#) at 260B–261I.

[80 Union Trustmaatskappy \(Edms\) Bpk v Thirion](#) [1965 \(3\) SA 648 \(GW\)](#) at 651; *Thirion v Upington Trustmaatskapy (Edms) Bpk* [1966 \(1\) SA 401 \(A\)](#) at 404; *Naboomspruit Municipaliteit v Malati Park (Edms) Bpk* [1982 \(2\) SA 127 \(T\)](#) at 131D.

[81 Naboomspruit Municipaliteit v Malati Park \(Edms\) Bpk](#) [1982 \(2\) SA 127 \(T\)](#) at 131D.

[82 See Minister of Police v Mbowneni](#) [2014 \(6\) SA 256 \(SCA\)](#) at 261.