

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

CASE NUMBER: 2024-059156

DELETE WHICHEVER IS NOT APPLICABLE

1.REPORTABLE: NO

2.OF INTEREST TO OTHER JUDGES: NO

3.REVISED: NO

08 DECEMBER 2025

Judge Dippenaar

In the matter between:

CHUMA MALL (PTY) LTD

PLAINTIFF

and

THE SPAR GROUP LIMITED

DEFENDANT

JUDGMENT

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by e-mail and uploading it onto the electronic platform. The date and time for hand-down is deemed to be 10h00 on the 08th of DECEMBER 2025.

DIPPENAAR J:

[1] The plaintiff sought summary judgment against the defendant for payment of an amount of R595 833.64 for arrear rental and other charges, together with interest at the rate of 13.75% per annum from 2 May 2024. In its particulars of claim and affidavit supporting its summary judgment application, the plaintiff relied on a lease agreement concluded on 7 June 2019, as amended by an addendum. The agreement contains an arbitration clause. These facts are common cause. The plaintiff further relied on a cancellation agreement concluded between the parties on 12 September 2022. The cancellation agreement does not contain an arbitration clause. That too is common cause. It is further undisputed that the cancellation agreement makes reference to the lease agreement.

[2] In its plea, although the plaintiff's claim is disputed in terse terms, the defendant's primary focus was on an arbitration clause justifying a stay of the proceedings as pleaded in its special plea. The defendant attached correspondence to its plea reflecting engagement between the parties pertaining to a dispute regarding the outstanding arrears. The correspondence is dated 26 May 2023 and 12 December 2023 respectively.

[3] The plaintiff did not deliver any replication to the special plea. The defendant elected not to plead over on the merits. It also elected not to postpone the summary judgment proceedings and seek leave to amend its plea by the introduction of a plea on the merits.

[4] In argument the plaintiff proffered an interpretation argument and contended that as the cancellation agreement has no arbitration clause, the arbitration clause in the lease agreement does not avail the defendant. It further contended that as there was no plea on the merits, the defendant admitted all the allegations in the particulars of claim and there was no arbitrable dispute. On that basis it was submitted that the defendant did not establish a *bona fide* defence and that summary judgment should be granted.

[5] The plaintiff's argument disregards its own reliance on the lease agreement and its breach both in its particulars of claim and in its affidavit resisting summary judgment. The lease agreement can thus not be ignored and exclusive reliance placed on the cancellation agreement, as the plaintiff sought to do in argument.

[6] The defendant in turn contended that the dispute falls squarely within the ambit of the arbitration clause contained in paragraph 33 of the lease agreement. It further relied on the contents of a letter sent by its legal representatives to those of the plaintiff on 15 August 2024, shortly after the service of the summons, in which various disputes were raised *inter alia* in respect of the calculation and accuracy of the plaintiff's claim for arrear rental. In that letter, the plaintiff was further advised that those disputes constitute a dispute in terms of the lease agreement, which provides for mediation and arbitration of all disputes emanating out of the lease agreement. It contended that the existence of the arbitration clause constitutes a complete defence against the summary judgment application, irrespective of whether the defendant's plea deals with the merits of the dispute or not.

[7] The defendant, correctly in my view, did not pursue its challenge to the jurisdiction of the court on the other basis raised, namely that its principle place of business and/or *domicilium citandi et executandi* is not located within the court's jurisdiction.

[8] It was not disputed that clause 33 of the lease agreement as read with clause 32 is wide enough to include any dispute under the lease agreement. What the plaintiff disputed, was the existence of an arbitrable dispute which brings the arbitration clause into play, given the existence of the cancellation agreement and the fact that the defendant did not plead to the merits.

[9] It is well established that it is open to the defendant to raise the arbitration clause and seek a stay of the proceedings in a special plea.¹ A debate ensued as to whether it was required of the defendant to plead over on the merits. It was uncontentionous that rule 22 sets out the requirements of a plea. The plaintiff relied on *Absa Bank Ltd v Meiring*² in submitting that the defendant was obliged to plead over when delivering a special plea and that it was inappropriate to withhold a general plea until a later stage.

[10] If the defendant had not in its special plea referred to the documentation which evidences a dispute regarding the plaintiff's claim, there may have been force in the argument that there is no arbitrable dispute as the defendant had not challenged its claim on the merits. The said documents form part of the pleadings.³ The plaintiff did not replicate to the special plea nor avail itself of the remedy under r 30 as provided for in r 22 (5). It cannot be concluded that there is no arbitrable dispute. It is not presently necessary to finally resolve the pleading over issue. The issue which must be determined is whether the defence raised is *bona fide* and one valid in law.⁴ The principles are well established and do not require repetition.

[11] There is merit in the defendant's submission that the plaintiff has failed to show any good cause why the dispute between them should not be referred to arbitration as envisaged in s 3(2)(b) of the Arbitration Act 42 of 1965. It has not sought to establish any exceptional circumstances as required. I conclude that the defendant has set out a *bona fide* defence and that there is a triable issue. Whether the arbitration clause in the lease agreement applies to the cancellation agreement or whether the cancellation agreement should be considered in isolation may well require determination in future. Given that the

¹ *Crompton Street Motors CC t/a Wallers Garage Service Station v Bright Idea Projects 66 (Pty) Ltd t/a All Fuels* 2022 (1) SA 317 (CC) para 32; *PLC Consulting (Pty) Ltd t/a Phillips Consulting SA v Tresso Trading 119 (Pty) Ltd* 2009 (4) SA 68 (SCA) para 7.

² *Absa Bank Ltd v Meiring* 2022 (3) SA 449 (WCC)

³ *Swissborough Diamond Mines (Pty) Ltd and Others v Government of the Republic of South Africa and Others* 1999 (2) SA 279 (T) at 324-325.

⁴ *South African Securitisation Programme (RF) Limited v BHM Bricks (Pty) Ltd and Others* (19666/2021) [2021] ZAGPJHC 784 (3 December 2021) paras 18-19, 22-25.

plaintiff placed reliance on both agreements in its case as pleaded and enunciated upon in its affidavit supporting summary judgment, that is a triable issue.

[12] I further agree with the defendant that the breach of the lease agreement as envisaged in clause 32, is of itself a triable issue. Although set out in terse terms, the documentation attached to the defendant's special plea must be considered. That, coupled with the fact that the defendant did not respond positively to the plaintiff's demand for payment illustrates that there is a dispute regarding certain charges levied by the plaintiff.⁵ According to the plaintiff the cancellation agreement resolved and settled that dispute. However, that is not evident from the applicant's summary judgment affidavit and the defendant's version cannot be rejected as untenable.

[13] It is not for present purposes necessary to determine whether the defendant's defence will succeed or not, as it urged me to do in this application. In argument, the defendant sought an order directing the stay of the proceedings in accordance with its special plea. That relief was not sought in the summary judgment proceedings before this court and no counter application was launched by the defendant. The defendant elected not to do so.

[14] Relying on *Timbela Trading CC v Anglo American Platinum Ltd and Another*⁶ and *CGS Security*,⁷ the defendant argued that it was open to this court to grant such an order. I am not persuaded that the authorities relied on support the defendant's submissions. *Timbela* specifically dealt with the determination of a special plea. In *CGS* there is no indication from the judgment whether the defendant in its papers sought a referral to arbitration in the summary judgment proceedings.

⁵ *CSG Security (Pty) Ltd v Elawini Luxury Residential Estate Homeowners Association NPC* (4313/2020) [2025] ZAMPBHC 19 (5 March 2025) para 22.

⁶ *Timbela Trading Close Corporation v Anglo American Platinum Limited and Another* (21/23506) [2024] ZAGPJHC 865 (9 September 2024)

⁷ Fn5 supra.

[15] The determination of the special plea is not before this court. It is only the summary judgment application which has been enrolled for hearing. The entire premise on which the defendant's answering affidavit was presented was that the defendant's special plea, (the court's lack of jurisdiction based on the arbitration clause), constitutes a triable issue. In its papers, the defendant sought dismissal of the summary judgment application, not a stay of the proceedings.

[16] It is not open to this court to deviate from the issue it is called upon to determine, merely because such approach would be pragmatic. The defendant has appropriate remedies which can be pursued in relation to the determination of its special plea.

[17] I conclude that the defendant should be granted leave to defend the action. The costs of the application should appropriately be costs in the cause in the action.

[18] I grant the following order:

[1] The defendant is granted leave to defend;

[2] The costs of the application are to be costs in the cause.



EF DIPPENAAR
JUDGE OF THE HIGH COURT
GAUTENG JOHANNESBURG

HEARING

DATE OF HEARING : 24 NOVEMBER 2025

DATE OF JUDGMENT : 08 DECEMBER 2025

APPEARANCES

PLAINTIFF'S COUNSEL : Mr J.G. DOBIE

PLAINTIFF'S ATTORNEYS : REAAN SWANEPOEL INC.

DEFENDANT'S COUNSEL : Ms M.N. NDLOVU

DEFENDANT'S ATTORNEYS : CLIFFE DEKKER HOFMEYR INC.