REPUBLIC OF NAMIBIA

IN THE HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

RULING

PRACTICE DIRECTION 61(10)

Case Title:		**Case No:**
		HC-MD-CIV-ACT-CON-2024/01188
Claudia Mbura	Applicant	INT-HC-CONACT-2024/00459
		Division of Court:
and		Main Division
		Heard on:
Kanaki Tjejamba	Respondent	8 October 2024
		Delivered on:
		16 October 2024

Heard before:

Honourable Lady Justice De Jager J

Neutral citation: *Mbura v Tjejamba* (HC-MD-CIV-ACT-CON-2024/01188) [2024] NAHCMD 603 (16 October 2024)

The order:

1. The respondent's condonation application dated 29 August 2024 for the late delivery of his answering affidavit under INT-HC-CONACT-2024/00459 is dismissed with costs, capped under rule 32(11).

2. The applicant's consolidation application under INT-HC-CONACT-2024/00459 is dismissed with costs including the costs of the applicant's consolidation application dated 5 July 2024, collectively capped under rule 32(11).

The matter under INT-HC-CONACT-2024/00459 is finalised and removed from the roll.

Reasons for order:

DE JAGER J:

Introduction

[1] Before the court is:

(a) a consolidation application under INT-HC-CONACT-2024/00459 by the applicant, Claudia Mbura, to have HC-MD-CIV-ACT-CON-2024/01606, an action instituted by her on 6 May 2024 against the respondent, Kanaki Tjejamba (the applicant's action), consolidated under HC-MD-CIV-ACT-CON-2024/01188, an action instituted by the respondent on 5 April 2024 against the applicant (the respondent's action);

(b) a condonation application by the respondent for the late delivery of his answering affidavit in the consolidation application;

(c) the issue of costs for the applicant's previous consolidation application dated 5 July 2024 that stood over on 24 July 2024.

The condonation application

[2] The condonation application is dealt with first.

[3] Prior to the consolidation application under INT-HC-CONACT-2024/00459, the applicant delivered a consolidation application dated 5 July 2024 under the main case number despite a previous court order that it must be brought under the ejustice interlocutory application function. Answering and replying affidavits were delivered thereto. The 5 July 2024 consolidation application was removed from the roll on 24 July 2024 and directions were given for it to be brought under the ejustice ancillary process function. Under the 24 July 2024 court order the respondent was further ordered to deliver his answering affidavit on or before 2 August 2024 and the costs pertaining to the 5 July 2024 consolidation application stood over for argument together with the consolidation application to be launched under the ejustice ancillary process function.

[4] On 2 August 2024 the respondent delivered the answering affidavit that was previously delivered in the 5 July 2024 consolidation application. On 5 August 2024 the respondent delivered a notice withdrawing the 2 August 2024 answering affidavit, stating it was filed erroneously, and an answering affidavit dated 5 August 2024 was delivered on 5 August 2024.

On 29 August 2024 the respondent delivered a condonation application for his late answering affidavit. The condonation application was set down for hearing on 8 October 2024 together with the consolidation application under INT-HC-CONACT-2024/00459. The applicant opposed the condonation application but no answering affidavit was filed.

[5] The condonation application had to be launched without delay. To succeed with the condonation application, the respondent had to show good cause by establishing a reasonable and acceptable explanation for the default and the timing of the condonation application, which explanation must be full, detailed and accurate for the court to clearly understand the reasons and by further showing a reasonable prospect of success on the merits in the consolidation application.

[6] The condonation application was not filed under the ejustice ancillary process function, nor was it indexed.

[7] The default was realised on 5 August 2024. The respondent failed to explain why the condonation application was only brought on 29 August 2024.

[8] The reason provided for the default is that the candidate legal practitioner mistakenly filed the previous answering affidavit instead of the ‘new one’. On realising the mistake, the erroneously filed answering affidavit was withdrawn and the ‘correct answering affidavit’ was filed. The ‘correct answering affidavit’ is, however, dated 5 August 2024. It did not exist on 2 August 2024 as the explanation implies when it had to be delivered but the previous answering affidavit was erroneously delivered in its stead. Assuming for the moment that the explanation is acceptable, the ‘correct answering affidavit’ would have been dated 2 August 2024 and not 5 August 2024. The explanation is insufficient for the court to clearly understand the reason provided. The explanation for the default is unacceptable. The respondent further failed to deal with his prospect of success in opposing the consolidation application. The respondent failed to show good cause, thereby failing to make a case for condonation to be granted. There is no reason why costs for the condonation application should not follow the event.

<u>The consolidation application</u>

[9] The court now deals with the consolidation application.

[10] Actions are consolidated to have issues which are substantially similar determined in one trial to avoid the disadvantages occasioned by multiple trials based on the same facts proceeding independently of each other. The main considerations are convenience and no substantial prejudice to the other party, the onus of which is on the party seeking consolidation. Convenience is paramount. Attendant costs are also considered.[1] Once a case for consolidation of actions is made, it falls in the court's discretion.

[11] The basis of the consolidation application is as follows. It will be convenient for the court to preside over the two matters as one, it will be convenient for the parties, and it will be cost and time efficient as the parties and the witnesses in the two actions are the same. The facts follow from a single time/sequence of events and the outcome will hinge on the witnesses' credibility. The version of events will be mutually exclusive and the court's credibility, factual and legal findings will only be made once thereby avoiding work duplication, the trial can be finalised in one week and less time will be spent waiting for an outcome. The applicant and the respondent have several grievances against one another, and they brought two different lawsuits against one another while they intend to rely on the same witnesses to prove or disprove their causes of action. The witnesses will only testify once. There will only be one mediation. The applicant submits that the respondent will not be prejudiced.

[12] Regarding opposition to the consolidation application, the respondent submits that the notice of withdrawal of the 2 August 2024 answering affidavit was conditional upon the condonation application's success and if the condonation application fails, the 2 August 2024 affidavit stand in opposition to the consolidation application. The applicant contends the 2 August 2024 answering affidavit should be ignored because it was withdrawn with a notice dated 5 August 2024 which did not state that the withdrawal was conditional.

[13] The 5 August 2024 notice of withdrawal was unconditional. As a result, the 2 August 2024 answering affidavit is not before the court and will not be considered.

[14] The founding papers are not clear on the causes of action in the matters sought to be consolidated. The court perused the particulars of claims in those matters and takes judicial notice of the fact that they were instituted and the grounds on which they were brought.[2]

[15] In the applicant's action, she has three claims against the respondent. The first and

[1] Van Loggerenberg *Erasmus Superior Court Practice* 2ed Volume 2 at D1-133 and the authorities cited there.
[2] *Shell Zimbabwe (Pvt) Ltd v Webb* 1981 (4) SA 749 (Z) at 753A.

second stem from the respondent's breach of a lease agreement concluded between the parties over a portion of a resettlement farm (the property). She prays that the respondent be ordered to vacate the property or cause his cattle to vacate it or to be removed from it and for payment of arrear grazing rental for N$73 010 and holding over damages from date of summons to date of eviction at N$9660 per month. The third claim stems from damage to the property's infrastructure for which she claims payment of N$149 137,90.

[16] In the respondent's action, he claims payment of N$100 000 from the applicant and prays for an order cancelling a loan agreement concluded between the parties whereby the respondent lent and advanced N$100 000 to the applicant which she failed to repay to the respondent as agreed.

[17] The applicant did not provide details about the single time/sequence of events referenced above. Other than the applicant and the respondent, it is not stated who the witnesses are going to be. The applicant did not place any facts before court as to what evidence will be led in the respective actions that may overlap.

[18] A counterclaim can be raised in respect of any matter wherein a defendant could maintain an independent action. The applicant gave no explanation why she instituted a separate action against the respondent instead of counter claiming against the respondent in his action against her. In the founding affidavit she states that, if the consolidation application succeeds, her action will become the counterclaim in the respondent's action. That begs the question why the applicant proceeded to institute a separate claim against the respondent on 6 May 2024 after she was served with the respondent's action on 19 April 2024 only to seek a consolidation of the two actions instead of raising her claim as a counterclaim in the respondent's action.

[19] The convenience to be considered must be shared by all the parties, the witnesses and the court. Based on the founding papers, a consolidation would be convenient only to the applicant. The applicant says the respondent intends to move for summary judgment in his action, but a summary judgment application will have no merit, so she says. However, neither of the parties' defences have been disclosed. Pleas were not entered in either of the actions. Pleadings have not closed in either of the actions. It is unknown what issues will arise from the respective defences.

[20] In *Kandjii v Awaseb and Others*[3] the court stated that a consolidation application can

normally only be considered when the cases sought to be consolidated are ready to go to trial. It said where pleadings in one of the matters have not closed and the issues have not been defined and where an applicant failed to place sufficient information before court to assess the convenience, it would be quite impossible to consider whether there should be a joint trial. The applicant conceded that pleas were not entered and that the facts of the applicant's defence to the respondent's claim were not set out in the founding affidavit.

[21] There are many unknowns. What is known, however, is that the causes of action in the respective actions are not substantially similar. They are different. The applicant, in her founding affidavit, states that what 'differs in the two matters is merely the causes of action'. That fact, on its own, should have informed the applicant not to seek consolidation. The one action is for eviction, arrear grazing rental and damage to property based on a lease agreement concluded in April 2021, claiming breach from June 2023 and a reasonable value to repair the infrastructure. The other action is for repayment of a loan based on a loan agreement concluded in November 2021 whereby the loan was repayable on 16 February 2022, claiming repayment of the loan amount.

[22] On the papers before court, the claims do not arise from the same or substantially similar causes of action. The applicant fears that conflicting credibility and factual findings may be made. Looking at the different causes of action and on the papers before court, the witnesses will not testify on the same subject matters for the respective actions, hence the applicant's fear was not established.

[23] For the reasons set out above, the applicant failed to make a case for the actions to be consolidated. The general rule is applied and costs for the consolidation application follow the event.

[24] Both parties ask that costs be uncapped under rule 32(11). The applicant argues the record is bulky because the wrong answering affidavit was delivered and subsequently a new one was delivered, and a defective condonation application was also delivered all of which increased costs. The respondent argues that, given the papers delivered, costs should not be limited under rule 32(11).

[25] The court considered the volume of papers delivered. The paginated bundle for the consolidation application consists of 83 pages which includes both answering affidavits. The

[3] *Kandjii v Awaseb and Others* 2014 (4) NR 1103 (HC) paras 14 and 15.

papers delivered in relation to the condonation application are less than 15. A case was not made for costs to be uncapped under rule 32(11).

The cost issue for the 5 July 2024 consolidation application

[26] The court now deals with the cost issue for the 5 July 2024 consolidation application.

[27] The respondent, in his answering affidavit to the 5 July 2024 consolidation application, took issue with the applicant's failure to have brought the application under the ejustice ancillary process function in compliance with the 13 June 2024 court order and submitted it must be dismissed with costs.

[28] In the spirit of the rules' overriding objective, the court, on 24 July 2024, suggested that the same consolidation application be brought under the ejustice ancillary process function, followed by the answering and replying affidavits that were already delivered at the time. The respondent did not take issue with the suggestion save to state that instructed counsel was briefed a few days ago (at the time) and the respondent wanted leeway to amplify the answering affidavit. The applicant thereupon indicated that in that event the replying affidavit may have to be supplemented.

[29] In those circumstances, the court removed the 5 July 2024 application from the roll on 24 July 2024 and gave directions for the consolidation application to be brought under the ejustice ancillary process function and on the respondent's request, costs stood over for argument with the consolidation application to be launched.

[30] The applicant argues the respondent should pay the applicant's costs for 24 July 2024 because all papers were delivered on that day, but the respondent wanted to deliver an amplified answering affidavit. The applicant accepts her error in not bringing the 5 July 2024 consolidation application under the ejustice ancillary process function but contends the exact same consolidation application was delivered the next day, and the respondent was not required to answer to a different new application. The applicant submits the respondent also delayed the matter in seeking an opportunity to deliver an amplified answering affidavit and the two should cancel each other out.

[31] The respondent argues that the 5 July 2024 consolidation application could not proceed on 24 July 2024 and if the consolidation application under INT-HC-CONACT-

2024/00459 is refused, the costs of the 5 July 2024 consolidation application must follow that event.

[32] The applicant was at fault for not bringing the consolidation application in compliance with the 13 June 2024 court order. The issue could, however, have been dealt with in a cost effective and efficient manner by the parties delivering the same papers without having to incur extra costs on new papers to be drawn and for the papers to be delivered on truncated periods a day or two apart for the matter to come before court as an ancillary process to the main action. The respondent, however, wanted an opportunity to amplify the answering papers. The applicant proceeded to file the exact same application, so her counsel submitted, under the ejustice ancillary process function and it was not required of the respondent to answer to a different new application. Both parties had a part in the further costs to be incurred in the consolidation application beyond 24 July 2024 instead of a hearing date having been given on that date. The consolidation application, however, remains an interlocutory proceeding brought by the applicant which failed.

[33] In those circumstances, the costs for the 5 July 2024 consolidation application should follow the event of the consolidation application under INT-HC-CONACT-2024/00459, collectively capped under rule 32(11).

Conclusion

[34] In conclusion, the order is as set out above.

Judge's signature:	**Note to the parties:**
Counsel:	
APPLICANT: S Morwe Of Morwe & Associates Inc, Windhoek	RESPONDENT: S M Rukoro Instructed by Tjitemisa & Associates, Windhoek