

**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

CASE NO.: 20973/2021

(1) REPORTABLE: NO

(2) OF INTEREST TO OTHER JUDGES: NO

(3) REVISED.

DATE: 10/2/2023

In the matter between:

ROSEMARY SNEAD N.O.

First Applicant

DEREK MILLER N.O.

Second Applicant

and

**DOUGLASDALE EXTENSION 156
HOMEOWNERS ASSOCIATION T/A
DOUGLASDALE RETIREMENT VILLAGE**
(Registration Number 2[...])

Respondent

JUDGMENT

MANAMELA AJ

INTRODUCTION

[1] The case has a peculiar history, the applicants (first and second defendants in the main action under case number 11058/2017 (“the First Action”)) instituted an

application for the striking out of an action under case number 20973/2021 (“the Second Action”).

[2] The respondent (the plaintiff in the main action) also instituted a counterapplication for the consolidation of the first and second actions.

[3] Both applications are opposed, respectively, and both parties are seeking costs orders against each other on a punitive scale, including the costs of two counsels, on the part of the applicants.

[4] The First Action was instituted on 15 February 2017, and the Second Action was instituted on 28 April 2021. Both applications were dealt with simultaneously.

[5] The claim from the first action emanates from the non-payment of levies by the applicants, in respect of an immovable property registered under the trustees for the time being of Eton Trust – I[...], the registered owner of a sectional title unit no. 1[...] D[...] R[...] V[...] held under Title Deed No.9[...] (“the Property”). The first applicant resides at the property.

[6] The basis for the application by the applicants is threefold, firstly, the applicants argue that the second action is an abuse of process, that it is a duplication of the first action and it is *prima facie* vexatious. Secondly, the applicant aver that the respondent’s continue to draw the applicant into unnecessary litigation and as a result this has led to the escalation of costs. Thirdly, it constitutes an abuse of process and serves to avoid certain disputes between the parties in the first action, which is still pending. Furthermore, that the respondent will not be prejudiced should its second action be struck out.

[7] The applicants submits that, they are not asking that the respondent to be declared a vexatious litigant in terms of the Vexatious Proceedings Act 3 of 1956 (“Vexatious Proceedings Act”). The applicants are also not seeking the dismissal of the second action.

[8] The respondent, on the other hand, seeks an order for the consolidation of the two actions in terms of Rule 11 of the Uniform Rules of Court¹. The explanations provided by the respondent in its answering affidavit, are amongst others that: both actions related to outstanding levies and the consolidation will avoid multiple matters being heard, and will be cost effective and convenient: that the court has jurisdiction in both actions; that the judgment by my colleague van der Schyff J is not a bar to the consolidation; and that there is no substantial prejudice to the applicants.

[9] The proposition by the applicants' counsel during their opening address was that these opposing applications be dealt with separately. Having considered the preliminary submissions made by both counsels, I made an order that both applications be dealt with simultaneously.

FACTUAL BACKGROUND

[10] The following facts pertaining to the factual background are common cause between the parties –

[10.1] The first applicant is Rosemary Ann Snead *N.O.* a retired female person residing at the property. The second applicant is Geoffrey Muller *N.O.* who resides at 5[...] R[...] Road, Parkwood, Johannesburg. The applicants are the trustees of the Eton Trust- I[...], the registered owner of the property.

[10.2] The respondent is the Douglasdale Extension 156 Homeowners Association (NPC), registration number 2[...].

[10.3] On 15 February 2017, summons was issued in the first action, under case number 11058/17. The applicants defended the first action and filed a plea including a special plea on 13 April 2017.

¹ Rule 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 seems meet with regard to the further procedure, and may give one judgment disposing of all matters in dispute in the said actions”

[10.4] Between 14 July 2017 and 3 October 2017, the respondent filed a Rule 7 notice, challenging the authority of trustees, as a power of attorney was not issued. The respondent instituted a Rule 30A notice and proceeded with the application in terms of Rule 30A.

[10.5] On 14 February 2018, the applicants delivered an amended letter of authority and response to the Rule 7 notice. On 15 February 2018, the respondents requested the applicants to file the heads of argument in respect of the Rule 30A application, which was delivered on 15 February 2018. The Rule 30A application was withdrawn on 20 September 2018. On 14 November 2018, a pre-trial in respect of the first action was held.

ISSUES FOR DETERMINATION

[11] The issues to be determined are twofold. The first being whether the second action constitutes an abuse of the legal process in that it is vexatious as alleged by the applicant. The second issue required for determination is whether it should be struck out, and secondly, whether the two actions should be consolidated.

LEGAL FRAMEWORK

[12] The constitutional basis relating to the inherent powers of the Court can be premised under section 173 of the Constitution, which provides that:

“The Constitutional Court, Supreme Court of Appeal and the High Court of South Africa each has inherent power to protect and regulate their own process, and to develop the common law, taking into account the interest of justice.”

[13] The Provisions of Rule 33(4) of the Uniform Rules of Court 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”

[14] The applicant contends that the Second Action is a duplication of the First Action and is therefore *prima facie* vexatious. Counsel for the applicants argues that it is not the plaintiff’s case that the actions are vexatious, but rather the conduct of the Respondent is vexatious, in that its action is based on improper or ulterior motive of shifting the onus of proof to the applicants by way of its amended version of the particulars of claim annexed to the Second Action. The applicants accuse the Respondent of using rhetoric and abusive language and derisive comments. The applicant further argues that the respondent has failed to make out a case in its counter-application in which the respondent seeks the consolidation of the two actions.

[15] In February 2020, shortly before the trial date of the first action, the respondent filed a notice of intention to amend its particulars of claim, purportedly to increase the monetary amount of its claim. The effect of the amendment, according to the applicants, is that the burden of proof rests with the Applicants, and in addition it has an effect of removing the factual allegations which relates to the charging of interest on the overdue amount and the applicability of the National Credit Act 34 of 2005 (“the NCA”).

[16] The Applicants filed an objection to the proposed amendment two days late, on 9 March 2020, and despite that the Respondent proceeded to file an amendment on 12 March 2020.

[17] The Applicants instituted an application to set-aside the amendment as an irregular step. An order to set aside the amendment was granted on 1 March 2021, by van der Schyff J. One of the orders by van der Schyff J was that the Respondent may pursue its amendment by means of an application for leave to amend, which had to be filed within a period of 10 days.

[18] On 28 April 2021, the second action was instituted. In June 2021, the Applicants indicated their intention to institute an application to strike out the second action. The Respondent sought an indulgence in respect of the filing of their answering affidavit, which indulgence was granted until 20 August 2021. The Respondent sought to enrol the first action for trial, whilst preparing an answering affidavit and counter application for consolidation.

DISCUSSION

[19] The abuse of legal process refers to the improper use of a civil or criminal legal procedure for an unintended, malicious, or perverse reason. It is the malicious and deliberate misuse of regularly using civil or criminal court process that is not justified by the underlying legal action. The abuse of process includes litigious actions in bad faith that is meant to delay the delivery of justice. Examples include serving legal papers on someone which have not actually been filed with the intent to intimidate the party, or filing a lawsuit without a genuine legal basis in order to obtain information, to force payment by the opposing party who may fear any possible legal entanglement or gain an unfair or illegal advantage. The determination of what is unfair and wrong is for the court to determine on the individual facts of each case based on its discretion.

[20] The inherent power to regulate a procedure when it comes to the High Court, grants the judicial officer the ability to entertain a claim or give any order it deems appropriate and would have been entitled to do or to give under the common law. The court must be mindful that this is an extraordinary power which must be exercised sparingly and only in exceptional circumstances²

[21] Counsel for the applicants made a comparison of the particulars of paragraph 7.3 which was a subject to an amendment. Where the respondent made reference to the applicability of the National Credit Act. The applicant takes issue with the

² South African National Congress v Democratic Alliance and Another 2014 (3) SA 608 (GJ); Moodiar N.O. v Hendricks NO and Others 2011 (2) SA 199 (WCC) and Jaffit v Garlicke & Bousfield Inc 2012 (2) SA 5, Fisheries Development Corp of SA Ltd v Jorgensen, Fisheries Development Corp of SA Ltd v AWJ Investments (Pty) Ltd 1979 (3) SA 1331 (W) and Belmond Guest House (Pty Ltd v Gore N.O and another 2011 (6) SA 173 (wCC) at 18.

amended particulars of claim, and argues that it results in shifting the onus to the applicant, in that the applicant would have to prove the interest has been charged on the amount, whilst in the first Particulars of Claim the onus would rest upon the respondent. This, the applicant alleges, would be prejudicial

[22] In the determination of this issues, I have taken note that there is no possible duplication of claims as the period for which the initial action relates is from December 2014 to 2017. The second claim relates to the period February 2017 to April 2021, as such there is no *prima facie* vexatious claim as alleged by the applicant and there is no duplicate claim. I have also considered the conduct of the respondent, and the allegation of the use of abusive language and find that the primary aim is to simply recover the outstanding levies.

[23] It is clear that the applicant does not rely on the provisions of the Vexatious Proceedings Act.

CONSOLIDATION IN TERMS OF RULE 11 OF THE UNIFORM RULES

[24] In its counter application, the respondent seeks the consolidation of the two actions as contemplated in Rule 11. It is common cause that the two actions sought to be consolidated are between the same parties and involves the same question of the law. The applicant argues that this is another delay tactic by the respondent and disagrees with the proposition that it was purely based on convenience. In *Beier v Thornycroft Cartridge Co; Beier v Boere Saamwerk*³ the court held that when it comes to the consolidation of actions under this sub-rule the following considerations must be made: the court has a wide discretion, the onus rests on the applicant; convenience is the paramount consideration. Lastly, there must not be substantial prejudice to the defendants, (applying the approach under Rule 33(4) which deals with the separation of issues about what is convenient applied).

[25] The general approach practiced by the courts when exercising the discretion as to whether to grant or refuse the order for consolidation is that the court has to consider the likelihood of convenience weighed against the possible prejudice. In

³ 1961 (4) SA 187 D

respect of consolidation of actions, the extent of prejudice may not be simple but rather substantial prejudice. The prejudice must be sufficient to cause the Court to refuse the consolidation even if the balance of convenience favours it⁴, particularly when considering the costs of both actions from the preparation and leading of evidence stages, the nature and history of the cases and the benefit of arriving at the same decision as opposed to obtaining different orders, for the similar or continuous cause of action.

[26] There is an acceptable explanation by the respondent that there is a time lapse between the first action and the second action. The claim against the applicant in respect of outstanding levies is over R1,000,000.00.

CONCLUSION

[27] The Applicants have not made out a proper case for the relief sought, the application by the Applicants itself is found to be frivolous, and consequentially the applicants should bear the costs on a punitive scale. The Respondent has made out its case to justify the consolidation of the two actions.

COSTS

[28] The Applicants are seeking costs on a punitive scale, including the costs of two counsels, and I find that the costs should follow the events, the applicants will have to fall by their own sword, *Treatment Action Campaign v Minister of Health*⁵.

ORDER –

The following order is order-

1. The Application for strike out is dismissed.
2. The Respondent is authorised to consolidate the two actions under case number 11058/2017 with case number 20973/2021.

⁴ International Tobacco Company v South Africa Ltd v United Tobacco Companies (South) Ltd 1953 SA 241

⁵ 2005 (6) SA 363 (T) at 371C – H (per Ranchod, AJ as he then was)

3. The Applicants are to pay the costs of these applications on attorney and client scale.

P N MANAMELA
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

Date of hearing: 24 August 2022

Judgment delivered: 10 February 2023

APPEARANCES:

Counsels for the Applicant: Adv. N Felgate
Adv. S Stone

Attorneys for the Applicant: SCHULTZ ATTORNEYS INC

Counsels for the Respondents: Adv. JH Sullivan

Attorneys for the Respondents: JANSEN VAN RSNBURG AND PARTNERS