

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK
RULING ON CONSOLIDATION APPLICATION

Case No: HC-MD-CIV-ACT-DEL-2016/02394

In the matter between:

KARSLRUH NUMBER 1 FARMING (PTY) LTD **1ST PLAINTIFF/1ST RESPONDENT**

NABIL BENANI **2ND PLAINTIFF/2ND RESPONDENT**

MOHAMED BOUDOUNI **3RD PLAINTIFF/3RD RESPONDENT**

And

QUINTON KEYS **1ST DEFENDANT**

DE WET ESTERHUIZEN **2ND DEFENDANT/APPLICANT**

Neutral Citation: *Karslruh Number One Farming Close Corporation v De wet Esterhuizen* (HC-MD-CIV-ACT-DEL-2016/02394) [2018] NAHCMD 388 (26 November 2018)

CORAM: PRINSLOO J

Heard: **05 November 2018**

Delivered: 28 November 2018

Reasons: 29 November 2018

Flynote: Practice – Consolidation of actions application – Onus on applicant to satisfy court that consolidation of actions favoured by balance of convenience – Principles reiterated.

Summary: The second defendant brought an application to consolidate two matters involving the same parties running before another judge for purposes of convenience in terms of Rule 41 of the High Court Rules. The plaintiffs opposed the application.

In argument, counsel for the second defendant was of the view that the parties in all three actions are the same and the issues in respect of all three actions emanate from the sale and/or occupation of Farm Vaalgras and therefore as a result, a major part of the evidence to be adduced will overlap. Counsel further submitted that submitted that there will not only be a reduction of costs, but also will be to the benefit of the court and the administration of justice and other litigants.

Counsel further submits that if the matters are consolidated, evidence regarding all three actions can be heard within one week and that there will be no prejudice suffered by the plaintiffs if the actions are consolidated. Counsel was further of the view that neither party will be seriously prejudiced if consolidation is granted and in fact will save lots of time and money if the actions are consolidated.

In respect of the plaintiffs, counsel submitted that even though the matters are considerably or otherwise the same, the actions differ substantially in nature and causes of action and further that the causes of action in respect of the three claims are entirely different and are to be supported by evidence which is different and relevant only to the specific cause of action.

On the notion that costs will be reduced generally, counsel submitted that the court should consider that the actions sought to be consolidated are at different stages in litigation and the court cannot lose sight of the issue of prejudice to the plaintiffs. He submitted that the plaintiffs are substantially prejudiced on account of the delay of the finalisation of this present matter, which was already previously postponed at the instance of the second defendant. Counsel further submitted that the second defendant failed to set out the basis in full in his application which he alleges makes it convenient for the three separate actions to be heard together and therefore submitted that the application should be dismissed with costs.

Held – it is common cause that the claims prayed for in all the three actions all arose from the occupation of the defendants on Farm Vaalgras. There can be no argument that the evidence are overlapping and intertwined. The parties are exactly the same in all three matters and the evidence that will be led during the trial will at all material times be relevant to all the parties concerned.

Held – The cost implications for the parties to attend to three separate trials can be far reaching. Once the consolidated matter is set down for hearing, it can be attended to in one week and be finalized, circumstance permitting. However, if three separate hearing dates are allocated to the different matters, there is no guarantee as to when the matters will be finalized.

Held further – Consolidation of the actions under the circumstance would therefore not only be cost effective for the parties but time effective and in keeping with the spirit and the primary objectives of the court rules.

ORDER

1. Case no. HC-MD-CIV-ACT-DEL-2018/02568 and HC-MD-CIV-ACT-CON-2018/02473 are hereby consolidated with case no. HC-MD-CIV-ACT-DEL-2016/02394.
2. The applicant is awarded the cost of this consolidation application, including cost occasioned by the employ of one instructed and one instructing counsel. Respondents to pay costs jointly and severally, the one paying the other to be absolved.
3. Costs limited in terms of Rule 32 (11).

JUDGMENT

PRINSLOO J:

Introduction

[1] This is an application for consolidation brought by the first defendant in consolidating two other matters involving the same parties. For purposes of this ruling, I will refer to the parties as in the 'main action' under case no. HC-MD-CIV-ACT-DEL-2016/02394.

[2] The other two matters sought to be consolidated with the present matter are case nos. HC-MD-CIV-ACT-DEL-2018/02568 and HC-MD-CIV-ACT-CON-2018/02473 which are being heard before Justice Oosthuizen.

[3] In the present matter as indicated in paragraph one, the first defendant sought to consolidate the other two matters before Justice Oosthuizen and the plaintiffs all jointly

opposed the sought consolidation. This court is thus called upon to determine the consolidation application. For purposes of this ruling, this court will focus primarily on the arguments advanced for and against the consolidation application.

[4] However, before I discuss the arguments advanced, it is important to briefly summarize how the parties are cited in the different cases and their respective causes of actions:

4.1 HC-MD-CIV-ACT-DEL-2016/02394:

- a) This case is the oldest case of three as is evident from the case number and the parties are cited in this matter as they appear in the heading of the matter *in casu*.
- b) This action was instituted against the defendants for rental income accrued by the plaintiffs in respect of Farm Vaalgras (being possessed by Karlsruhe Number 1 Farming (Pty) Ltd.
- c) This matter was enrolled for trial on 14 May 2018 before this court but an adjournment was granted at the instance of the second defendant, who was not ready to proceed with the trial due to the fact that his expert statement was not filed. The further reasons advanced during application for postponement was that the second defendant's erstwhile legal practitioners failed to institute his counterclaim for unjust enrichment in respect of renovations effected by him for the time period that he has occupied Farm Vaalgras.
- d) This lead to the second action between the parties as the second defendant instituted action against all three the plaintiffs.

4.2 HC-MD-CIV-ACT-DEL-2018/02473:

- a) This matter is technically the 'counterclaim' of the second defendant against the plaintiffs. It must be noted that the first defendant in the 'main action' is not a party to this action.
- b) The second defendant instituted action against the plaintiffs in respect of a loan and in terms of an acknowledgment of debt in respect of the plaintiffs as well as an action for unjust enrichment in respect of the improvements that the second defendant effected on Farm Vaalgras, during the period that he occupied the farm.
- c) The action was defended by the plaintiffs and they filed a special plea in this matter.
- d) Pleadings have closed in this matter and the matter was postponed until 11 February 2019 on the request of the second defendant.

4.3 HC-MD-CIV-ACT-DEL-2018/02568

- a) In this action, the parties are as they are cited in the 'main action'.
- b) In this action, the plaintiffs are claiming damages against the first and/or the second defendants for hampering the plaintiffs' in the implementation of an olive project on Farm Vaalgras, consequent to the defendants apparent wrongful and intentional occupation of Farm Vaalgras.
- c) The action was defended by the second defendant.

- d) The pleadings closed in this matter and the matter was postponed to 11 February 2019 on request of the defendant(s).

On behalf of the Applicant/Second Defendant

[5] Mrs. Garbers-Kirsten submitted on behalf of the second defendant that the parties in all three actions are the same and that the issue raised by the plaintiffs on the position of the first defendant is irrelevant as he did not oppose any of the actions and also did not participate in any of the actions.

[6] In addition thereto, it was submitted that the issues in respect of all three actions emanate from the sale and/or occupation of Farm Vaalgras and therefore as a result, a major part of the evidence to be adduced will overlap. Mrs. Garbers-Kirsten argued that the three actions are intertwined and related to each other with regard to the evidence to be adduced.

[7] Counsel further submits that no trial date was granted in respect of the present matter and therefore by the time a trial date is identified and granted, the other two actions will also be ripe for trial. According to Mrs. Garbers-Kirsten, in case HC-MD-CIV-ACT-DEL-2018/02473 discovery by the parties and a pre-trial report need to be drawn up by the parties. In respect of HC-MD-CIV-ACT-DEL-2018/02568, she submitted that what is left is to be done is the filing of possible expert reports, discovery and the filing of a pre-trial report by the parties as well.

[8] On the issue of costs, Mrs. Garbers-Kirsten submitted that there will not only be a reduction of costs, but also will be to the benefit of the court and the administration of justice and other litigants. Counsel further submits that if the matters are consolidated, evidence regarding all three actions can be heard within one week. Counsel further draws the situation that if all three actions are to be heard separately, then it is foreseen that three weeks will be allocated to these matter for the hearing of the three separate trials.

[9] On the issue of prejudice, Mrs. Garbers-Kirsten submitted that the only prejudice to be suffered by the plaintiffs is that the present matter has been pending since 2016. She submitted that this matter will in any event be set down for trial during May or June 2019 and by that time, the other two matters will also be ripe and ready for trial. In the result, counsel submits that there will be no prejudice suffered by the plaintiffs if the actions are consolidated.

[10] Mrs. Garbers-Kirsten, in concluding, submits that the paramount consideration is convenience to all parties involved and further that the facts of the three actions “scream” for consolidation. Counsel submits that neither party will be seriously prejudiced if consolidation is granted and in fact will save lots of time and money if the actions are consolidated.

On behalf of the plaintiffs/respondents

[11] Mr. Shikongo argued on behalf of the plaintiff that for applications such as those for consolidation, the primary purpose is that of convenience but further what must be considered is the notice to all parties concerned. On this point, counsel for the plaintiffs submits that while acknowledging that the second defendant is a party to the proceeding and is an interested party, he has not been notified of the application for consolidation.

[12] Counsel further submits that no representation was made with regard to prior notification of the application to the second defendant in compliance with the requirements of Rule 41.¹ Counsel further submits that as a result, the application for consolidation is not properly before court and cannot be adjudicated upon and must be dismissed with costs.

¹ Consolidation of actions and intervention of persons as plaintiffs or defendants.

[13] At this point, I must interpose and note that this submission was made in the written heads of arguments on behalf of the respondents at the time of filing thereof. Hereafter, an affidavit of Mr. Keys was uploaded on E-Justice wherein he confirms that he is aware of the application for consolidation as same was served on him by the Deputy Sherriff. Mr. Keys indicated that he does not intend to oppose the application. Proof of such service was uploaded as well.

Ad merits

[14] Addressing the merits on the consolidation application, counsel for the plaintiffs submitted that it is clear that whereas the first action under case HC-MD-CIV-ACT-DEL-2016/02394 relates to arrear rental, the second action under case HC-MD-CIV-ACT-CON-2018/02473 relates to a damages claim on behalf of the plaintiffs and the third action under case HC-MD-CIV-ACT-DEL-2018/02568 relates to a loan repayment and unjustified enrichment claim. Counsel for the plaintiffs submits that being considerably or otherwise the same, the actions differ substantially in nature and causes of action.

[15] Mr. Shikongo further submits that the causes of action in respect of the three claims are entirely different and are to be supported by evidence which is different and relevant only to the specific cause of action.

[16] On the notion that costs will be reduced generally, Mr. Shikongo submitted that the court should consider that the actions sought to be consolidated are at different stages in litigation and the court cannot lose sight of the issue of prejudice to the plaintiffs. He submitted that the plaintiffs are substantially prejudiced on account of the delay of the finalisation of this present matter, which was already previously postponed at the instance of the second defendant.

[17] Mr. Shikongo contended that the notion of multiplicity of trials and findings in itself is not a cogent ground on its own in support of consolidation to be considered as

the balance of convenience, prejudice to the plaintiffs as well as substantial difference in the cause of action mitigate against consolidations of hearings.

[18] In conclusion, Mr. Shikongo submitted that the second defendant failed to set out the basis in full in his application which he alleges makes it convenient for the three separate actions to be heard together and therefor submitted that the application should be dismissed with costs.

The Applicable Law

[19] In terms of Rule 41 of the High Court Rules, it makes provision for the consolidation of actions as follows:

41. (1) Where separate actions have been instituted the managing judge may on the application of any party to any action after notice to all interested parties and if it appears to the managing judge convenient to do so, make an order consolidating the actions, after which -

(a) the actions proceed as one action;

(b) rule 40 applies with necessary modifications required by the context to the action so consolidated; and

(c) the court may make any order it considers suitable or appropriate with regard to the further conduct of the matter and may give one judgment disposing of all matters in dispute in the actions.

(2) A person entitled to join as a plaintiff or liable to be joined as a defendant in any action may, on notice to all parties, at any stage of the proceedings apply to the managing judge for leave to intervene as a plaintiff or defendant.

(3) The managing judge may on application made under subrule (2) make such order including an order as to costs and give such directions as to further procedure in the action which he or she considers suitable or appropriate.'

[20] Erasmus: *Superior Court Practice*,² sets out the purpose and test in regards to consolidation of actions as follows:

'The purpose of consolidation of actions under this rule and the joinder of a third party under rule 13 is in broad terms the same: to have issues which are substantially similar tried at a single hearing so as to avoid the disadvantage attendant upon a multiplicity of trial....'

And on B1-99 he proceeds:

'The paramount test in regard to consolidation of actions is convenience. Consolidation of actions will in general be ordered in order to avoid multiplicity of action and attendant costs. In *Nel v Silicon Smelters (Edms) Bpk* convenience was found inter alia, in the fact that the consolidated prosecution of the case would reduce costs and expedite proceedings; there would be one finding concerning a factual dispute involving a number of parties; and the plaintiff's various claims arising from the same cause of action would be heard in one action.'

[23] Rule 11 referred above is equivalent to Rule 41 of the current High Court Rules.

Convenience and Prejudice

[24] In *Placecol (Pty) Ltd v Absa Bank Ltd and SARS & Absa Bank Ltd UTi South Africa (Pty) Ltd (Mounties Division)*³ Satchwell J set out the law on consolidation as follows:

'[7] The test for consolidation in terms of Rule 11 is that of "convenience" to the parties, witnesses and to the court. The approach of our courts to "convenience" appears to be similar in questions of joinder of parties or actions, separation of issues or consolidation. Convenience, broadly and widely understood connotes "not only facility or expedience or ease, but a/so

² :B1-98A.

³ (2012) ZAGPJHC 193 (4 October 2012).

appropriateness in the sense that procedure would be convenient if in all the circumstances of the case, it appears to be fitting and fair to the parties concerned ... "

[8] A distinction is to be drawn between two types of consolidation - "the consolidation of actions separately instituted at the pleading stage and a consolidation of actions separately pleaded merely for the purposes of hearing". To my mind the application in the present matter is for "consolidation of separate actions for the purposes of trial". In *International Tobacco Co v United Tobacco Co* 1953 (1) SA 241 W, the applicant sought to amend its two declarations alternatively to incorporate by amendment the one into the other which the court found would "bring about the joint trial of the actions in what seems to me to be a far more effective manner than would a consolidation of the actions". In *New Zealand v Stone* supra, Corbett AJ (as he then was) commented that the approach in *International Tobacco v United Tobacco* supra exemplified consolidation for purposes of the hearing.

[9] In exercising its discretion in respect of the consolidation for purposes of the hearing, it was held in *New Zealand Insurance v Stone* supra (and since frequently followed) that: " ... the Court will not order a consolidation of trials unless satisfied that such a course is favoured by the balance of convenience and that there is no possibility of prejudice being suffered by any party. By prejudice in this context it seems to me is meant substantial prejudice sufficient to cause the Court to refuse a consolidation of actions, even though the balance of convenience would favour it.

[10] In exercising its discretion on what is "convenient" the court must have regard to a number of factors including the saving of costs and the avoidance of a multiplicity of actions particularly where there is "the danger of the same questions tried twice with possibly different results. "

Application of the law to the facts

[25] In *Kandjii v Awaseb and Others* 2014 (4) NR 1103 (HC), Ueitele J makes reference to *Licences and General Insurance Co Ltd v Van Zyl and Others* 1961 (3) SA 105 (D) at 111D – E wherein 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.'

[26] I am in agreement with the position that Ueitele J took in the *Kandji* matter in that the applicant must provide the court with sufficient information to assess the convenience of consolidating actions and in the event where the pleadings have not closed and the issues are not yet defined that it would be difficult, if not impossible for a court to consider whether there should be a joint trial or not.

[27] In the present matter, it is common cause that the older matter of the three was ripe for trial only for the first defendant to bring an application for postponement, as his expert witness's statement was not filed and the erstwhile legal practitioners failed to institute his counterclaim for unjust enrichment in respect of renovations effected by him on Farm Vaalgras for the time period that he occupied the said farm.

[28] The other two matters have reached *litis contestatio* (pleadings have closed) and the matters are approaching the pre-trial stage.

[29] It is further common cause that the claims prayed for in all the three actions all arose from the occupation of the defendants on Farm Vaalgras. There can be no argument that the evidence are overlapping and intertwined. The parties are exactly the same in all three matters and the evidence that will be led during the trial will at all material times be relevant to all the parties concerned, except for the first defendant who is not a party to the action relating to the second defendant's 'counterclaim'

[30] The same parties and the same set of facts therefore arise in all three actions. The parties in the three actions have also pleaded and discovery was done and in the result, the issues in dispute can be defined once the pre-trial reports have been

concluded between the parties in the two actions that are still in the judicial case management phase.

[31] I am of the opinion that the only prejudice to be suffered by the plaintiffs is the fact that the older case of the three is pending since 2016. This matter was however returned to the judicial case management roll, and no trial date was allocated as yet.

[32] The cost implications for the parties to attend to three separate trials can be far reaching. Once the consolidated matter is set down for hearing, it can be attended to in one week and be finalized, circumstance permitting. However, if three separate hearing dates are allocated to the different matters, there is no guarantee as to when the matters will be finalized. Allocation of separate hearing dates in a matter that is essentially one matter consisting of two main claims and a claim in reconvention/counterclaim, would be irresponsible and would contribute to the further congestion on the court roll.

[33] Consolidation of the actions under the circumstance would therefore not only be cost effective for the parties but time effective and in keeping with the spirit and the primary objectives of the court rules.

[34] In the result, it will be convenient for the matters to be consolidated into one action.

Costs

[35] Costs will be limited in terms of Rule 32 (11) by virtue of the present matter being interlocutory in nature.

[36] My order is therefore as follows:

1. Case nos. HC-MD-CIV-ACT-DEL-2018/02568 and HC-MD-CIV-ACT-CON-2018/02473 are hereby consolidated with case no. HC-MD-CIV-ACT-DEL-2016/02394.
2. The applicant is awarded the cost of this consolidation application, including cost occasioned by the employ of one instructed and one instructing counsel. Respondents to pay costs jointly and severally, the one paying the other to be absolved.
3. Costs limited in terms of Rule 32 (11).

J S Prinsloo
Judge

APPEARANCES

PLAINTIFFS/RESPONDENTS: E Shikongo
of Shikongo Law Chambers, Windhoek

SECOND DEFENDANT: H Garbers-Kirsten
instructed by Francois Erasmus and Partners,
Windhoek