IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

CASE NO:90897/2015

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

24/5/2019
DATE

SIGNATURE

In the matter between:

MAHLION WHEELS SOUTH AFRICA (PTY) LTD PLAINTIFF

and

EKURHULENI METROPOLITAN MUNICIPALITY DEFENDANT

JUDGMENT

NEUKIRCHER J:

1. This matter involves three actions which were consolidated for

hearing by agreement between the parties and previous order of this Court:

1.1. the first summons was issued on 28 March 2012 under case number 17604/2012, in which the sum of damages claimed from the defendant is R1 828 281.77, plus interest and costs;

1.2. the second summons was issued on 4 July 2013 under case number 41280/2013, for an amount of R1 603 604.49, plus interest and costs; and

1.3. the third summons was issued on 10 November 2015 under case number 90897/2015, for an amount of R61 622 680.65, plus interest and costs.

2. Mr Du Plessis, assisted by Mr Leeuwner, appear for plaintiff and Mr Mullins, assisted by Mrs Retief, appear for the defendant.

3. The trial action has been set out for hearing, before me, for a period of three weeks commencing Monday 27 May 2019. For purposes of the present interlocutory application, it is not necessary to set out all the facts of this matter. What will suffice is a very brief summary:

3.1. the plaintiff, an aluminium alloy motor vehicle wheels

manufacturer owns a factory within the municipal area of the defendant;

3.2. the plaintiff's causes of actions are based on contract alternatively delict committed by the defendant and is a claim for damages to compensate plaintiff's loss caused by electricity interruptions and/or reduced electricity supply at various periods during 2011, 2012 and 2013.

4 The defendant is its pleas to the actions, and more especially the plea to the third action, did not admit the power supply interruptions, pleaded that it was not obliged to provide constant and uninterrupted electricity supply to the plaintiff and also denied any obligation (under contract/delict), wrongfulness or recklessness/negligence.

5. The parties held their first pre-trial meeting on 30 March 2016.[1] In this pre-trial minute, the following is minuted:

> "*4.1. Defendant proposes that an issue be separately determined in terms of Rule 33(4), namely whether section 32 of the defendant's by-laws excuses the defendant from potential liability to the plaintiff, whether in contract or delict, as pleaded in*

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1 It was at this that they agreed to consolidate the three actions

paragraph 13.2 of its Plea.

4.2. The plaintiff points out that the applicability of the said section is dependent on the proviso that the defendant complied with the requirement of the Electricity Act ..., and that an investigation of the facts would in any event be necessary. Accordingly, it is doubtful whether the issue can conveniently be decided separately as required by Rule 33(4).

4.3. The defendant will formulate the issue more precisely for consideration of the plaintiff with the view to reaching agreement on the separation, failing which the defendant intends to apply to court under Rule 33(4)."

6. Despite this disagreement, in paragraph 6 of that same pre-trial minute, the following is agreed:

> *"It is agreed that the merits and the quantum remain separated as provided for in the Practice Manual."*

7. The Practice Manual at paragraph 6.13 of the "*Practice Manual of the North Gauteng High Court*" effective date 25 July 2011, provides as follows under the heading "*PRE-TRIAL*

CONFERENCE":

> *"3.5. If the parties do not settle the matter:*
>
> *3.5.1. ...*
>
> *3.5.2. ...*
>
> *3.5.3. there shall be an automatic separation of merits and quantum in accordance with rule 33(4) unless the parties agree that there shall be no separation;"*

8. The problem was, that the formulation of what would form part of the merits and what of the quantum was not agreed.

9. This lack of precision was perpetuated in the pre-trial held on 1 March 2017. In this a reference was made to a letter sent by the plaintiff's attorney dated 20 October 2016 in which compliance with the Practice Manual was sought[2]

10. This was met with the response on 31 October 2016 in which the defendant stated that its plea should be regarded as a clear version of how the incident giving rise to the action occurred. This

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[2] Chapter 6.13 at paragraph 3.5 states:
"If the parties so not settle the merits of the matter:
3.5.1 the attorneys must set out in the pre-trial minutes clearly and concisely their client's version of how the incident giving rise to the action occurred..."

is, unfortunately, not of much use as the plea itself does not contain a proper delineation of the issues or version of events and was overtaken by the "*Defendant's Pre-Trial Suggestions and Answers*" in respect of the minutes of 30 March 2016.

11. A case meeting took place on 22 February 2018. Northing with regard to the rule 33(4) was said.

12. At the third pre-trial on 6 August 2018, the plaintiff again complained of the defendant's failure to comply with the provisions of the Practice Manual and set out its version.[3] However, it appeared that already on 20 July 2018, the defendant served on the plaintiff *"The Defendant's Response to Annexure "C" to the Pre-Trial Minute of 1 March 2017"*. In this, the defendant filed a comprehensive response to the plaintiff's pre-trial questions filed over two years prior. The defendant also, for the first time, admitted that interruptions to the plaintiff's power supply occurred on certain dates specified in this document, however the defendant specifically pleaded:

> *"12.4. ... none of these interruptions was the result of negligence on the part of the defendant."*

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3 One must bear in mind that it is now two years and five months after the first pre-trial was held

13. That response also contains admissions of paragraphs 51, 52 and 53 of the plaintiff's particulars of claim, which read as follows:

> *"51. The plaintiff had been a consumer of electricity supplied by the defendant prior to the promulgation of the defendant's 2002 Electricity By-Laws as envisaged in section 3(1) of the By-Laws.*
>
> *52. A consumer's contract as envisaged in section 3(1) of the By-Laws had de facto not been concluded between the plaintiff and the defendant prior to the promulgation of the By-Laws on 24 April 2002.*
>
> *53. In the premises a consumer's contract in terms of section 3(1) of the By-Laws is deemed to have been concluded on 24 April 2002 between the plaintiff and the defendant in terms of section 3(3) of the By-Laws (the plaintiff's consumer contract")."*

14. The specific admission is the following:

> *"17.1. The allegations contained in paragraph 51 of the particulars of claim are admitted.*
>
> *17.2. As far as the allegations contained in paragraph 52 of the particulars of claim are concerned, the*

defendant's stance is as follows:

17.2.1. The defendant is unable to trace a written consumer contract between the parties.

17.2.2. The parties initially contracted many decades ago, and if a written consumer contract existed, it has become lost (by both parties) in the mists of time.

17.2.3. In the premises, the defendant will not contest the correctness of the allegations contained in paragraph 52 of the particulars of claim, which can on that basis be regarded as admitted.

17.3. In the premises outlined above, the allegations contained in paragraph 53 of the particulars of claim are admitted."

15. Then, on 28 February 2019 the defendant filed a *"... Supplementary Response to Annexure "C" to the Pre-Trial Minute of 1 March 2017"*. That contains the following *"admissions"*. (the word "*admission*" is in quotes because of the dispute that

subsequently arose):

> *"1. With reference to paragraph 6 and 12 of the defendant's response dated 19 July 2018, the defendant accepts liability to the plaintiff for such damage (if any) as the plaintiff might prove itself to have suffered (limited to such damage as also passes the test of legal causation as outlined in the judgment of Corbett CJ at 764I-765B of Standard Chartered Bank of Canada v Nedperm Bank Ltd, 1994 (4) SA 747 (A)) as a result of the interruptions in the supply of electricity to the plaintiff's premises on the following dates, 20, 21, 22, 25 and 26 February 2013, and 6, 7 and 14 March 2013."*

18 On 26 April 2019, the fourth and final pre-trial conference was held. It was at this that the present dispute arose. In the plaintiff's agenda it formulated the issues that were to be decided at the trial commencing on 27 May 2019 as follows:[4]

> *"11.1. Whether the plaintiff suffered damage as set out in paragraphs 63 to 67 of the particulars of claim (without proof of the quantum thereof);*

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[4] And given the defendant's qualified admissions of liability outlined in paragraph 15 *supra*

11.2. Whether the element of legal causation exists between the damage referred to in the previous subparagraph and the aforementioned interruptions."

17. From the minutes of that meeting however it appears that there was a difference in opinion as:

"4.2. ... the defendant replied that its interpretation of the separation in terms of rule 33(4) was that:

4.2.1. the questions concerning the fact of damage and legal causation were part of the 'quantum';

4.2.2. accordingly, apart from claims 2 and 3 (relating to the 2011 and 2012 damage respectively) all the Court had to decide at the forthcoming trial is the matter of a costs order, if plaintiff claimed an award over and above the defendant's tender of costs in paragraph 1.3 of the defendant's answers, including the length of this spatium deliberandi.

4.2.3. the quantum, including the fact of damage and legal causation, should stand over for later determination; and

4.2.4. the plaintiff is at this stage entitled to an order as formulated in paragraphs 2(a), (b) and (c) of defendant's answers."

18. This then lead to the plaintiff recording that "*its interpretation was that the question of causation and the factual damage formed part of 'liability' which had to be decided at the forthcoming trial with the quantum to stand over for later determination and that it intended to lead evidence on these aspects.*" The defendant responded that it would object to this evidence in light of its stance on the issues.

19. In a document titled *"Plaintiff's Response in terms of Paragraphs 4.6 of the Minutes of the Pre-Trial Conference held on 26 April 2019"*, the plaintiff notified the defendant that it intended to apply for an order of separation at the trial in terms of rule 33(4) in the following terms:

"2.1. The merits and the quantum are separated in terms of rule 33(4).

2.2. *The 'merits' in this case shall mean whether the defendant is liable in delict, alternatively in contract, to the plaintiff as set out in claims 1, 2 and 3 and shall include:*

2.2.1. *all elements of delictual liability, including whether damage was suffered and the result of the omissions/commissions of the defendant as well as legal causation, except the quantum of damages;*

2.2.2. *all elements of contractual liability, including the contractual obligations, the breach thereof and whether damage was suffered, except the quantum of damages;*

2.2.3. *the 'quantum' shall mean the calculation of the damage and the amount of the damages to be awarded;*

2.2.4. *the trial will proceed to determine the merits. The quantum shall stand*

over for later determination;

2.2.5. *the defendant to pay the costs of the application in the event of its opposition."*

20. The parties had agreed that no formal rule 33(4) application was necessary although a notice was formally filed and, given that the parties required direction for purposes of proper preparation, including the preparation of experts if necessary, the application was heard on Friday 17 May 2019.

21. The Supreme Court of Appeal has often, and again very recently, deplored a court's lack of proper consideration of the actual issues when ordering a separation in terms of rule 33(4).[5]

22. In **Odifin (Pty) Ltd v Reynecke**,[6] it was stated:

> *"Before dealing with the merits of the appeal, there is one issue that needs to be addressed. The issue concerns the separation of issues in terms of rule 33(4). Judges should not approve a separation just because the parties have agreed to do so. And if a separation is approved, the court must ensure that its terms are clear ..."*

Western Cape Department of Social Development v Barley & Others, 2019 (3) SA 235 (SCA) at paras. 19 - 21

2018 (1) SA 153 (SCA) at par. 11

23. In **Denel (Edms) Bpk v Vorster**,[7] Nugent JA set out the purpose of rule 33(4):

> *"Rule 33(4) of the Uniform Rules – which entitles the court to try issues separately in approved circumstances – is aimed at facilitating the convenient expeditious disposal of litigation. It should not always be assumed that that result will always be 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 may appear to be discrete. And even where the issues are discrete 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 may be readily dispositive of the matter. It is only after careful thought has been given to the anticipated course of litigation as a whole, that it would be possible to properly determine whether it is convenient to try an issue separately. But where the trial court is satisfied that it is proper to make such an order – an in all cases, it must to be so satisfied before it does so – it is the duty of the court to ensure that the issues to be*

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7 2004 (4) SA 481 (SCA)

tried are clearly circumscribed in its order so as to avoid confusion. The ambit of terms like the merits and the quantum is often thought by all the parties to be self-evident at the outset of a trial but in my experience it is only in the simplest of cases that the initial consensus survives. Both when making rulings in terms of rule 33(4) and when issuing its orders a trial court should ensure that the issues are circumscribed with clarity and precision."

24. In **ABSA Bank v Bernert**[8] this view was again emphasised:

"It is imperative at the start of a trial that there should be clarity on the questions that a court is being called upon to answer. Where issues are to be separated, rule 33(4) requires the court to make an order to that effect. If for no reason but to clarify matter for itself a court that is asked to separate issues must necessarily apply its mind to whether it is indeed convenient that they be separated, and if so, the questions to be determined must be expressed in the order with clarity and precision."

25 The plaintiff's claim is one based in contract, *alternatively* delict.

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8 2011 (3) SA 74 (SCA) at par. 21

In order to prove its delictual claim, it must prove the following:

- the conduct of the defendant of which it complains;
- the wrongfulness of that conduct;
- the fault on the part of the defendant (in the form of negligence);
- that it had suffered harm;
- a causal connection between such harm and the defendant's conduct.

26. It is only once these elements are proven that the court will quantify the claim.[9]

27. Mr Du Plessis argues that the terms "*merits*" and "*quantum*" have a standard meaning[10] which would apply if no special arrangements were made. This he submits is clear from the cases of **MTO Forestry (Pty) Ltd v Swart NO** and **Cothill v Greeff** (*supra*):

27.1. in the **MTO Forestry**-judgement Leach JA set out the implication of separation i.e. that the plaintiff had to

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9 **Cothill v Greeff**, 2018 JDR 0876 (WCC); **MTO Forestry (Pty) Ltd v Swart NO**, 2017 (5) SA 76 (SCA) at par. 12

10 Although open to variation by the parties.

establish all the elements of the delict, including the causal connection between the harm and the respondent's conduct;

27.2. In the **Cothill**-judgment, Andrews AJ held that all the elements of delictual liability were to be determined at the trial and that only the quantification of the harm would stand over for later determination. Thus, in his view, the plaintiff would be obliged to bring all the elements of the delict, those being: (a) the conduct of the defendant of which he complained; (b) the wrongfulness of that conduct; (c) that the defendant was negligent (i.e the element of fault); (d) that the plaintiff had suffered harm; and (e) the causal connection between the harm and the defendant's conduct, i.e. the element of causation.

28. Mr Du Plessis' argument is that the advantages of the separation he proposes are that:

28.1. the *quantum* (i.e. the rands-and-cents calculation of the damages) is a self-contained issue which can be done without duplicating the evidence led on the various elements of the delictual or contractual liability;

28.2. determining liability, without the lengthy evidence by

accountants and loss adjusters concerning the quantum, can save substantial court time because a settlement on quantum is more likely once liability has been determined;

28.3. the allocated 15 days will be utilised productively.

29. It was also argued that the defendant's submission as set out in paragraph 15 *supra*, is "*an admission of law*" as:

29.1. no facts relating to wrongfulness, conduct or fault had been admitted;

29.2. it is not binding on plaintiff, defendant or the Court;[11]

29.3. that, insofar as it amounts to a proposal for a stated case in terms of rule 33(1) and 33(2) it is ineffective as it relates to the law and not the facts and would be subject to the agreement by the plaintiff;[12]

29.4. the court at the second hearing would be unable to make a finding of causality between wrongful conduct and

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11 See **Paddock Motors (Pty) Ltd v Ingesund**, 1976 (3) SA 16 (A) at 23H:
"Is this court then bound by an order given by the court a quo – even if wrong on those facts – as a result of an abandonment of a legal contention flowing from a mistaken view of the law? I think not. If it was so, the intolerable situation envisaged in Van Rensburg v Van Rensburg supra, would be created and the court prevented from forming its 'duty to ascertain whether the court below came to a correct conclusion on the case submitted to it'."

12 Per Paddock Motors (*supra*) at par. 24A - B

damage, if no conduct, fault or wrongfulness have been proven.

30. Mr Du Plessis submitted that:

30.1. the plaintiff intended to call the plaintiff's maintenance manager who will give evidence on the interruptions and the notifications by plaintiff to defendant of those interruptions. On the defendant's rule 33(4) separation, Mr Lambert will have to testify again regarding the damage that was done to the plaintiff's equipment;

30.2. Mr Van Zyl, the plaintiff's expert and an electrical engineer will testify "on the factual causes of the interruptions because of the defendant's actions". Based on the defendant's rule 33(4) separation, he will need to testify again on the issue of legal causation which he argues relates not to the extent of the damage but to the type of damage.

30.3. Mr Volek, the plaintiff's managing director, will lastly testify as to how the interruptions led to a loss of income. He will give evidence regarding the cause of the interruptions and the fault of the defendant.

30.4. At the quantum trial, the plaintiff will call financial staff and experts to testify on the quantum on the various types of damage.

31. Mr Du Plessis argues that none of this will result in a curtailment of the court time and may very well result in extending it. He argues that the defendant's proposed separation is thus not convenient whereas, on the plaintiff's 33(4) version, it is not foreseen that any witness will be required to testify twice.

32. Mr Mullins' approach is that the following is:

32.1. part of the merits: that the plaintiff will have to prove:

(a) whatever instances of interruption or diminution in the electricity supply the plaintiff intends to rely upon over and above those for which the defendant accepted liability;[13]

(b) that those additional instances were negligently caused;

(c) to the extent that the plaintiff persists with the delictual claim, wrongfulness in respect of those additional instances; and

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13 See the admission set out in paragraph 15 *supra*

(d) the duration of each instance of interruption or diminution.

32.2. As part of the quantum:

(a) that each instance of interruption or diminution caused the plaintiff to suffer at least some damage; and

(b) that whatever damage the plaintiff suffered passed the test for legal causation; and

(c) the quantum of damages to be paid if the plaintiff is successful.[14]

33. Mr Mullins argues that the test for legal causation was stated by Corbett CJ in **Standard Chartered Bank of Canada v Nedperm Bank Ltd**:[15]

> *"... the test to be applied is a flexible one in which factors such as reasonable foreseeability, directness, the absence or presence of a novus actus interveniens, legal policy, reasonability, fairness and justice all play their part."*

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14 The plaintiff did not take issue with this interpretation of the defendant's formulation of its 33(4) case

15 1994 (4) SA 747 (A) at 764I – 765B

34. Mr Mullins' argument is that the plaintiff proposed separation goes against the letter and the spirit of 33(4). He argues that the witnesses who will be called to give evidence on (a) whether damage was caused; (b) if so, what damage was caused; and (c) whether the nature of that damage was reasonably foreseeable, will have to be recalled to give evidence on much the same evidence regarding the quantum – which then defies the purpose of rule 33(4).

35. And this all is tied up at the end of the day with the issue of convenience as rule 33(4) provides:

> *"If, in any pending action, it appears to the court ... that there is a question of law or fact which may be conveniently decided either before any evidence is lead 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."*

36. It goes without saying that the purpose of rule 33(4) is to dispose

of litigation conveniently and expeditiously.[16]

37. In **Absa Bank v Botha**,[17] Hancke J confirmed certain principles:

(a) that a court is obliged to order a separation except if the balance of convenience does not favour a separation (at 513C – D);

(b) the most important consideration, i.e. that of convenience, is still the decisive issue (at 513E – F); and that

(c) convenience does not concern only expediency, efficiency and desirability but also fairness, justice and reasonableness.

38. In **S v Malinde**,[18] Nicolas AJA stated the following:

> *"Some of the points made by Miller J[19] 'in the course of this judgment were these. Substantial grounds should exist for the exercise of the power. The basis of the jurisdiction is the convenience -- the convenience not only of the parties but also of the court. The advantages and disadvantages likely to follow upon the granting of an order must be weighed. If overall, and with due regard to the divergent interests and*

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16 **Denel (Edms) Bpk v Vorster**, 2004 (4) SA 481 (SCA) at 485
17 1997 (3) SA 510 (O)
18 1990 (1) SA 57 (A) at par. 68 – this decision discuss rule 33(4) as it then read
19 In **Minister of Agriculture v Tongaat Group Ltd**, 1976 (2) SA 357 (D)

considerations of convenience affecting the parties, it appears that the advantages would outweigh the disadvantages, the court would normally grant the application. When deciding an application under the subrule, the court is not called upon to give a decision on the merits. But it must consider the cogency of the point concerned because unless it has substance, a separate hearing would be a waste of time and costs. So, the court should not grant an application for a separate hearing 'unless there appears to be a reasonable agree of likelihood that the alleged advantages would in fact result'."

39. One of the issues referred to by Miller J[20] was the reliability and credibility of witnesses:

"Moreover, once it is accepted that evidence will or is likely to be led on these issues at the preliminary hearing, it follows that questions of credibility or reliability of a witness or witnesses might arise. The witnesses, or some of them, who testify at the first hearing will in all probability also testify at the trial in the event that the disputed questions are decided against the defendant at the preliminary hearing. They will, as it were, complete their evidence at the trial, but

[20] In the **Minister of Agriculture v Tongaat Group Ltd** (*supra*) case

meanwhile findings depending on their credibility or reliability will already have been made by the Court, which might, after hearing the second instalment of such witnesses' evidence, be disposed to re-assess their credibility or reliability. What this serves to emphasise is not that such a situation should never be allowed to arise, but that generally it is undesirable to decide piecemeal an issue which, although notionally it may be divisible into two parts, is essentially a composite issue to the extent that there is a degree of inter-dependence of its notionally divisible components."

40. As the decisive consideration in all applications of this nature is the issue of "*convenience*", the very nature of that enquiry will mean that no hard and fast rules can be laid down to determine what is convenient or not. That determination will, in my view, of necessity be case specific. Certain relevant questions, other than the issues of determination of the credibility and reliability of witnesses, may well assist the court in coming to a decision for example the overlapping of evidence regarding liability on the one hand, and quantum on the other[21] and the issue of how far

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21 Which may include evidence (or further evidence) on causation, **Internatio (Pty) Ltd Lovemore Brothers Transport CC**, 2000 (2) SA 408 (SE); **Cape Empowerment Trust Ltd v Fisher Hoffman Sithole**, 2013 (5) SA 183 (SCA)

defendant's counsel must go in cross-examination of the witnesses in the first trial.[22]

41. In the **Internatio**-matter, Horn AJ stated:

> *"... a court will not grant a separation where it is apparent that the evidence required prove any of the issues on the merits will also be required to be led when it comes to proving quantum. Such a situation will result in witnesses having to be recalled to cover issues which they have already testified about when it comes to dealing with the evidence concerning quantum ... It could also hinder the opposing party in his cross-examination. ..."*

And, as a result, the learned acting judge was of the view that, in such cases, a court would be slow to exercise its discretion in favour of such a separation.

42. Mr Mullins has submitted that it is more expedient for this court to decide now whether there were interruptions in the supply of electricity to the premises, if so when these interruptions occurred, their cause and whether the defendant is to blame for those interruptions. The court can then at the second trial, decide what the effect of those interruptions was on the plaintiff

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22 See **Internatio** (*supra*) at p. 411H - I

and any damages to be awarded.

Mr Mullins has also pointed out that the plaintiff's rule 36(9)(b) summary of its electrical engineer contains no opinion evidence – only factual evidence. Given that the plaintiff needs to prove that the defendant is to blame for the interruptions in the electricity, I must say that this is, *prima facie*, puzzling. Mr Du Plessis has submitted the plaintiff is not required to provide opinion evidence at this stage and that the evidence provided by his witnesses will be sufficient to equid the plaintiff of its burden.

44. In my view, given the witnesses that the plaintiff intends to call and the ambit of their evidence as set out in paragraph 30 *supra*, I am of the view that Mr Mullins is correct:

44.1. trisk of a duplication of evidence and the possibility of having to make findings of credibility or reliability against witnesses in this trial, which may have to be revisited in the second trial, will be eliminated on his 33(4) version;

44.2. any witnesses for plaintiff who testify both on merits and quantum (including causality) will testify on different facts;

44.3. the ambit of the defendant's cross-examination will be assured.

45. All-in-all it is clear that it is convenient for the parties and the court that the separation be ordered as proposed by the defendant.

46. "*When separating issues, the parties ought to be precise as to what issues are to be determined first and what to be stayed for later hearing. This would normally be done by reference to specific paragraphs of the pleading.*"[23]

47. To this end Mr Mullins handed up a very detailed draft order setting out the terms of the proposed rule 33(4) separation by the defendant. I have amended paragraph 2.5(b) so that it reads "*paragraph 18 (excluding paragraph 18.1) to 26*" and paragraph 3 to include the date of 17 May 2019 at the end of that paragraph of the proposed draft.

48. As to costs of this application – the parties agreed that costs should follow the result.

ORDER:

49. Thus, the order that I make is the following:

49.1. The draft order marked "**X**" and attached to this judgment is made an order of Court.

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[23] **Tolstrup NO v Kurapa NO**, 2002 (5) SA 73 (W) at 77 – again emphasising there should not merely be a split between "merits" and "quantum".

NEUKIRCHER J

JUDGE OF THE HIGH COURT

6 March 2019

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

On the 17th day of May 2019 before Neukircher J in Court 8B:

Case number: 90894/2015

In the matter between:

MASION WHEELS SA (PTY) LTD Plaintiff

and

EKURHULENI METROPOLITAN MUNICIPALITY Defendant

DRAFT ORDER

Having read the papers and after hearing argument on behalf of the Plaintiff and the Defendant, the following order is made:

1. It is ordered that, with reference to the parties' agreement of 30 March 2016 to separate merits and quantum, issues of whether the Plaintiff suffered damage or not, and if so whether that damage passes the test of legal causation, are to be dealt with as part of the quantum and not as part of the merits.

2. Consequently:

   2.1. The issues which are to be decided as part of the merits under Case Number 17684/12 are the following paragraphs of the Particulars of

Claim in that action read together with the corresponding paragraphs of the Plea:

(a) Paragraphs 1 to 5.2;

(b) Paragraph 6.6 (save for the words "and causing a shutdown of some of the operations of the Plaintiff");

(c) Paragraphs 6.7 and 6.9;

(d) Paragraph 7 (excluding the references to the water supply and the reference in paragraph 7.5 to the conduct having "caused damages [sic] to Plaintiff as pleaded hereunder").

2.2. The issues to be postponed *sine die* for later determination as part of the quantum under Case Number 17684/12 are the following paragraphs of the Particulars of Claim in that action read together with the corresponding paragraphs of the Plea:

(a) Paragraph 5.3;

(b) Paragraph 6.6, to the extent of proof that the failures in the electricity supply caused "a shutdown of some of the operations of the Plaintiff";

(c) Paragraph 7.5, to the extent of proof that the conduct "caused damages [sic] to Plaintiff as pleaded hereunder";

(d) Paragraph 8.

2.3. The issues which are to be decided as part of the merits under Case Number 41280/13 are the following paragraphs of the Particulars of Claim in that action read together with the corresponding paragraphs of the Plea:

(a) Paragraphs 1 to 5.2;

(b) Paragraph 6.6 (save for the words "and causing a shutdown of some of the operations of the Plaintiff");

(c) Paragraphs 6.7 and 6.9;

(d) Paragraph 7 (excluding the references to the water supply and the reference in paragraph 7.5 to the conduct having "caused damages [sic] to Plaintiff as pleaded hereunder").

2.4. The issues to be postponed *sine die* for later determination as part of the quantum under Case Number 41280/13 are the following paragraphs of the Particulars of Claim in that action read together with the corresponding paragraphs of the Plea:

(a) Paragraph 5.3;

(b) Paragraph 6.6, to the extent of proof that the failures in the electricity supply caused "a shutdown of some of the operations of the Plaintiff";

(c) Paragraph 7.5, to the extent of proof that the conduct "caused damages [sic] to Plaintiff as pleaded hereunder";

(d) Paragraph 8.

2.5. The issues which are to be decided as part of the merits under Case Number 90894/15 are the following paragraphs of the Particulars of Claim in that action read together with the corresponding paragraphs of the Plea and the Plaintiff's Replication:

(a) Paragraphs 1 to 13;

(b) Paragraphs ~~18.2~~ 18 (excluding paragraph 18.1) to 26;

(c) Paragraphs 28 to 35;

(d) The opening two sentences of paragraph 36;

(e) Paragraphs 37 to 49;

(f) Paragraphs 51 to 54; and

(g) Paragraphs 56 to 62.

2.6. The issues to be postponed *sine die* for later determination as part of the quantum under Case Number 90894/15 are the following paragraphs of the Particulars of Claim in that action read together with the corresponding paragraphs of the Plea:

(a) Paragraphs 14 to 18.1;

(b) Paragraphs 27 and 55 (subject to the admission made in paragraph 6.1 of the Defendant's Further Particulars on p98 of the Pleadings Bundle);

(c) Paragraph 36, from the third sentence thereof onwards;

(d) Paragraph 50; and

(e) Paragraphs 63 to 68.

3. The Plaintiff is ordered to pay the costs of the dispute between the parties as to the formulation of the Rule 33(4) Separation, including the costs of the Defendant's employing two counsel, and the costs of drawing the Heads of Argument, and of argument on 17 May 2019

4. The action will proceed on 27 May 2019 on the issues outlined in paragraphs 2.1, 2.3 and 2.5 above.

By order

Registrar