THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not Reportable

Case no: 183/2019

In the matter between:

IVECO SOUTH AFRICA (PTY) LTD **APPELLANT**

and

CENTURION BUS MANUFACTURERS (PTY) LTD **RESPONDENT**

Neutral citation: *Iveco South Africa (Pty) Ltd v Centurion Bus Manufacturers (Pty) Ltd* (Case no 183/2019) [2020] ZASCA 58 (3 June 2020)

Coram: NAVSA, ZONDI, DLODLO, MBATHA JJA AND KOEN AJA

Heard: 6 MAY 2020

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by email, publication on the Supreme Court of Appeal website and release to SAFLII. The date and time for hand-down is deemed to be 9h45 on 3 June 2020.

Summary: Contract – breach – claim for damages for 'loss of income' in relation to part of contract period – interpretation of contract – whether appellant obliged to supply minimum number of vehicles for conversion per month – whether obligations reciprocal – whether order should have been granted separating merits and damages.

ORDER

On appeal from: The North Gauteng High Court, Pretoria, sitting as a court of appeal, (Fabricius J, Kollapen and Mokose JJ concurring):

1. The appeal succeeds to the extent set out below.
2. The order of the full court of the North Gauteng High Court is set aside and substituted with the following:

   '(a) The appeal succeeds to the extent set out below.

   (b) The judgment of the trial court is set aside and substituted with the following order:

   "(i) It is declared that the agreement concluded between the parties obliged the defendant to deliver a minimum of 40 vehicles for conversion to the plaintiff per month;

   (ii) The matter is remitted to the trial court to determine all the remaining outstanding issues, which will include, without detracting from the generality of the aforesaid, a determination of all issues relating to the reciprocity of obligations, a determination of which obligations were reciprocal, the nature and extent of any non-compliance with such obligations, the effect of such non-compliance, and a determination of the respondent's damages, if any;

   (iii) The costs are reserved."'
3. The costs of the appeals before the full court and this court are reserved pending the finalisation of the proceedings before the trial court, whereafter the matter may be re-enrolled and further submissions advanced regarding the liability for the reserved costs.

JUDGMENT

Koen AJA (Navsa, Zondi, Dlodlo and Mbatha JJA concurring)

[1] The appellant, Iveco South Africa (Pty) Ltd (Iveco), is an importer of Iveco panel vans, many of which are converted into passenger minibuses. The respondent, Centurion Bus Manufacturers (Pty) Ltd (CBM), carries on business as a converter of vehicles. The primary issue for determination in this appeal is whether the written agreement concluded between the parties on 21 September 2006, in terms whereof Iveco appointed CBM to manufacture bus conversions,[1] obliged Iveco to supply a minimum of 40 vehicles for conversion to CBM every month, or whether it merely required that CBM was obliged to establish and maintain the capacity to convert 40 vehicles per month.

[2] It is common cause that Iveco did not consistently supply 40 vehicles for conversion to CBM every month.[2] After the lapse of a few years from the inception of the agreement, when the number of vehicles supplied for conversion had reduced dramatically and talks between the parties to deal with that issue failed to achieve a mutually satisfactory result, CBM instituted an action in the North Gauteng Division of the High Court for damages. Its

[1] The conversions were predominantly to 23-seater buses but the agreement also provided for conversion to 16 and 28 seater buses.

[2] Iveco also asserted that from the end of 2008, instead of it being the only conduit for conversions, private owners and dealers/franchisees placed orders for conversions directly with CBM as one of three manufacturers, and that these numbers ought to be taken into account when determining whether there was compliance with the respective obligations of the parties.

damages represented the income[3] it allegedly lost due to Iveco's failure to supply 40 vehicles for conversion every month. Iveco pleaded that CBM had not at all times maintained a minimum manufacturing capacity of 40 bus conversions per calendar month, as it even failed, on occasion, to ensure that conversions numbering below 40 per month were completed within a reasonable time and without undue delay (the capacity defence). It also pleaded that many conversions had not been of 'an acceptable quality' (the quality defence). These obligations on the part of CBM were pleaded to be obligations 'reciprocal to [Iveco's] duties in terms of the agreement' which, if breached, would preclude CBM's claim.

[3] The trial court[4] granted an order separating the merits and quantum. It observed that 'the contract is bilateral because the core obligations are reciprocal in that the performance of the plaintiff is conditional on the performance of the defendant.' It said that [u]nless the defendant supplied 40 vehicles the plaintiff could not convert 40 vehicles'. It found that the agreement contemplated that CBM would convert a minimum of 40 vehicles per month and, accordingly, that Iveco's failure to supply that number of vehicles amounted to a breach of the agreement. The capacity and quality defences were not considered. The trial court granted the following order: 'The claim succeeds and judgement is entered for the plaintiff with costs'.

[3] Although the agreement terminated on notice on 30 November 2011, CBM's claim for lost income, represented by the profit it allegedly would have made had it manufactured 40 vehicles per month, was confined to the period from June 2009 to September 2011. It claimed for 1120 conversions (calculated at 40 conversions per month) at an agreed price of R45 300 including VAT per conversion, at an average profit loss of 9%, resulting in a claim for payment of R4 566 240.

[4] Per Makhafola J.

[4] The full court[5] of the North Gauteng Division of the High Court dismissed an appeal against the judgment of the trial court with costs. However, because the trial court had disregarded the order of separation, it altered the trial court's order to read that the 'Plaintiff's claim succeeds with costs, with the quantum of damages to be adjudicated upon separately'. Regarding the capacity and quality defences, the full court concluded that, as the 'Plaintiff's claim is one for damages ... and that specific performance was certainly not sought ... [the] evidence relating to alleged performance by the Plaintiff a quo was therefore irrelevant and need not be dealt with'.

[5] The present appeal, with the special leave of this court, is against the order of the full court.

The primary issue – the interpretation of the agreement

[6] It is trite law that the provisions of an agreement must be read and understood in the context within, and having regard to the purpose for which, the agreement was concluded.[6] The point of departure is the language employed in the document.[7] But the words must not be considered in isolation. A restrictive examination of words, without regard to the context or factual matrix, has to be avoided. Evidence of prior negotiations is inadmissible, but evidence relating to the surrounding circumstances and the meaning to be

[5] Fabricius J, Kollapen and Mokose JJ concurring.

[6] *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] ZASCA 13; 2012 (4) SA 593 (SCA) at 603E-604D; *Bothma-Batho Transport (Edms) Bpk v S Bothma & Seun Transport (Edms) Bpk* 2014 (2) SA 494 (SCA) para 12; *City of Tshwane Metropolitan Municipality v Blair Atholl Homeowners Association* [2018] ZASCA 176; 2019 (3) SA 398 (SCA) paras 59-61; *Swart en 'n Ander v Cape Fabrix (Pty) Ltd* 1979 (1) SA 195 (A) at 202C-D; *Coopers & Lybrand and Others v Bryant* 1995 (3) SA 761 (A) at 767H-768E; *KPMG Chartered Accountants (SA) v Securefin Ltd and Another* [2009] ZASCA 7; 2009 (4) SA 399 (SCA) at 409I-410B.

[7] See for example *City of Tshwane Metropolitan Municipality v Blair Atholl Homeowners Association* [2018] ZASCA 176; 2019 (3) SA 398 (SCA) para 63.

given to special words and phrases used by the parties, is admissible.[8] No distinction is drawn between context and background circumstances. Words have to be interpreted sensibly so as to avoid unbusinesslike results.

[7] The introduction/preamble to an agreement is instructive, but not decisive, as it is regarded as subordinate to the operative part of a contract, which, if the meaning thereof is clear, will prevail over anything to the contrary in the preamble. However, where the operative part is not clear, recourse may be had to the preamble to assist in elucidating it.[9] The contextual setting for interpretation might furthermore include subsequent conduct of the parties which indicates how they understood their agreement.[10] Recourse to such evidence is permissible[11] where the evidence indicates a common understanding of the terms of the agreement, and does not alter the meaning of the words used, provided such evidence is used as conservatively as possible.[12] All the above considerations must be considered holistically.[13] Insofar as it may find application, regard may also be had to the *contra proferentem* rule.

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[8] *KPMG Chartered Accountants (SA) v Securefin Ltd and Another* [2009] ZASCA 7; 2009 (4) SA 399 (SCA); *City of Tshwane Metropolitan Municipality v Blair Atholl Homeowners Association* [2018] ZASCA 176; 2019 (3) SA 398 (SCA) para 67.
[9] RH Christie & GB Bradfield *Christies Law of Contract in South Africa* 7 ed(2016) at 251, the previous edition of which was referred to with approval in *ABSA Bank Limited v South African Commercial Catering and Allied Workers Union National Provident Fund (under curatorship)* [2011] ZASCA 150; 2012 (3) SA 585 (SCA) para 32.
[10] *Unica Iron and Steel (Pty) Ltd and Another v Mirchandani* [2015] ZASCA 150; 2016 (2) SA 307 (SCA) para 21.
[11] *Urban Hip Hotels (Pty) Ltd v Kcarrim Commercial Properties (Pty) Ltd* [2016] ZASCA 173 para 21.
[12] Ibid.
[13] See generally *City of Tshwane Metropolitan Municipality v Blair Atholl Homeowners Association* [2018] ZASCA 176; 2019 (3) SA 398 (SCA).

The genesis and terms of the agreement

[8] Mr Vermeulen, the sole director and shareholder of CBM, was responsible for the first draft of the agreement which was sent to Iveco. Iveco's attorneys however 'came up with the contract' in its final form. Dr Jan Nel signed the agreement on behalf of Iveco and Mr Vermeulen signed on behalf of CBM. The agreement expressly provides that it constitutes the entire agreement between the parties. No variation thereto would be of any effect unless reduced to writing and signed by the parties. Iveco appointed CBM 'to manufacture bus conversions in terms of this agreement.' The 'Introduction' clause recorded that Iveco wished 'to appoint [CBM] to manufacture a minimum of forty (40) bus conversions per month', and that CBM wished 'to accept the appointment ...'. The agreement would endure for an initial period from 1 January 2007 until 31 December 2007, and would continue for an indefinite period thereafter, subject to the right of either party to terminate the agreement on six months' written notice.

[9] The further material terms of the agreement included the following:

'5 PRODUCTS & SERVICES TO BE PROVIDED BY CBM:

5.1 CBM undertakes to ensure that it has sufficient capacity and suitably qualified staff, material and other facilities available at all times to enable it to:

5.1.1 Manufacture a minimum of forty (40) bus conversions per calendar month totalling 480 conversions during the INITIAL CONTRACT PERIOD.

5.1.2 Increase production of an additional twenty (20) bus conversions per calendar month to a total of sixty (60) bus conversions per calendar month if required by Iveco SA.

5.1.3 Ensure that schedule of vehicle completion dates is sent to Iveco SA on a weekly basis. This schedule is to be sent to Iveco SA every Monday. Should the Monday fall on a public holiday, the schedule will be sent on the next working day.

5.1.4 Ensure that Iveco SA are notified in writing a week in advance when more vehicles should be delivered to ensure a continuous flow of production in order to meet the minimum requirement of forty (40) bus conversions per month.

5.1.5 Ensure that Iveco SA are notified in writing once vehicles have been completed and are ready for collection.

5.1.6 Ensure that an acceptable quality of bus conversions is provided and maintained throughout the period of the agreement.

5.1.7 Ensure that no dealer direct orders take preference and are accepted by CBM during the contract period prior to the said forty units for Iveco SA.

...

16 BREACH AND TERMINATION:

16.1 Subject to the provisions of clause 1.5.2 no party shall be entitled to cancel this Agreement as a result of a breach, unless:

16.1.1 The party has received written notice of the details of the breach, calling upon the party to remedy the breach and such party fails to remedy the breach within thirty (30) days of receipt of the notice, and

16.1.2 The breach is substantial and material.

16.2 It is recorded that the manufacturing of a minimum quantity of forty (40) conversions per month is an essential term of this Agreement and is of the essence.'

...

18 CONDONATION OR WAIVER

18.1 The failure by any parties to enforce compliance of the provisions of this Agreement, shall not be deemed to constitute a waiver of the parties rights.'

The context and purpose of the agreement

[10] For some time prior to the conclusion of the agreement,[14] CBM and four other businesses[15] manufactured conversions for Iveco. The extent of the demand for conversions depended on orders placed with Iveco through an

[14] Iveco suggested that an association relating to the conversion of vehicles by CBM for Iveco existed from 2002 to 2003. CBM suggested it was from 1999. Nothing turns on this.

[15] Iveco also used other converters, namely Angelo Kater (from 2002), Bus Truck (2007/2008), Mr Coach (but very minimally) and TFM (from 2003).

independent dealer network. The volume of demand for conversions at that stage was lower, initially around 10 and later 15 to 20 conversions per month. With the boom in the South African economy in 2007, and the advent of the taxi recapitalisation programme in the minibus industry, an increased demand for conversions was anticipated.

[11] Iveco would require the services of CBM and other converters to satisfy this increased demand for conversions. The agreement did not grant any exclusive rights to CBM. CBM could manufacture conversions for customers other than Iveco as well, but was required to prioritise work for Iveco. Nor did the agreement contain an express term guaranteeing a supply of vehicles for 40 conversions per month. Mr Vermeulen testified that the calculations regarding the taxi recapitalisation pointed to 'more than 200 vehicles a month that was supposed to be supplied'. It was envisaged that the conversions which CBM would be required to manufacture, would increase to between 40 to 60 vehicles per month. He fairly conceded that, at that stage, the anticipated demand was just a calculation in volumes of what the government planned; it was only realised later on that the market would determine the number'; that the only true measure of the increased number of conversions required per month would be the market demand; and that anything beyond that would be a mere projection – particularly as Iveco was not a dealer, and was not marketing the conversions directly. It appears though that there was optimism on the part of all in respect of demand.

[12] It was common cause that in order to meet the increased demand, a substantial capital investment was required on the part of CBM. It would have to increase its capacity in various respects, including engaging a larger

workforce, to enable it to manufacture 40 conversions per month. It was in that context that the agreement was drafted and concluded.

[13] Following on the conclusion of the agreement, CBM secured larger premises from which to operate. It spent some R4.4 million to ready the premises for a manufacturing capacity of 40 conversions per month and employed additional staff. Mr Vermeulen testified that CBM invested in the belief and hope that it would realise a positive return on its investment, if the numbers which it and Iveco had speculated about materialised.

[14] During the initial period Iveco, at times, ordered 40 or more conversions per month. Although orders for conversions were initially placed with CBM by Iveco, this subsequently changed with some dealers exercising the option to buy a new vehicle from Iveco and thereafter selecting a converter, of its choice or its customer's choice, elsewhere, to attend to the conversion of the vehicle. It appears that when Iveco had a free choice, it, in the main, chose CBM as its preferred converter. However, as there were these other businesses also manufacturing conversions and thus competing for the demand, the marketing required to attract conversions fell largely to the conversion manufacturers. These factors all appear to have contributed to a decline in the supply of vehicles by Iveco to CBM, which culminated in the litigation leading up to the present appeal. Iveco also placed the blame for the downturn in volumes of vehicles for conversion on the diminished quality of the conversions manufactured by CBM and complaints received from its customers. It furthermore transpired that where CBM, at one stage, manufactured roll over kits for Iveco, orders for conversions, corresponding

to the number of roll over kits manufactured, were not always received from Iveco.

Discussion

[15] It is against the aforesaid contextual setting that I turn to interpret the relevant clauses of the agreement. Clause 3.1 appointed CBM 'to manufacture bus conversions in terms of this Agreement'. Clause 5.1.1 required it to maintain the capacity to manufacture a minimum of 40 conversions per month. CBM found larger premises and expended an amount of some R4.4 million to have the capacity to manufacture a minimum of 40 conversions per month. It would be unbusinesslike to undertake the obligation to have that capacity, suitably qualified staff, material and other facilities available at all times, at CBM's cost and risk, if Iveco could provide vehicles for conversions in volumes of less than 40 per month at its discretion.

[16] On Iveco's construction of the agreement, CBM only had to convert what was provided to it. CBM was one of a number of converters used by Iveco, which would then suggest that Iveco could starve CBM of the supply of conversions, whilst still insisting that CBM maintain sufficient capacity to manufacture 40 conversions per month, even though those conversions were not being realised.

[17] An interpretation that 40 vehicles were to be supplied for conversion on a monthly basis, is also consistent with the terms of clause 5.1.4. It provides for weekly notifications to ensure a continuous flow of production 'in order to meet the minimum requirement of forty (40) bus conversions per month' at all times. Monthly production lists were sent to Iveco. If, in the discretion of

Iveco, any lesser number of conversions could have been requested by it, then there would have been no need to create an administrative process providing for the delivery of notices 'to ensure a continuous flow of production in order to meet the minimum requirement of forty (40) bus conversions per month'. Such an interpretation is also consistent with the undertaking by CBM to ensure that no orders directly from another dealer would take precedence over 'the said 40 units for Iveco SA', contained in clause 5.1.7. Significantly also, it was not the capacity to manufacture 40 conversions, but the actual '*manufacture of a minimum* of 40 conversions', that was stipulated to be an essential term of the agreement in clause 16.2 for the purpose of any cancellation (Emphasis added.) This interpretation is also consonant with the termination on six months' notice clause, which gave either party an opportunity to assess whether it was to its advantage in the prevailing circumstances to continue with the agreement or to withdraw. The six month period was one that gave each party sufficient time to adjust to changing circumstances.

[18] Iveco's argument that these provisions related only to CBM's capacity to 'manufacture' a minimum of 40 bus conversions per month, being the express undertaking in clause 5.1.1, and that it did not require Iveco to provide at least 40 vehicles per month for that purpose, could at best have had some persuasive value if clause 5.1.1 was the only provisions containing a reference to a minimum of 40 conversions per month. It is in conflict with the remainder of the wording of the agreement. On a proper construction of the agreement as a whole, the argument cannot be sustained. Not surprisingly, the parties acted consistently with the interpretation of the agreement preferred above, as the following two instances demonstrate.

[19] Regarding the first instance, the full court in reaching a similar conclusion regarding the interpretation of the agreement, referred to the attempt by Iveco at one stage when the demand for conversion fell, to 'change the obligation of 40 vehicles per month to an undetermined lower number of vehicles,.. [which] ...proposal was not accepted by the [respondent]'. This refers to a proposed addendum to the agreement, which was attached to an email dated 17 September 2008 which was sent by Mr Hoffman, the Sales and Marketing director of Iveco at the time, to amongst others Mr Mienie, the Finance director of Iveco,[16] prior to Mr Hoffman meeting with Mr Vermeulen. In the email Mr Hoffman stated that he would 'try to get them [CBM] to sign'. The addendum provided:

'With reference to the points 5, 5.1, 5.1.1 and 16, 16.2 of the agreement it is understood between the above named parties that a changed economic environment and the difficulties in the targeted taxi market have led to a significant slowdown of sales, especially bus conversions as manufactured by CBM. The number of previously agreed 40 units per month will be reduced to a lower, undetermined number of units to be produced in accordance and within the needs of the IVECO SA sales organization.'

Mr Vermeulen's undisputed evidence was that when he met with Mr Hoffman, he declined to sign the addendum because the 'lower, undetermined number' of conversions referred to therein could not be justified in view of the investment CBM had already made. The terms of the addendum would render CBM's investment cost ineffective.

[20] There would have been no reason for Iveco to want to conclude such an addendum if it was not required to provide a minimum of 40 vehicles per

[16] Mr Mienie under cross examination denied having had sight of Mr Hofmann's email. This denial does not affect the import of what the addendum sought to achieve.

month for conversion, and if it could, instead, provide any number of vehicles to CBM for conversion in its discretion. Mr Hoffman was still employed by Iveco at the time of the trial but was not called to testify to explain what else the addendum might have intended to achieve.

[21] In the second instance, Mr Vermeulen testified that CBM sent production lists to Iveco every month. He however came to realise[17] that despite Iveco having indicated that the sales of converted buses had reduced, Iveco was sending vehicles it required for conversion to other converters. He instructed CMB's attorney to address a demand to Iveco for the supply of a minimum of 40 vehicles per month for conversion. Iveco's attorney replied to this demand on 30 May 2011 as follows:

'4. Due to the down-turn of financial markets worldwide and in or about September 2008, discussions were held by Mr Markus Hoffman of our client with Mr Vermeulen of your client where a reduction of the agreed forty units per month to an undetermined number of units to be produced in accordance with the needs of our client's sales organisation was discussed. It was agreed that our client would prepare an addendum which it did and which was e-mailed to your client on 17th September 2008.

5. Whilst Mr Vermeulen of your client failed to sign the addendum, our respective clients continue to conduct business in terms of the agreement in respect of units below the minimum as specified in the agreement. This was accepted by your client who continued with conversions without demur or complaint until receipt of your letter under reply.

[22] There would be no need for Iveco to assert that business was continued in respect of units 'below the minimum as specified in the agreement', if Iveco had not considered itself obliged to provide a minimum of 40 vehicles for

[17] CBM would in some months manufacture 40 roll over kits which would be supplied to Iveco, but then CBM would not receive 40 vehicles for conversion.

conversion per month. It was not contended that the attorney's letter did not convey Iveco's instructions accurately. The fact that fewer vehicles were being converted by CBM, without demur or protest, is legally irrelevant in the light of the provisions of clause 18.1[18] of the agreement.

[23] Finally, to the extent that there might be any ambiguity because clause 5.1. refers to CBM having to ensure that it has sufficient 'capacity' to manufacture 40 conversions per month, in contradistinction to clauses 5.1.4, 5.1.7 and 16.2 which all suggest that the parties contemplated a 'minimum' of 40 conversions per month being manufactured, regard may be had to wording of the introductory clause and the *contra proferentem* rule. Any ambiguity that might still remain must also be interpreted against Iveco, as *proferens*, in accordance with the *contra proferentem* rule.[19]

[24] For all the reasons set out above, it has been shown that neither the trial court, nor the full court, erred in finding that Iveco was contractually obliged to provide 40 vehicles for conversion per month. To that extent the appeal must fail. The effect of that conclusion is that for each month, when the obligation to provide the minimum 40 vehicles was not met, CBM was notionally entitled to claim damages for Iveco's failure to do so, without any need to cancel the agreement.[20]

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[18] Similarly, Iveco's failure to have taken steps regarding any delayed conversion of some vehicles would likewise be legally irrelevant.

[19] *Verba fortius accipiuntur contra proferentem* (words are interpreted against/to the disadvantage of the party uttering them).

[20] A plaintiff who claims damages for breach, whether expectation or reliance damages, need not cancel – see generally RH Christie & GB Bradfield *Christies Law of Contract in South Africa* 7th ed (2016) at 644. Indeed, during the currency of the agreement neither party sought to cancel the agreement.

The separation of issues, the reciprocity of obligations, and damages

[25] This court has frequently cautioned that a separation of issues should not be resorted to readily where issues arise that are intertwined. It held in amongst others *Consolidated News Agencies (Pty) Ltd (in liquidation) v Mobile Telephone Networks (Pty) Ltd and Another*[21] that*:*

'Piecemeal litigation is not to be encouraged. . . This Court has warned that in many cases, once properly considered, issues initially thought to be discrete are found to be inextricably linked. 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. A trial court must be satisfied that it is convenient and proper to try an issue separately.

In the present case counsel for both parties informed us that notwithstanding a decision in this matter a number of issues would still be outstanding. Not all of the remaining issues were identified, nor do they appear to have occupied the mind of the court below.'

[26] Rule 33(4) of the Uniform Rules of Court,[22] providing for a separation of issues, exists 'so that a factual issue can be determined which can give direction to the rest of the case and, in particular, to obviate the leading of evidence. The purpose is to determine the plaintiff's claim without the costs and delays of a full trial.'[23] The 'word "convenient" within the context of the

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[21] *Consolidated News Agencies (Pty) Ltd (in liquidation) v Mobile Telephone Networks (Pty) Ltd and Another* [2009] ZASCA 130; 2010 (3) SA 382 (SCA) paras 89-91. Also see *City of Tshwane Metropolitan Municipality v Blair Atholl Homeowners Association* [2018] ZASCA 176; 2019 (3) SA 398 (SCA) para 52; *South African Broadcasting Corporation SOC Ltd and Others v Democratic Alliance and Others* [2015] ZASCA 156; 2016 (2) SA 522 (SCA) para 67; *ABSA Bank Ltd v Bernert* [2010] ZASCA 36; 2011 (3) SA 74 (SCA) para 21.

[22] Rule 33(4) provides that:

'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 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.'

[23] DE van Loggerenberg *Erasmus Superior Court Practice* 2 ed (2016) at D1-436. (Citations omitted.)

sub-rule conveys not only the notion of facility or ease or expedience, but also the notion of appropriateness and fairness.'[24]

[27] In *Denel (Edms) Bpk v Vorster*[25] Nugent JA cautioned that, although rule 33(4) 'is aimed as facilitating the convenient and expeditious disposal of litigation', an order that issues are separated will not necessarily lead to that result. He continued:

'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 the 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.'[26]

[28] In the present matter the question arises as to which issues were to be included under the 'merits' when the order for separation was granted, and whether, those issues did not overlap with issues more appropriately forming part of the inquiry into damages. The interpretation issue, determined above, could be separated, although even that separation might require the same witnesses to be recalled in respect of damages, thus perhaps making it an issue not to be separated 'conveniently'. The further issues arising from the pleadings, which might affect the merits, included at least:
(a) whether Iveco's obligation to provide vehicles for 40 conversions per month, and the obligations of respondent to manufacture a minimum of 40

[24] Ibid.
[25] *Denel (Edms) Bpk v Vorster* 2004 (4) SA 481 (SCA) at 484I-485B.
[26] *Denel (Edms) Bpk v Vorster* (op cit fn 24) at 485A-C.

conversions timeously and of an acceptable quality every month, were reciprocal;

(b) whether and when CBM failed to comply with its obligations; and

(c) if so, the materiality and effect of such non-compliance.

[29] The agreement is prima facie a bilateral synallagmatic contract imposing a number of obligations on each of the contracting parties. Iveco pleaded that its obligation to supply vehicles to manufacture a minimum of 40 conversions per month, and CBM's obligations to manufacture a minimum of 40 conversions of an acceptable quality every month, were reciprocal. It argued that if it is found that CBM did not maintain the capacity to manufacture a minimum of 40 conversions per month, or that the quality of conversions was unacceptable, that it was excused altogether from providing 40 vehicles per month.

[30] Much time was also spent in the evidence on the alleged defective quality of some conversions[27] and the failure to deliver conversions, even when they numbered significantly less than 40 per month timeously, within a month, or at least within a reasonable time. In many instances conversions of only a few vehicles, often as few as six or less, would take months to complete. Whether the failure to manufacture 40 conversions in each month was all due to Iveco's conduct, or was in part due to defective quality of the work, and whether CBM would have been able to manufacture 40 conversions if

[27] Seat upholstery was cracking, escape hatches that were installed for safety became loose and water leaked into the cab, and seat covers were coming loose. According to Mr Wannenburg, by 2010 some dealers, for example AFS, Italian Commercial, and Track City, no longer wanted conversions manufactured by CBM, and others did not want to send vehicles for conversion to CBM because of the problems relating to quality and late performance.

supplied with 40 vehicles, are issues that called for thorough consideration and detailed evidence. It might also call for a consideration of whether the failure to supply 40 vehicles over a sustained period crippled capacity. These issues impact potentially both on the merits of each claim for damages and on the quantum. The issues were not explored properly, as they ought to have been. The trail court did not consider or decide any of these issues and insufficient thought by both parties was given to the necessary evidence. The full court took the view, wrongly, that as CBM's claim was one for damages, any evidence relating to CBM's failure to meet its obligations was immaterial and affected only the quantum of damages. That conclusion was not supported on appeal by CBM.

[31] Before us, counsel on behalf of both parties were constrained to concede that insufficient thought had been given to the aforementioned aspects when the parties agreed to a separation of issues, and that further evidence, which impacted both on merits and damages ought to have been considered and led. It was agreed that this court ought to decide the primary issue and if it redounded in favour of CBM the matter ought to be remitted to the trial court for further ventilation on those aspects, in accordance with the terms of the order set out below.

Costs

[32] It is appropriate, as the costs of the appeal might be influenced by the success or failure of the claim for damages, which at this stage is still uncertain, that the costs of the appeals before the full court and this court be reserved pending finalisation of the proceedings before the trial court.[28] The

[28] *Pretorius v Slabbert* 2000 (4) SA 935 (SCA) at 939E-G.

matter may thereafter be re-enrolled, and further submissions advanced on the question of costs.

The order

[33] The following order is granted:

1. The appeal succeeds to the extent set out below.
2. The order of the full court of the North Gauteng High Court is set aside and substituted with the following:

   ’(a) The appeal succeeds to the extent set out below.

   (b) The judgment of the trial court is set aside and substituted with the following order:

   “(i) It is declared that the agreement concluded between the parties obliged the defendant to deliver a minimum of 40 vehicles for conversion to the plaintiff per month;

   (ii) The matter is remitted to the trial court to determine all the remaining outstanding issues, which will include, without detracting from the generality of the aforesaid, a determination of all issues relating to the reciprocity of obligations, a determination of which obligations were reciprocal, the nature and extent of any non-compliance with such obligations, the effect of such non-compliance, and a determination of the respondent’s damages, if any;

   (iii) The costs are reserved.”’

3. The costs of the appeals before the full court and this court are reserved pending the finalisation of the proceedings before the trial court, whereafter the matter may be re-enrolled and further submissions advanced regarding the liability for the reserved costs.

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P A KOEN
ACTING JUDGE OF APPEAL

Appearances

For appellant:	D Vetten
Instructed by:	Lovius Block
	31 First Avenue
	Westdene
	Bloemfontein
	Ref C12973*PDY/mn/AD317/18.
For respondent:	JP Vorster SC and CA Kriel
Instructed by:	Phatshoane Henney
	35 Markgraaf Street
	Westdene
	Bloemfontein
	(Ref J le Riche/Bianca Strydom