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REPUBLIC OF NAMIBIA

**IN THE HIGH COURT OF
WINDHOEK
JUDGMENT**



NAMIBIA, MAIN DIVISION,

Case no: I 2696/2012

Case no: I 2077/2013

In the matter between

GERSON UAKAERA KANDJII

APPLICANT

And

ELIFAS AWASEB

1ST RESPONDENT

ZEGURIN AWASES

2ND RESPONDENT

OBED TJONGARERO

3RD RESPONDENT

KATRINA TJONGARERO

4TH RESPONDENT

REGISTRAR OF DEEDS

5TH RESPONDENT

FIRST NATIONAL BANK OF NAMIBIA

6TH RESPONDENT

Neutral citation: Kandjii v Awaseb (I 2696/2012) [2014] NAHCMD 177 (11 June 2014)

Coram: Ueitele, J

Heard on: 12 December 2013

Delivered on: 11 June 2014

Flynote: Practice - Parties - Joinder - Applicant applying for an order directing the consolidation of actions against it - When to be ordered.

Summary

This is an application where the applicant seeks an order for consolidation of two actions (Case No. I 2696/2012 and Case No: I 2077/2013). The application is opposed by the plaintiffs.

The plaintiffs' action (in Case No. I 2696/2012), is based on ejectment of the applicant from a certain immovable property namely Erf 4...., E..... Street, K....., Windhoek and a claim for damages allegedly suffered by the plaintiffs as a result of the occupation of the property by the applicant. The applicant's action (in Case No: I 2077/2013) is based on a breach of contract in that he seeks an order to declare an agreement of sale entered into by and between the plaintiffs on the one hand and the third and fourth respondents on the other hand void and of no legal effect

The pleadings in Case No. I 2696/2012 have closed and the matter is trial ready whereas in Case No: I 2077/2013 the pleadings are still at the early stages they have not even closed. At the time of hearing the application for consolidation the respondents had not yet filed their plea and the issues between the parties have accordingly not yet been defined.

The onus is upon the party applying to Court for a consolidation to satisfy the Court that such a course (i.e. consolidation of actions) is favoured by the balance of convenience and that there is no possibility of prejudice being suffered by any party.

Held the only facts which are common in the two actions is the immovable property and the fact that both the plaintiffs and the appellants purchased the immovable property from the third and fourth respondents. That does not mean that the questions of law and fact upon which the right to relief in the two actions depend is 'substantially' the same.

Held that an order to consolidate the actions will not be convenient if it causes prejudice to any of the parties.

Held the applicant failed to make out a case for the consolidation of the two cases.

The application for consolidation is dismissed with costs.

ORDER

1. The application for consolidation is dismissed with costs. Those costs to include the costs of one instructed and one instructing counsel.
2. Case no. I 2696/2012 is postponed for a pre-trial conference to be held on 11 June 2014 at 08h30.
3. Case no. I 2077/2013 will proceed to case planning conference with the notice for the date and time of the case planning conference to follow soon.

JUDGMENT

UEITELE, J

INTRODUCTION

[1] The applicant, in this interlocutory application for the consolidation of two actions (Case No. I 2696/2012 and Case No: I 2077/2013), is Mr Gerson Uakaera Kandjii and he is the defendant in case no: I 2696/2012 (I will in this judgment refer to him by that designation that is, the applicant). The applicant is the plaintiff in case

no: I 2077/2013 and the six respondents in this application are the six defendants in that case.

[2] The first and second respondents are the first and second plaintiffs in case no I 2696/2012 (I will in this judgment and for the sake of convenience refer to the first and second respondents as the plaintiffs) and they instituted action against the applicant in which action they claim an order ejecting the applicant from a certain immovable property namely Erf 4....., E..... Street, K....., Windhoek (I will, in this judgment refer to it as the immovable property) and damages allegedly suffered by the plaintiffs as a result of the occupation of the property by the applicant.

[3] The applicant filed a notice of intention to defend the plaintiffs' claims in that action (i.e. case no: I 2696/2012) and requested further particulars which were given. The plaintiffs applied for summary judgment which the applicant opposed. The application for summary judgment was then abandoned. The pleadings in that case (i.e. case no: I 2696/2012) closed and the matter was referred to judicial case management. On 10 July 2013 a case management conference was held and at the conference, I amongst others ordered that a pretrial conference be held on 30 October 2013 and the matter proceeds to trial during the week of 11-15 November 2013. I also ordered that the parties must file their discovery affidavits on or before 06 September 2013.

[4] The pretrial conference and the trial did, however, not proceed as envisaged because on 29 October 2013 the applicant gave notice that he will, at the pretrial conference scheduled for 30 October 2013, apply for the consolidation of the two actions. On 30 October 2013 the applicant indicated that he had not served the application for consolidation on the respondents, because he was encountering problems with the plaintiffs' addresses. I ordered the applicant to serve the application, at the offices of the plaintiff's legal practitioners. That application is before me and is opposed by the plaintiffs. The third to sixth respondents have not entered the fray in this consolidation application.

[5] As I have indicated above the applicant is the plaintiff in case no: I 2077/2013 and in that action he seeks an order to declare an agreement of sale entered into by and between the plaintiffs on the one hand and the third and fourth respondents on the other hand void and of no legal effect. The summons in case no: I 2077/2013 was issued out of this Court by the Registrar on 08 July 2013, but was by 25 October 2013 not yet served on the plaintiffs or the third to sixth respondents. At the time of hearing the application for consolidation the respondents had not yet filed their plea and the issues between the parties have accordingly not yet been defined.

[6] The applicant in this application for consolidation, states that both actions arise out of the same facts and if consolidation is not ordered it will result in a multiplicity of actions with more than one court being asked to decide on the same facts and issues. In the launching affidavit, Mr Siyomunji (the legal practitioner for the applicant) who deposed to that affidavit, amongst others submitted as follows:

'8 Applicant's (plaintiff's) action under case no I 2077/2013, is in essence a defence and a claim in reconvention against First and Second Respondent's (First and Second Plaintiffs') claim against the Applicant (defendant) under Case No. I 2696/2012.

9 In the light of the aforesaid it is respectfully submitted that the claims in the two aforementioned actions, which have been put forward by the Applicant and the First and Second Respondents in Respect of the immovable property situated at Erf 4....., E..... Street, K....., Windhoek arise out of the same facts and if consolidation is not ordered it will result in a multiplicity of actions with more than one court being asked to decide on the same facts and issues.

10 I consequently, respectfully submit that, in order to avoid a multiplicity of actions and attendant unnecessary costs, as well as for purposes of convenience and expedition it is necessary to consolidate the aforesaid two actions into one action...'

[7] Ms. Visser who appeared for the applicant submitted that the claims in both the actions overlap and relate to and are founded on the disputed ownership of the immovable property. Likewise the claims arise out of the same facts and evidentiary

documents which have already been discovered by the parties. She further submitted that the convenience of the Court and that of the parties themselves to have the two actions consolidated far outweighs any prejudice the plaintiffs may suffer due to the matter not having proceeded to trial during the week of 11-15 November 2013.

[8] This application is however opposed by the plaintiffs. The plaintiffs oppose the application on three grounds namely:

- (a) The applicant has failed to make out case for the consolidation of the two cases;
- (b) The plaintiffs will suffer substantial prejudice if the application is granted because the action in case no. I 2696/2012, is trial ready whereas in case no: I 2077/2013 the pleadings are still at the early stages they have not even closed;
- (c) The applicant's application for consolidation is not *bona fide* it is calculated to buy the applicant more time.

[9] I will now proceed to consider the merits and demerits of the application. Rule 11 of the Rules of this Court reads as follows:

'11. Where separate actions have been instituted and it appears to the court convenient to do so, it may upon the application of any party thereto and after notice to all interested parties, make an order consolidating such actions, whereupon:

- (a) the said actions shall proceed as one action;
- (b) the provisions of rule 10 shall mutatis mutandis apply with regard to the action so consolidated; and
- (c) the court may make any order which to it seems meet with regard to the further procedure, and may give one judgment disposing of all matters in dispute in the said actions.' (Italicized and underlined for emphasis)

[10] In the matter of *New Zealand Ins Co Ltd v Stone*¹ Corbett, AJ observed that the *onus* is upon the party applying to Court for a consolidation to satisfy the Court that such a course (i.e. consolidation of actions) is favoured by the balance of convenience and that there is no possibility of prejudice being suffered by any party. Although Rule 11 makes no mention of prejudice I am of the view that if an order to consolidate the actions will not be convenient if it causes prejudice to any of the parties.

[11] I have indicated above that the plaintiffs oppose the application for consolidation and that one of the grounds on which they oppose the application is the ground that the applicant has not established in his papers that it is convenient to the court and to both the parties to consolidate the two actions. It is correct that to enable me to exercise my discretion in determining whether it would be convenient to consolidate these matters, I would need to have some understanding or appreciation as to the ambit and extent of the evidence which would be avoided in duplication.

[12] The only information which the applicant has placed before me is the fact that the plaintiffs' action (in case no. I 2696/2012), is based on ejection of the applicant from the immovable property and a claim for damages and that that the applicant's action (in case no: I 2077/2013) is based on a breach of contract, not by the applicant but by the third and fourth respondents to this application. The applicant does not in the affidavit supporting the application elucidated (when he clearly had the onus to do so) the facts which he alleges make it convenient for the two separate and distinct actions to be heard together. The applicant furthermore does not elaborate on the nature of the prejudice he will suffer if the actions are not consolidated.

[13] Ms. Visser in her submission alluded to an overlap of the action because of the disputed ownership of the immovable property. Although there may be some overlap of evidence, the applicant bears the onus of establishing that overlap. But

¹ 1963 (3) SA 63 (C).

she has not been able to do so properly. I therefore agree with Mr Khama who appeared for the plaintiffs that the applicant simply made conclusions without laying the basis for the conclusions when he submitted (I have quoted above from Mr Siyomunji's affidavit) that it is convenient for the court to consolidated the two actions. In my view the only facts which are common in the two actions is the immovable property and the fact that both the plaintiffs and the appellants purchased the immovable property from the third and fourth respondents. That in my view does not mean that the questions of law and fact upon which the right to relief in the two actions depend is 'substantially' the same.

[14] In the matter of *Licences and General Insurance Co. Ltd v Van Zyl and Others*.² Wessels, J made the following observation:

'In so far as the Court may be entitled to consider an application for a joint trial of the separate actions, I am of the opinion that such an application could normally only be considered when the various cases are ready to go to trial. In this matter the pleadings have not yet been closed and the issues have accordingly not yet been defined. In the circumstances it would appear to be quite impossible to consider whether there should be a joint trial or not.'

[15] In find myself in a similar situation, apart from the fact that the applicant has not placed sufficient information before me for me to assess the convenience of consolidating the actions, the pleadings in case no: I 2077/2013 have not yet been closed and the issues have accordingly not yet been defined. In the circumstances it would appear to be quite impossible to consider whether there should be a joint trial or not. It would seem to me that it is not, in the exercise of my discretion, convenient as is contemplated by Rule 11, to consolidate these actions. In the exercise of my discretion, I refuse the application for consolidation with costs.

[16] It follows that case no. I 2696/2012 must proceed to a pre-trial conference and as regards case no: I 2077/2013 that case must, in terms of the newly promulgated rules of court proceed to case planning conference. The parties in case no. I 2077/2013 will be given notice as to the date of the case planning conference in due

² 1961 (3) SA 105 (D).

course. I am not in a position to do that today because of the fact that the third to sixth respondents have-not participated in these proceedings and that case was not docket allocated.

[17] The order I accordingly make in this application is as follows:

- 1 The application for consolidation is dismissed with costs. Those costs to include the costs of one instructed and one instructing counsel.
- 2 Case no. I 2696/2012 is postponed for a pre-trial conference to be held on 11 June 2014 at 08h30.
- 3 Case no. I 2077/2013 will proceed to case planning conference with the notice for the date and time of the case planning conference to follow soon .

Ueitele S F I
Judge

APPEARANCES

APPLICANT/DEFENDANT:

Ms I Visser

Instructed by:

Nambahu & Associates

1st & 2nd RESPONDENTS/1st & 2nd PLAINTIFFS:

D Khama

Instructed by:

Sisa Namandje & Co. Inc