



**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION: GQEBERHA)**

CASE NO: 1946/20

In the matter between

RECYCLE YOURSELF (PTY) LTD

Applicant/Plaintiff

and

WHITE AND WILLIAMS INCORPORATED

First Respondent/Defendant

T/A LEXICON ATTORNEYS

MICHAEL WHITE

Second Respondent/Defendant

ANTHONY BOWES

Third Respondent/Defendant

MFUNDO MADIKIZELA

Fourth Respondent/Defendant

PAUL ABERNETHY

Fifth Respondent/Defendant

GENEVIEVE DE KLERK

Sixth Respondent/Defendant

PETER VAN ROOYEN

Seventh Respondent/Defendant

JAN LOUW JANSEN

Eighth Respondent/Defendant

SEAN JOHNSON

Ninth Respondent/Defendant

JUDGMENT

NGOQO AJ

[1] The plaintiff seeks an order in terms of Rule 33(4) of the Uniform Rules of Court directing a separation of the merits (the issue of liability) from the quantification of the claimed damages.

It proposes that the issues of liability in the action proceedings instituted under case number 1946 /20, pleaded in paragraphs 18 to 31 of the Plaintiff's particulars of claim, read with the Defendants' plea to those paragraphs, be separately determined. and that the remaining issues

on the pleadings stand over for later determination. The Plaintiff's contention is that the proposed separation will not only be convenient, but will serve the interests of justice.

[2] The defendants have opposed the application on the grounds that the separation is not convenient and will result in the duplication of evidence, delay and prejudice. According to the defendants, their plea to the allegations contained in paragraphs 32 to 34 of the plaintiff's

particulars of claim, raises various grounds of defence relevant to the averments made therein.

[3] The following facts are common cause between the parties:

- (a) The plaintiff conducted business from the premises in Deal Party, Port Elizabeth which it leased from Clemlen Investments No 10 (Pty) Ltd (Clemlen);
- (b) On 5 June 2018 the plaintiff's landlord, Clemlen, issued summons against the plaintiff claiming payment of arrear and future rentals (the Clemlen summons);
- (c) A copy of the Clemlen summons was sent to the first defendant whereafter, on 8 June 2018, an oral contract of mandate was concluded between the plaintiff and the first defendant. A component of that mandate was an instruction from the plaintiff to Ms. Jenna Friedman, a practicing attorney representing the first

defendant, to enter an appearance to defend the Clemlen action. Ms. Friedman accepted that instruction;

(d) Despite Ms. Friedman's advice that a notice of intention to defend had been filed, it subsequently transpired that the first defendant had failed to timeously enter an appearance to defend;

(e) Default judgment was granted against the plaintiff which included an eviction order, despite no such relief being claimed in the Clemlen action;

(f) The plaintiff was evicted from the leased premises on the 28 June 2018.

(g) Plaintiff instituted rescission proceedings in the Magistrates Court which was refused in respect of the orders for payment of arrear and future rental rates;

(h) No other proceedings were brought by the plaintiff to secure re-occupation of the leased premises.

[4] What this court is called upon to decide is whether a separation as suggested by the plaintiff should be granted or whether such separation would be convenient and in the interest of justice or alternatively, such separation should be granted with the inclusion of paragraphs 32 to 33.

[5] Rule 33(4) reads as follows:

‘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 such 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 be conveniently decided separately.’

[6] The process envisaged in this Rule is aimed at facilitating the convenient and expeditious

disposal of litigation.¹ The word ‘conveniently’ within the context of the sub-rule seems to suggest a mechanism which brings about ease or expedience, and appropriateness and fairness

to all who are parties to the proceedings.

[7] In the case of *Denel (Pty) Ltd v Vorster*² the Supreme Court of Appeal expressed the following view;

‘Rule 33(4) of the Uniform Rules - which entitles a Court to try issues separately in appropriate circumstances – is aimed at facilitating the convenient and expeditious disposal of litigation. It should not be assumed that that result is always achieved by separating the issues. In many cases, once properly considered, the issues will be found to be inextricably linked, even though, at first sight they might appear to be discrete. And even where the issues are discrete, the expeditious disposal of 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.’

[8] The Supreme Court of appeal appreciated the fact that, insomuch as a ventilation of facts at one hearing is the default position, the question of whether a separation should be ordered is objectively assessed on a case to case basis based on the litigation as a whole. However, it cautions litigants that a separation of issues should not be readily resorted to where in particular, issues that arise are intertwined.

[9] In the case of *Molotlegi v Mokwalase*³ the Supreme Court of Appeal dealing with the same aspect, laying down some guidelines, stated the following;

¹ DE Van Loggenberg, Erasmus, Superior Court Practice, Vol 2 Second edition D1-437

² 2004 (4) SA 481 (SCA) at para 3

³ 2010 (4) All SA 258 (SCA) at para 20

‘It follows that a court seized with such application has a duty to carefully consider the application to determine whether it will facilitate the proper, convenient and expeditious disposal of litigation. The notion of convenience is much broader than a mere facility or ease or expedience. Such a court should also take due cognizance of whether separation is appropriate and fair to all the parties. In addition, the court considering an application for separation is also obliged, in the interest of fairness, to consider the advantages and disadvantages which might flow from such separation.

[10] The function of the court before whom an application for separation of issues is under consideration, is to gauge to the best of its ability the nature and extent of the advantages which would flow from the separation and the disadvantages. The court ought not to grant the separation “unless there appears to it to be a reasonable degree of likelihood that the alleged advantages would in fact result.”⁴

[11] In the matter of Absa Bank Ltd v Bernert,⁵ the Supreme Court of appeal emphasized the extent to which a court must engage the question of separation when it said;

‘If for no reason but to clarify matters for itself a court that is asked to separate issues must necessarily apply its mind to whether it is indeed convenient that they are separated, and if so, the question to be determined must be expressed in its order with clarity and precision.’

[12] The Plaintiff contends that in the current action, the issue of liability and quantification are clearly distinct and can be conveniently separated as follows:

- a. The enquiry into liability will involve limited factual evidence. Those questions will mainly center on legal argument which is governed by long standing principles and authority as those are applied to the largely undisputed facts;
- b. Should the plaintiff fail to establish liability on the first defendant’s part, the need for a time-consuming and expensive quantification hearing will be unnecessary. That outcome

⁴ Coppermoon Trading v Eastern Cape Province 2020 (3) SA 391 (ECB) at para 20

⁵ 2011 (3) SA 74 (SCA) at para 21

would obviate the risk of incurring significant, and, ultimately, futile expenditure and extensive court time;

- c. If liability is established, the quantification phase can proceed with clarity and focus, supported by the factual findings flowing from the liability hearing;
- d. The advantages of a separation outweigh any potential disadvantages and
- e. No serious prejudice will be occasioned to any of the parties should a separation be order.

[13] The defendants in their counter argument contend that contractual damages can either be general or intrinsic damages being damages that flow naturally from the breach of the contract concerned, (the breach of mandate alleged), in which event they are generally recoverable, or they can be special or extrinsic damages in which event they are ordinarily in law regarded as to remote to be recovered unless in the special circumstances that prevailed at the conclusion of the contract, the parties actually or presumptively contemplated that they would probably result from breach.

[14] The defendants contend that the plaintiff claims for general contractual damages as special contractual damages. However, the plaintiff excludes the aforesaid issue, namely a determination of whether the damages claimed are general or special damages, and all that goes with that, from the issue it seeks to separate as the separation is sought only with reference to paragraphs 18 to 31 of the particulars of claim.

[15] According to the defendants, it is clear that at least the claims for loss of profits comprise claims for special damages. Separation of issues as proposed by the plaintiff, seeks, in addition to the exclusion of a determination of whether the damages are general or special damages, to exclude pertinent issues of causation, more specifically and with refence to the

excluded paragraphs, firstly, whether the plaintiff could not successfully revive its business

operations due to its inability to re-occupy the leased premises and its eviction therefrom, and whether the entirety of its business operation subsequently ceased, and whether that was

similarly, as a result of its inability to re-occupy the leased premises and its eviction therefrom. Secondly, whether the damages, if proven, were suffered as a result of the defendants' breach.

[16] The Plaintiff contends that it is incumbent on the defendants to satisfy the court that the questions sought to be separated cannot conveniently be resolved in the manner the plaintiff

proposes. It contends that the objections of the defendants are mainly argumentative. They are flawed as they improperly conflate the nature and requirements of liability and quantification. They also exaggerate the complexity of the disputes on liability. And in addition, the defendants have relied mainly on speculation and supposition which do not outweigh the procedural and substantive benefits of the separation.

[17] I struggle to understand the argument by the Plaintiff that the objections by the Defendants are argumentative. Paragraph 30 of the plaintiff's amended particulars of claim, which forms

part of the issues to be separated, reads as follows;

‘Owing to its inability to re-occupy the leased premises and its unlawful eviction therefrom on the 28 June 2018 the Plaintiff could not successfully revive its business operations and the entirety of its business operations ceased on or immediately after 28 June 2018.

[18] Paragraph 32 of the amended particulars, which does not form part of the issues to be

separated, as per the plaintiff's proposal, reads as follows;

‘Owing to its inability to re-occupy the leased premises and its unlawful eviction therefrom the Plaintiff could not successfully revive its business operations and the entirety of its business operations subsequently ceased.’

[19] No one can seriously argue that there is no interlinking between the two paragraphs such that evidence adduced in respect of paragraph 30 would have to be adduced in respect of paragraph 32. That in essence would mean a duplication of evidence and unnecessary costs being incurred in the matter. The contention by the plaintiff that the defendants are being argumentative and are making flawed objections can thus not be correct.

[20] The proposed separation, which excludes paragraph 32 to 33 seems to exclude pertinent and

material issues relating to causation without which such cannot be determined. On this ground alone, I cannot agree with the proposed separation by the plaintiff. I am not convinced that it will bring convenience to any of the parties in its current form. In the contrary, I am of the view that it has a potential of duplicating evidence, something which is not desirable.

Order

[21] In the result, I make the following orders:

- i. The application is dismissed.
- ii. Each party to pay its own costs.

D. N. Ngoqo
Judge of the High Court (Acting)

Date heard: 7th August 2025

Delivered on: 5th February 2026

Appearances:

For the plaintiff: ARG MUNDELL SC

For the defendants: JJ NEPGEN SC