IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL DIVISION, PIETERMARITZBURG

Case No: 10098/2018P

In the matter between:

TRANSNET SOC LIMITED	**APPLICANT**
and	
SEAWORLD AVIATION SERVICES (PTY) LTD	**RESPONDENT**

In re:

TRANSNET SOC LIMITED	**PLAINTIFF**
and	
SEAWORLD AVIATION SERVICES (PTY) LTD	**RESPONDENT**

ORDER

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1. The issue that in terms of Rule 33(4) is separated from other issues to be determined first is whether due to the failure to develop the premises which are the subject of the agreement, cancellation of the agreement is valid and effective and it results in the defendant to have no right to continue to be in occupation of the premises.

2. The costs of the application and counter- application to be costs in the cause.

JUDGMENT

Mngadi J

[1] The parties seek separation of issues in terms of Rule 33(4) in different terms resulting in an application and a counter application, both opposed.

[2] The plaintiff, Transnet SOC Limited, instituted an action against defendant SeaWorld Aviation Services (Pty) for a cancellation of the agreement between the parties, ejectment of the defendant from the premises and payment of related damages.

[3] The defendant pleaded to the claim resisting the cancellation of the agreement, ejectment and payment of damages. It counter-claimed that plaintiff breached and repudiated the agreement, delaying the defendant's preparation and use o the premises resulting in it suffering loss of profit and incurring additional costs. In total, the defendant claimed R340,396m.

[4] The plaintiff in the particulars of claim in which it attached the copy of the agreement stated that on 15 June 2017 the parties concluded an agreement in terms of which it leased to defendant certain premises. The agreement commenced on 1 September 2017. The defendant at its costs to develop the premises that are leased to it. The defendant failed to develop the premises as agreed, sublet part of the premises for purposes unrelated to the development of the premises, failed to pay certain charges relating to its lease of the premises, and despite the cancellation of the agreement on 7 June 2018 defendant refused to vacate the premises.

[5] The defendant pleaded that for developing the premises as a commercial airport it was granted a lease for an initial period of ten (10) years, renewal period of ten(10) years, and it would be liable for VAT, Insurance, rates and taxes and other charges commencing from the completion date of the development, the commencement date being 1 September 2017. The defendant granted access to the premises from the commencement date. The development brief, construction program me, specification and bill of quantities all to be finalized and submitted to the lessor within twelve (12)

months from close of commencement date, except or otherwise agreed. The completion date being 31 January 2019.

[6] The defendant pleaded that it was acknowledged in the agreement that a portion of the premises was unlawfully occupied that needed to be removed, portion of the premises was leased to several other tenants, it was entitled to sublet portion of the premises during the duration of the agreement. The defendant, in addition, pleaded that the unlawful occupier(s) could not be removed, there were other illegal tenants and the plaintiff failed to remove the illegal tenants from the premises. As a result, it did not develop the premises as only a small portion of the premises was not occupied by illegal tenants, and it continued not to have access to the biggest part of the leased premises. On 17 August 2018 the defendant advised plaintiff that it has been unable to commence any development of the premises.

[7] The plaintiff in its application for separation of issues seeks an order that the issues relating to the merits and quantum of both its claim and the defendant's counter-claim be separated and the following questions of fact and law be determined at the merit stage, prior to and independently of any determination of quantum:

1. Whether the defendant breached the lease agreement in that it failed to develop the leased premises into a commercial airport within the agreed 18 months period as was required in terms of the leased agreement.
2. Whether defendant unlawfully sublet portions of the leased premises before fulfilling its development obligation.

3. Whether the defendant breached its obligations under the leased agreement to furnish the plaintiff with progress report and development plans, including obtaining any required statutory approvals.
4. Whether as a result of any or all if the aforementioned breaches the plaintiff was entitled to and did in fact lawfully cancel the lease agreement.
5. Whether the plaintiff complied with the breach notice provisions stipulated in the development agreement.

[8] The defendant seeks separation to the effect that issues raised in paragraphs 141 to 143 of its plea be separated and determined first, namely, a breach notice is a precondition to any valid suit at the instance of plaintiff, defendant denies that the plaintiff has complied with the preconditions and therefore has no cause of action, subletting is not a breach as the defendant in the agreement was granted the right to be sublet, breach notice TSL2 is not a breach of any alleged term of the lease agreement, TSL2 has not been given under clause 17.3 of the lease agreement, Annexure TSL3 demands compliance with non-existence of a term of the agreement, Annexure TSL3 demands compliance whereas non-compliance is as a result of breach by plaintiff, plaintiff delayed to cancel after issuing notice of breach.

[9] Rule 33(4) requires that separation be ordered for a discreet distinct issue, its determination shall shorten the litigation be separated and it be determined first.

[10] The plaintiff is seeking confirmation of the cancellation of the agreement and the ejectment of the defendant from the premises.

[11]` Clause 17.4 of the agreement provides: If, for any reason, the lessee is unable to perform its development obligation in whole or in part, the lessor reserves the right to cancel the agreement, without prejudice to any other right it may have in terms of thereof, in which event the amount contemplated in clause 17.5 shall be forfeit as a pre-estimate of the lessor's damages.

[12] It is a fact that the defendants did not develop the premises. The development of the premises was a material term of the agreement. The plaintiff conveyed to the defendant that since there was no development of the premises, amongst other things, it intended to cancel the agreement and subsequently cancelled the agreement. The defendant contends that the plaintiff could not cancel the agreement due to failure to develop the premises prior to the expiry of the time stipulated for the development. However, the defendant had informed the plaintiff that it is not in a position to develop the premises, and it clearly was not taken any steps to develop the premises. By September 2018 when the plaintiff issued summons it was common cause between the parties that the defendant had not started with and had no intention to develop the premises. The defendant did not in its plea nor in any form indicate the intention to develop the premises as agreed. It had 18 months from September 2017 to develop the premises to completion, but it never commenced with the development of the premises.

[13] The parties in my view in their respective applications for separation, in particular, issues proposed to be the issues for determination have missed the point.

The issues proposed by plaintiff are rather unclear and broad whereas those set out by the defendant are too narrow and will not address the crux of the matter. However, if one considers the main claim and the counter –claim, it is clear that the main issue to be determined before other issues is the validity of the cancellation of the agreement based on the fact that there was no development of the premises in terms of the agreement, and if it is found that this is valid cancellation whether the defendant has any right to remain in occupation of the premises.

[14] The said issue is capable of being independently determined without traversing other issues. Its determination is regulated by the provisions of the agreement; the pleadings read with an annexures setting out the steps taken by the plaintiff in cancelling the agreement; facts admitted in the pleadings including in the counter claim by defendant establishing that there was no development of the premises as agreed. Even if plaintiff had not issued any notice of breach followed by cancellation, it is entitled to do so in the particulars of claim if it was relying on a ground for cancellation that need not be preceded by a notice of breach, in particular, if it is relied on a fact admitted by the defendant.

[15] Separation may be at the instance of a party or at the instance of the court. The court considers separation as proposed by a party, but it is not bound by it. The separation must be in the interest of justice. It must be directed at resolving the dispute or main part thereof to avoid a delay which is prejudicial to one or both parties, that is likely to save costs. The determination of the separated issue may lead to the

settlement of the entire dispute. Separation is meant to facilitate expeditious litigation. It is convenient and appropriate to order separation in the term set out above. See *Minister of Agriculture v Tongaat Group Ltd* 1976 (2) SA 357 (D) at 362E-H; *Denel (Pty) Ltd v Vorster* 2004 (4) SA 481 (SCA) at 484J-485A-E

[16] In relation to both the application and the counter – application, I make one order. The separation in the stated terms is meant to benefit both parties and the court. The separation is a process towards the settlement of the dispute. Both parties, although in different terms, supported separation. The costs of the applications for separation must be costs in the resolution of the dispute. It appears at this stage that the agreement could not be proceeded with because due to no fault of any party development of the premises could not be made.

[17] If the cancellation of the agreement is valid and effective, the defendant loses the right to remain in occupation of the premises based on the agreement. This is a discreet
distinctive issue that can be determined separately and it shall have an impact on the litigation between the parties. This issue is in terms of Rule 33(4) separated, and it is ordered that it be determined separately. It is ordered the costs be costs on the cause. The separated issue may be placed on the expedited trial roll for trial.

[18] It is ordered as follows.

1. The issue that in terms of Rule 33(4) is separated from other issues to be determined first is whether due to the failure to develop the premises which are the subject of the agreement, cancellation of the agreement is valid and effective and it results in the defendant to have no right to continue to be in occupation of the premises.

2. The costs of the application and counter- application to be costs in the cause.

Mngadi J

APPEARANCES

Case Number:	10098/2018P
For the Applicants	V. Maleka SC with T Mathopo
Instructed by	Mkhabela Huntley Attorneys c/o Ismath Akoo & Associates **PIETERMARITZBURG**
For the Respondent:	GD Hapur SC with C DuToit
Instructed by	DMI Attorneys c/o Rei Mornet Attorneys **PIETERMARITZBURG**
Heard on:	13 April 2026
Judgment delivered on:	05 May 2026