REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

Case Number: 030581/22

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED: NO

25/3/2026 [redacted]

DATE SIGNATURE

In the matter between:

GILDA AGENCY (PTY) LTD	Applicant/Plaintiff
and	
MASSTORES (PTY) LTD	1st Respondent/Defendant
MASSDISCOUNTERS (PTY) LTD	2nd Respondent / Defendant

JUDGMENT

MAKUME, J

Introduction

[1] This is an application in terms of Rule 33(4) of the Uniform Rules in which the plaintiff seeks an order that merits of their dispute be heard first separately and that quantum be heard after a decision shall have been made on liability.

[2] It is trite law that this rule is aimed at facilitating the convenient and expeditious disposal of litigation. It proceeds on the accepted premise that the governing enquiry is one of convenience as stated in *Absa Bank Bpk Vs Botha*[1], once convenience is established an order for separation ordinarily follows. The court should grant such an application unless it appears that the question cannot conveniently be decided separately.

[3] The plaintiff is a private company registered and incorporated in accordance with the company laws of the Republic of Botswana. First and second defendants are related companies duly registered and incorporated in accordance with the company laws of the Republic of South Africa and conduct business in Durban and in Johannesburg.

[4] It is common cause that during or about 4 April 2019 and at Durban, the plaintiff and the second defendant, a wholly owned subsidiary of the first defendant, concluded a written lease agreement in respect of premises in a shopping centre still to be developed by the plaintiffs on Plot 50637, Block 10, Gaborone, Botswana.

[5] It was a term of the lease that the defendants would take occupation on 31 October 2020 and trade thereon as Game Stores for a period of 10 years expiring on 31 October 2030.

[6] The defendants were designated anchor tenants in the shopping complex; hence, it was a further term of the lease as set out in Clause 10.2 of the lease which reads as follows.

> "The tenant mix of the line shops is to be approved by the tenant."

[7] Clause 10.7 of the lease agreement reads as follows:

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[1] 1997(3) SA 510 (0) at 513 (C).

"There must be direct flow of vehicular and pedestrian traffic between the airport junction and the Game Centre. The plans for this must be agreed to by the tenant as indicated on Annexure B attached."

[8] On 20 May 2019, Ms Anna Nirmal, acting on behalf of the defendants, addressed a letter to Mr Sabet, of the plaintiff and conveyed the following to him:

"I am happy to confirm that we have received our board approval. We need to set up a spec and project meeting and it would be preferable that this takes place in Johannesburg. We will also start preparing the draft lease agreement."

[9] It would appear that when this last letter was sent, the plaintiff had already commenced with construction of the shopping centre. Then suddenly events started taking a different shape when, on 13 August 2019, Ms Anna Nirma addressed a letter to the plaintiff in the following words:

"We believe that the opening date should be moved to March 2022 to enable you to have sufficient time to complete the development. If you are in agreement, then send me a formal letter notifying me of the opening date moving to March 2022 so that it can be read in conjunction with the signed offer to lease."

[10] On 28 February 2020, Mr Armin Sabet, writing on behalf of the plaintiff, informed the defendant that:

"We are in the advanced stage in this project as per your initial request to accelerate it if possible."

In response to that letter, Mr Adrian Otto, who had by now taken over from Ms Nirmal, told Mr Sabet that they would be happy to take occupation by July 2021, no longer in the year 2022.

[11] On 27 May 2020, Adrian Otto sent a letter to the plaintiff complaining about how Covid-19 had affected their cash flow and requested that the occupation date be moved to February 2022.

[12] It was on 3 September 2020 that events took a drastic turn which directly led to this litigation. In that letter addressed to the plaintiff, the following was said:

> "The construction was met with certain hindrances occasioned by delay, consequently the delivery of the contractual terms that were essential to the contract, more specifically the beneficial occupation date as well as the trading date failed to be delivered. This imposed upon the terms of the agreement, essentially having to move out the affected date. Protocol compelled us to submit a new proposal to the board of directors due to the request of having essential terms of the agreement being valid which entailed proposal of a new opening date. We unfortunately, with deep regret inform you that the subsequent proposal submitted to our board was met with rejection, hence we are unable to proceed with leasing of the premises."

[13] Finally, it was on 10 November 2020 when the defendant informed the plaintiff that they have decided to withdraw from the deal because of the following:

a. That the plaintiff had failed to fulfil the material terms of the agreement.

b. Absence of confirmed tenant.

c. That plaintiff's letter of 19 October 2020 only confirmed Game as the anchor tenant and that the others were mere consideration.

d. That plaintiff has not copiously addressed the traffic reticulation with the stakeholder at airport junction.

[14] On 17 September 2021, plaintiff's attorneys addressed a letter to the defendant accepting the latter's repudiation of the agreement and claimed damages under various heads. Summons was issued on 7 October 2022, pleadings have become closed and the matter is ready for trial. Hence, in one of the case management meetings held before Judge Vally, the plaintiff intimated a desire that the issue of merits and liability be decided first in terms of rule 33(4) of the Uniform Rules.

[15] It is common cause that the defendants opposes such proposal and say that there should be no separation of issues and that it would not be convenient nor cost saving to separate as evidence on the merits overlaps to a large extent with evidence to be led in respect of damages.

[16] In the particulars of claim, the plaintiff pleads repudiation and consequently breach of the agreement in paragraphs 15 up to 17, read with the defendants plea in paragraphs 4, 5, 6, 7, 8, 9 and 10. It is these paragraphs that relate to the liability, hence they are referred to as the merits issue.

[17] In paragraphs 18 up to 18.7 of the particulars of claim, the plaintiff sets out details of damages it has suffered and continues to suffer as a result of the defendants having resiled from the agreement. The defendants' defence is detailed in paragraphs 11 of the plea. It is a denial of the breach and a denial that the plaintiff suffered any damages. The defendants say they have pulled out of the agreement because the plaintiff did not ensure that it met the trading date of 31 October 2020. Secondly, that the plaintiff failed to procure a tenant mix of the line shops adjacent to the proposed Game Store in contravention of Clause 10.2 of the lease, and lastly, that the plaintiff failed to ensure a direct flow of the key vehicular and pedestrian traffic between airport junction shopping mall and the planned Game shopping mall in breach of Clause 10.7.

[18] During submissions before me the defendants abandoned reliance on the breach of clause 10.7. Their argument centred on whether it is the plaintiff who breached the agreement as pleaded by the defendant or whether it is the defendant who repudiated the agreement.

[19] The defendants correctly identified in their heads that central to the determination of the defendants' liability to the plaintiff is the question whether the plaintiff met the conditions precedent, alternatively the material terms of the lease that was accepted by the second defendant on 4 April 2019. One of those conditions is whether the plaintiff submitted to the defendant the tenant mix of the line shops as appears in Clause 10.2.

[20] The position in relation to clause 10.2 requires closer scrutiny. The defendants' plea places in issue whether the plaintiff complied with its obligation to present

the tenant mix for approval, and whether such compliance constituted a condition precedent or material term. The plaintiff's claim for damages, in turn, includes alleged losses flowing from the loss of rental from prospective tenants and costs associated with securing replacement tenants.

[21] The question which arises is whether the evidence required to establish compliance or non-compliance with clause 10.2 is substantially the same as, or materially overlaps with, the evidence required to establish causation, mitigation and the quantum of damages.

[22] If the evidence is discrete and can be confined to the merits without engaging the detailed factual matrix relevant to damages, separation may serve the interests of convenience. If, however, the same witnesses and documentary material will be required to traverse both compliance with clause 10.2 and the alleged financial consequences thereof, the risk of duplication and piecemeal adjudication becomes a material consideration.

[23] The determination of whether there is a true overlap is therefore pivotal to the balance of convenience. It is only once that enquiry is resolved that the Court can properly determine whether the issues are capable of convenient separation within the meaning of Rule 33(4).

[24] It is the defendants' case that the plaintiff failed to procure and submit to the defendant for approval the tenant mix of the line shops adjacent to the planned Game Store. The evidence in that respect will be presented by Sobet and Salojee and supported by the defendants own letter dated 10 November 2020 in which they confirmed receipt of a letter from the plaintiff dated 19 October 2020 in which they confirmed that "only Game as a tenant and that the others were mere considerations". Clearly, they did receive a list of tenants. It will not be necessary as the defendants argue that the plaintiff will need to lead evidence in support of the quantum of damages.

[25] The lease agreement is silent as to when plaintiff was to have submitted the tenant mix, but that was submitted. On the other hand, whilst the lease agreement had dates of occupation and dates of commencement to trade, the

evidence shows that it is the defendant who kept on shifting dates, citing firstly financial constraints and later Covid-19 business slump.

[26] There exists various and substantial issues which fall to be determine prior to determining the extent of damages, if any, suffered by the plaintiff.

[27] It is both convenient and cost-effective to deal with issues relating to liability first before embarking on damages. The quantum issues are substantial and have been fully covered and dealt with in the plaintiff's founding affidavit. The determination of the damages suffered by the plaintiff will occupy substantial factual and expert evidence.

[28] Flemming AJP, in the matter of *Rauff v Standard Bank Properties*[2] at 703 stated that:

> "The entitlement to seek the separation of issues was created in the court rules so that an alleged lacuna in the plaintiff's case or an answer to the 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 a parcel of evidence. The purpose is to determine the fate of the plaintiff's claim or one of the claims without the costs and delays of a full trial."

[29] The factual issues that are in dispute in this matter are twofold. First, it is whether the dispute arose as a result of any act or omission on the side of the plaintiff. Secondly, whether the dispute is as a result of any act or omission on the side of the defendant. It is in my view convenient that the parties do not incur substantial costs associated with the issue of damages. It is accordingly not only convenient, but it has the advantage that an inquiry into damages issue will only arise in the event of a finding of breach by the defendant. If the court does not find in favour of the plaintiff on merits, it will be the end of the matter and time and costs will be saved.

[30] The defendants contend that a separation will result in an overlap of evidence required to prove any of the remaining issues. It is correct that a court should not grant a separation where it is clear that an overlap would occur resulting in

[2] 2002 (6) SA 693 (W).

witnesses having to be recalled. The defendants contend that the merits issue and quantum issue are inextricably linked in relation to two issues, namely that the plaintiff's alleged breach of Clause 10.2 of the lease, in that it failed to procure the approval of the second defendant in respect of the tenant mix of the line shops adjacent to the planned Games Store. Secondly, the alleged breach of Clause 10.7 which the defendant has now abandoned.

[31] The defendant's interpretation of Clause 10.2 is not in line with what the parties agreed upon. Firstly, in their own letter dated November 2020, the respondents did confirm that they received names of prospective tenants and they chose to refer to them as mere considerations. The defendant does not explain what they meant by mere considerations.

[32] The evidence and factual considerations relevant to whether or not the plaintiff presented the tenant mix of the line shops for approval, if so and when, are narrow and crisp and will not necessarily traverse the issue of damages. The evidence will not require that plaintiff lead evidence to determine quantum issues.

[33] The court in the matter of *Minister of Agriculture v Tonga Brook*[3] held that:

> "The interest of the parties and the ends of justice will be better served by disposing of a particular issue before considering other issues and that depending on the result of the issues singled out may fall away or become confined to substantially narrower limits."

[34] I have come to the conclusion that a separation of merits from quantum will be in the best interest of the parties as it will not only curtail costs, but it is to the advantage of both parties.

[3] 1976 SA 357 (D).

Order

[35] For these reasons, I make the following order.

1. The issues regarding –

a. The conclusion of the agreement between the plaintiff and the defendant as pleaded in paragraphs 5, 6, 7, 8, 9, 10, and 11 of the particulars of claim read with paragraphs 4 and 5 of the defendants' plea,

b. The plaintiff's compliance with the agreement as pleaded in paragraphs 12, 13, and 14 of the particulars of claim, read with paragraphs 6, 7, and 8 of the defendants' plea,

c. The defendants(or any of their breaches and/or repudiation) of the agreement as pleaded in paragraphs 15, 16, and 17 of the particulars of claim, read with paragraphs 9 and 10 of the plea,

d. Whether in consequence of the foregoing the defendants, (or any of them) are liable to the plaintiff,

be determined separately from, and prior to the damages suffered by the plaintiff and the quantum thereof as more fully stated in paragraph 18 of the particulars of claim, read with paragraph 11 of the plea.

2. The remainder of the issues in the action be and are postponed sine die.

3. The defendants are ordered to pay the plaintiff's cost of this application on a party-and-party scale including cost of two Counsel on Scale C.

[redacted]

MAKUME
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, JOHANNESBURG

Appearances

For the Applicants	:	W LA Grange SC
For the Respondent	:	Adv J Babamia SC
Instructed	:	Clyde & Co