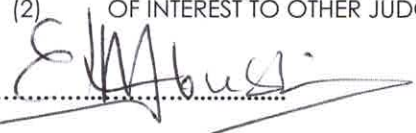




IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

Case Number: 79752/2019

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
	
E.M. KUBUSHI	
DATE: 21-04- 2021	

In the matter between:

LINDA MBANA

Applicant

and

FUZILE BALINTULO

First Respondent

BUTI MESHACK LESIELA

Second Respondent

HERMANUS KAREL BREEDT

Third Respondent

ABRAHAM JOHANNES BOSCH

Fourth Respondent

JUDGMENT

KUBUSHI J,

Delivered: This judgement is handed down electronically by circulating to the parties' representatives by email and by uploading on Caselines. The date and time of hand-down is deemed to be 10h00 on 21 April 2021.

INTRODUCTION

[1] This is an application for consolidation in terms of Uniform Rule 11. The applicant, Linda Mbana, seeks consolidation of four actions instituted against her by the four respondents, who are all opposing the application for consolidation. In essence, the applicant seeks that four actions in which the four respondents have instituted action for damages for defamation against her under case numbers 79752/2019, 79753/2019, 79754/2019 and 79755/2019, be consolidated and proceed with as one action under case number 79752/2019. The applicant also seeks relief in terms of other ancillary prayers contained in the notice of application.

[2] Uniform Rule 11 provides that 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.

[3] In addition to the application for consolidation, a number of other interlocutory applications have been filed in the different cases sought to be consolidated. A directive was issued pursuant to a case management meeting held on 9 December 2020 to provide direction regarding the further conduct of the said interlocutory applications. It was decided that the consolidation application be heard before the other interlocutory applications and that at the hearing of the consolidation application the parties address court on how the pending interlocutory applications will be affected by the granting or refusal of

the condonation application. I am in this judgment, therefore, seized with the application for consolidation and have also to give direction as to how the other pending interlocutory applications are to be dealt with further.

FACTUAL BACKGROUND

[4] The facts leading to this application are common cause. In summation, each of the four respondents has separately instituted action for defamation against the applicant. The claims are based on the same cause of action that the applicant made defamatory statements against each of the respondents during a SABC TV interview. The allegations contained in the respondents' pleadings are the same other than the *quantum* claimed.

[5] The applicant has approached court for the consolidation of the four matters claiming that it is convenient for the court to consolidate them and that none of the four respondents will suffer substantial prejudice if the matters are consolidated.

[6] The four respondents are each opposing the application for consolidation on the basis that it is not convenient for the court to do so, and that they stand to suffer substantial prejudice should the consolidation of the four matters be ordered.

THE APPLICABLE LAW

[7] The learned author, *Erasmus*,¹ provides the following exposition to the phrase "*it appears to the court convenient to do so*",² which I find apposite in the circumstances of the matter before me:

¹ Erasmus: Superior Court Practice Vol 2 page D1-133.

² As appears in Uniform Rule 11.

"The paramount test in regard to consolidation of actions is convenience. It has been held³ that the word 'convenient' connotes not only facility or expedience or ease, but 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. The overriding consideration is that of convenience of the parties, of witnesses and last but not least, of the court.⁴

Convenience of actions will in general be ordered in order to avoid multiplicity of actions and attendant costs.⁵ In *Nel v Silicon Smelters (Edms) Bpk*, convenience was found, *inter alia*, in the fact that (i) the consolidated prosecution of the case would reduce costs and expedite the proceedings; (ii) there would be one finding concerning a factual dispute involving a number of parties and (iii) the plaintiffs various claims arising from the same cause of action would be heard in one action."

[8] As stated by the learned author *Erasmus*,⁶ consolidation of actions will not be ordered if there is the possibility of prejudice being suffered by any party. By prejudice in this context is meant 'substantial prejudice sufficient to cause the court to refuse a consolidation of action, even though the balance of convenience would favour it.⁷

[9] In *New Zealand Insurance Co Ltd v Stone and Others*,⁸ it was held that in an application for consolidation the court, it would seem, has a discretion whether or not to order consolidation, but in exercising that discretion, the

³ *Qwelane v Minister of Justice and Constitutional Development* 2015 (2) SA 493 (GJ) at 497D-F.

⁴ *Rail Commuters' Action Group v Transnet Ltd* 2006 (6) SA 68 (C) at 68B.

⁵ 1981 (4) SA 792 (A) at 801D and 802B.

⁶ *Erasmus: Superior Court Practice* Vol 2 page D1-134.

⁷ See *New Zealand Insurance Co Ltd v Stone* 1963 (3) SA 63 (C) at 71D-H.

⁸ 1963 (3) SA 63 (C) at 69.

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.

[10] 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. The authorities also appear to establish that the *onus* is upon the party applying to court for a consolidation to satisfy the court upon these points."

[11] The party seeking consolidation must, therefore, satisfy the court that the consolidation is favoured by the balance of convenience and that there is no possibility of prejudice being suffered by any party to the proceedings. If it can be found that the prejudice is substantial the court may refuse a consolidation of actions even though the balance of convenience favour such consolidation.

[12] The burden of proof lies on the party requesting consolidation to show the court that convenience favours the consolidation and that such consolidation will not cause substantial prejudice to other parties.⁹

THE ISSUE

[13] The main issue that requires determination is whether the applicant satisfied the requirements of consolidation in terms of Uniform Rule 11. Underlying the said issue is whether the applicant has satisfied the court that the jurisdictional factors of consolidation by showing that the balance of

⁹ See *Mpontsha v Road Accident Fund and Another* 2000 (4) SA 696 (CPD) at 699E-F and 701C-D.

convenience favours the consolidation it seeks; and that there is no possibility of any party suffering substantial prejudice as a result of the consolidation.

ARGUMENTS

[14] The applicant submits that it will be convenient for the actions to be consolidated as they concern the determination of substantially the same issues. The grounds the applicant relies on are that –

- 14.1. the consolidation will prevent multiplicity of actions and attendant costs as the actions are premised on the same cause of action;
- 14.2. allowing these matters to proceed separately will defeat the purpose of Uniform Rule 11 which is to avoid the multiplicity of actions; and
- 14.3. the consolidation will substantially reduce the duration of the trial and further delays, in that all these matters will be disposed of in one hearing and the court will be anticipated to make one judgment only.

[15] As regards prejudice, the applicant alleges that firstly, the respondents will suffer no prejudice if the respondents' matters are consolidated and that she, on the other hand, will be substantially prejudiced by the separate hearing of the four matters. Secondly, it is not in the interest of justice that the four actions proceed separately as she is being financially prejudiced in defending each action.

[16] To the contrary, the four respondents, relying in the main on the judgment in *New Zealand*, are opposing the consolidation on the following grounds:

16.1. That it is not convenient that the four actions be consolidated due to the following reasons:

16.1.1. that various interlocutory applications are pending, which have not been disposed of and which will determine the further conduct in each action;

16.1.2. that costs have already been awarded against the applicant;

16.1.3. that the consolidation application is premature since the applicant has not filed her Plea in any of the actions. As such, the issues between the parties have not been identified or limited. The issues may or may not be the same;

16.1.4. that the respondents raised a counter-application.

16.1.5. that of the various notices served condonation in respect of some of them is being sought;

16.1.6. that the applicant previously sought to delay and frustrate the proceedings and continues to do so with this consolidation application;

16.1.7. that there is a real possibility that a conflict may arise going further should the matters be consolidated;

- 16.1.8. the duration of the trial would be considerably protracted because the *quantum* of the various respondents differs the respondents will be substantially hampered in the actual conduct of their cases at trial;
- 16.1.9. if the matters are consolidated the question might arise as to the order of precedence as between the different respondents;
- 16.1.10. one or more of the respondents are bound to find themselves in a position where evidence destructive of his case is placed on record before he has had an opportunity of leading his own evidence;
- 16.1.11. unnecessary delays could result by consolidation if one or more of the respondents cannot or does not attend on the trial date for some or other reason which may result in a postponement, effectively meaning that whoever is able to attend to the trial might be faced with a scenario that the matter would be postponed to circumstances where the specific respondent is able to proceed with the trial.

APPLICATION OF THE LAW TO FACTS

The Balance of Convenience

[17] From the aforementioned arguments it is manifest that the balance of convenience favours the consolidation. Firstly, it is common cause that the

claims of the respondents against the applicant stems substantially from the same cause of action. Except for the names of the claimants and the amount of *quantum* claimed, the allegations contained in the respondents' particulars of claim are exactly the same.

[18] Secondly, the consolidation will prevent the multiplicity of actions and attendant costs which is precisely the objective of consolidation. It is said that the purpose of consolidation of actions under this Rule is to have issues which are substantially similar, like in this instance, tried at a single hearing so as to avoid the disadvantages attendant upon a multiplicity of trials.¹⁰

[19] Thirdly, the consolidation will substantially reduce the duration of the trial and further delays, in that all these matters will be disposed of in one hearing and the court will be anticipated to make one judgment only. The respondents are also represented by the same attorneys and counsel; same evidence will be led in respect of all four matters. It will make it easy to arrange the order of precedence as between the different respondents.

[20] In this sense the consolidation favours the convenience of the court and of the parties.

Prejudice

[21] As already stated, a court will not order consolidation where there is a possibility of substantial prejudice against any party. The respondents contend that they will be substantially prejudiced by the consolidation. I am, however, convinced by the applicant's argument that all the instances of prejudice raised by the respondents are not real or substantial and are speculative at best.

¹⁰ See Erasmus: superior Court Practice Vol 2 page D1-133.

[22] The applicant has further conceded in the heads of argument that the cost orders against the applicant will remain unaffected by the consolidation. I am, also, of the view that the consolidation will not affect the interlocutory applications as any interlocutory application can still be proceeded with depending on the need to do so by any of the parties.

CONCLUSION

[23] The applicant, in my view, has satisfied the requirements of Uniform Rule 11 and the four actions should be consolidated as per the order granted hereunder.

[24] All the interlocutory applications that will be required to be proceeded with after the consolidation of the four actions must be set down to be heard simultaneously on the same date.

COSTS

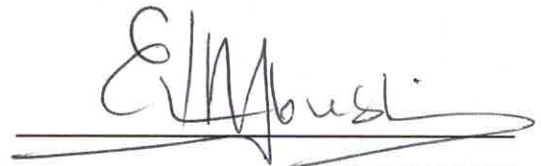
[25] Costs should follow the result.

ORDER

[26] Consequently, I make the following order:

1. The four actions under case numbers 79752/2019, 79753/2019, 79754/2019 and 79755/2019 are consolidated and shall proceed as one action under case number 79752/2019.

2. The provisions of Uniform Rule 10 pertaining to the joinder of defendants shall *mutatis mutandis* apply to the consolidated action.
3. All the interlocutory applications that will be required to be proceeded with after the consolidation of the four actions to be heard simultaneously on the same date.
4. The respondents to pay the costs of this application jointly and severally, the one paying the other to be resolved.



E.M KUBUSHI

**JUDGE OF THE HIGH
COURT**

GAUTENG DIVISION, PRETORIA

Appearance:

Applicant's Counsel	: Adv. E. Labuschagne SC Adv. J Hlongwane
Applicant's Attorneys	: Lucky Thekisho Inc. Attorneys
First to Fourth Respondent's Counsel	: Adv. W.F Wannenburg
First to Fourth Respondents	: Brits Muller Attorneys.
Date of hearing	: 23 March 2021
Date of judgment	: 21 April 2021