



Reportable:	NO
Circulate to Judges:	NO
Circulate to Magistrates:	NO
Circulate to Regional Magistrates:	NO

HIGH COURT OF SOUTH AFRICA
NORTHERN CAPE DIVISION, KIMBERLEY

CASE NO: 1388/14

In the matter between:

**FINCROP RISK MANAGEMENT (PTY) LTD
(IN LIQUIDATION)**

APPLICANT

and

LUSERN KONING CC

1ST RESPONDENT

ANDRIES JACOBUS GROENEWALD N.O

2ND RESPONDENT

FRANCOIS GROENEWALD N.O

3RD RESPONDENT

PAUL MICHIEL BESTER N.O

4TH RESPONDENT

In re:

FINCROP RISK MANAGEMENT (PTY) LTD

PLAINTIFF

AND

LUSERN KONING CC

(Registration no 2004/094520/23)

1st DEFENDANT

ANDRIES JACOBUS GROENEWALD N.O

2ND DEFENDANT

FRANCOIS GROENEWALD N.O

3RD DEFENDANT

PAUL MICHIEL BESTER N.O

4TH DEFENDANT

And

In Re:

Case No: 964/14

**FINCROP RISK MANAGEMENT (PTY) LTD
(IN LIQUIDATION)**

PLAINTIFF

And

ANDRIES JACOBUS GROENEWALD N.O

DEFENDANT

FRANCOIS GROENEWALD N.O

3RD DEFENDANT

PAUL MICHEL BESTER N.O

4TH DEFENDANT

(Each in their capacity as trustees of the Voordeel Trust)

Coram: Lever AJ

JUDGMENT

L Lever AJ

1. This is an application to consolidate two civil matters under the provisions of Rule 11 of the Uniform Rules of Court (the Rules). This application itself was brought in terms of Rule 6(11) of the Rules. The two matters which the applicant seeks to consolidate are: firstly, a civil action against the first to fourth respondents who are respectively the first to fourth defendants in this civil claim brought under case number 1388/14; and secondly, a matter that started its life as an interpleader brought under case number 964/14 which was subsequently referred to trial in a Court Order made by agreement.

2. Rule 11 of the Rules provides:

"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 regards to the further procedure, and may give one judgment disposing of all matters in dispute in the said actions."

3. The principles to be applied when considering whether two separate actions should be consolidated can be summarised as follows:

3.1. From the wording of Rule 11, set out above, the main consideration is 'convenience'. In this context convenience refers to the convenience of the parties, witnesses and the Court.¹

3.2. Further, in the context of Rule 11 'convenience' includes a consideration of all the circumstances of the cases concerned and making a value judgment based on such circumstances as to whether it appears to be fitting and fair to the parties concerned to consolidate the said actions.²

3.3. The purpose of consolidating matters in terms of Rule 11 is to enable the determination of issues which are substantially the same in one action to avoid a multiplicity of actions with the associated disadvantages.³

3.4. An important consideration for a court considering the exercise of its discretion to order the consolidation of actions in any particular case is, whether it will save money and avoid a multiplicity of actions.⁴

3.5. The 'associated disadvantages' of a 'multiplicity of actions' mentioned in 3.3 above, refers to the risk of different courts making conflicting findings of facts and credibility of witnesses

¹ Rail Commuters Action Group and Others v Transnet Limited and Others 2006 (6) SA 68 (C) at 88B.

² Mpotsha v Road Accident Fund and Another 2000 (4) SA 696 (C) at 700I-J.

³ Nel v Silicon Smelters (Pty) Ltd and Another 1981 (4) SA 792 (A) at 801D-E and 802B.

⁴ Rail Commuters Action Group v Transnet Ltd, above at 88A; Mpotsha v Road Accident Fund, above at 700H.

in respect of the same facts and witnesses.⁵ This would naturally be undesirable for obvious reasons.⁶

3.6. A court will not exercise its discretion to order a consolidation of actions where this will result in a party suffering substantial prejudice.⁷

4. In order to deal with the consolidation application in its proper context, it is necessary to briefly set out the roles of the respective parties and the basis of the respective claims.

5. In the action brought under case number 1388/14, the applicant in the present application, is the plaintiff (Fincrop). Lusern Koning CC (Lusern Koning), the first respondent in the present application, is the first defendant in the said action. Second, third and fourth respondents in the present application are the second, third and fourth defendants in such action. The second, third and fourth defendants are cited in their capacities as joint trustees of the Voordeel Trust (the Voordeel Trust or the Trust) in the said action.

6. In case number 1388/14 Fincrop claims payment of amounts due under two separate loan agreements made with Lusern Koning. In the said action, Fincrop claims against the Voordeel Trust on the basis that the

⁵ Rail Commuters Action Group v Transnet Ltd, above at 89B.

⁶ Rail Commuters Action Group v Transnet Ltd, above at 89G-I.

⁷ New Zealand Insurance Co Limited v Stone and Others 1963 (3) SA 63 at 69B.

trust executed a suretyship in favour of Fincrop for the debt of Lusern Koning to Fincrop.

7. A combined plea was filed on behalf of Lusern Koning and the Voordeel Trust in the said action. On behalf of Lusern Koning, the following defences were raised in such plea:

- 7.1. Lusern Koning pleads that Fincrop does not have *locus standi* as it ceded its claim against Lusern Koning to Grindrod Trading;
- 7.2. Lusern Koning denies the conclusion of the two loan agreements;
- 7.3. Lusern Koning in any event denies the contention that Fincrop fulfilled its obligations in terms of the relevant loan agreements, if it is found that such loan agreements were concluded; and
- 7.4. Lusern Koning denies that it is liable to Fincrop in any sum.

8. In the said combined plea, and on behalf of the Voordeel Trust, the contention that a valid and enforceable deed of suretyship was executed by the Voordeel Trust in favour of Fincrop was denied on the basis that at the time that the said suretyship was executed, not all of the trustees appointed at the relevant time signed the said deed of suretyship.

9. In the action that started off as an interpleader, being case number 964/14, Fincrop, in an Order obtained by consent, became the plaintiff.

In terms of the same Court Order, the Voordeel Trust represented by the second, third and fourth respondents herein, became the defendant.

10. Originally, the said interpleader was launched by Suidwes Landbou (Pty) Ltd trading as Suidwesfin (Suidwesfin). Suidwesfin held an amount in the order of R3.4 million. Both Fincrop and the Voordeel Trust claimed the amount held by Suidwesfin.
11. In terms of the court Order taken by agreement, referred to above, Fincrop became the plaintiff and filed a declaration, and the Voordeel Trust became the defendant and it filed a plea to the said declaration.
12. In the said declaration Fincrop pleaded that:
 - 12.1. It relied upon the same two loan agreements between it and Lusern Koning pleaded in Case Number 1388/14;
 - 12.2. Lusern Koning failed to pay the monies advanced to it in terms of the said loan agreements and that Lusern Koning was indebted to Fincrop in an amount greater than the amount held by Suidwesfin;
 - 12.3. In terms of each of the said loan agreements Lusern Koning ceded to Fincrop its claim against any third parties arising from the sale of any agricultural products by Lusern Koning to such third parties;
 - 12.4. The sum held by Suidwesfin constituted the proceeds of the sale of wheat cultivated by Lusern Koning with the funds

advanced to Lusern Koning by Fincrop in terms of one of the loan agreements already referred to above;

- 12.5. The relevant wheat delivered to Suidwesfin was delivered by Lusern Koning falsely in the name of the Voordeel Trust. That such false representation was made to thwart Fincrop's claim to the proceeds that flowed from the sale of such wheat. That Fincrop's claim to the proceeds of the sale of such wheat arose from the cession given by Lusern Koning in favour of Fincrop referred to in 12.3 above.
- 12.6. The wheat delivered to Suidwesfin was in fact wheat delivered by Lusern Koning;
- 12.7. The transactions between Lusern Koning and the Voordeel Trust in respect of the wheat delivered to Suidwesfin were concluded unlawfully and in fraud of Fincrop's claim as a creditor of Lusern Koning. In the circumstances, Fincrop is entitled to an order setting aside such fraudulent transactions; and
- 12.8. If such transactions are set aside, then Lusern Koning acquired a claim against Suidwesfin equal to the proceeds of the sale of the wheat concerned, being the sum presently held by Suidwesfin. By virtue of the cession referred to in 12.3 above, Fincrop claims the amount held by Suidwesfin together with the interest that has accrued on the said sum.

13. The Voordeel Trust raises the following defences in the plea filed on its behalf:

- 13.1. Again, the *locus standi* of Fincrop is placed in dispute. The Voordeel Trust alleges that Fincrop ceded any claim which it may have against Lusern Koning to Grindrod Trading. The same defence is raised by Lusern Koning in case number 1388/14;
- 13.2. It denies the contention that the two loan agreements between Fincrop and Lusern Koning were concluded. This defence was also raised by Lusern Koning in case number 1388/14;
- 13.3. It takes the position that if it is found that the said loan agreements between Fincrop and Lusern Koning were in fact concluded, then Fincrop did not fulfil its obligations in terms of such loan agreements. This defence was also raised by Lusern Koning in case number 1388/14; and
- 13.4. It avers that the wheat that was delivered to Suidwesfin was delivered in the name of the Voordeel Trust and that consequently the Voordeel Trust is entitled to the proceeds of the sale of such wheat together with the interest that has accrued on the relevant sum.

14. The above summary of the pleadings is a fair reflection of the issues as they were raised in the pleadings in the respective matters. In the consolidation application, the issues reflected in the respective pleadings were not placed in issue. In the circumstances, the issues raised in the

respective pleadings, as summarised above, were common cause between the parties in the present application.

15. From the above summary, it can be seen that there are a number of issues that are common to both actions and would have to be determined in both actions. These issues include the following:

- 15.1. Whether Fincrop has *locus standi*;
- 15.2. Whether Fincrop and Lusern Koning concluded the two loan agreements relied upon by Fincrop. This is directly relevant in case number 1388/14 and is relevant in case number 964/14, originally the interpleader, on two grounds firstly whether or not the liability exists under such loan agreements and whether Fincrop is entitled to the proceeds of the sale of the wheat by Suidwesfin by virtue of the cession in its favour in such loan agreements;
- 15.3. In the event that Fincrop establishes that such loan agreements were concluded, whether Fincrop had discharged its obligations in terms of such loan agreements; and
- 15.4. Whether Lusern Koning is liable to Fincrop in any amount if such loan agreements were concluded and the actual quantum of such liability.

16. As can be seen from the summary of the issues raised in the pleadings, there are two issues which are not common to both actions. These issues are:

16.1. In case number 1388/14 the issue of whether the Voordeel Trust is a surety for the liability of Lusern Koning to Fincrop. This is not an issue in case number 964/14; and

16.2. In case number 964/14 the question of whether the proceeds of the sale of the wheat delivered to Suidwesfin were cultivated by Lusern Koning with finance from the funds advanced to it by Fincrop are not in issue in case number 1388/14. However, taken together with the associated issues of fraud and false representations relating to the delivery of the wheat to Suidwesfin in the name of the Voordeel Trust, as pleaded by Fincrop, shows that although Lusern Koning is not cited as a party in case number 964/14, it is intimately involved in or connected to case number 964/14.

17. The arguments made by applicant in support of consolidation are:

17.1. That the same witnesses will testify in matters that are common to both actions;

17.2. Consolidation will avoid a multiplicity of actions and the associated duplication of costs, which will result in substantial savings in respect of both costs and time;

- 17.3. Consolidation will avoid the risk and prejudice of conflicting findings of fact and credibility of witnesses by different courts in this division;
- 17.4. Consolidation will not entail substantial prejudice to Lusern Koning or the Voordeel Trust; and
- 17.5. It would be convenient to both the court and the parties if the actions were consolidated.

18. The arguments made by respondents in opposition to consolidation are:

- 18.1. Relying on the authority of the New Zealand Insurance case⁸ respondents argued that applicant bore the onus of establishing that the respondents would not suffer substantial prejudice by virtue of the consolidation. It was submitted on behalf of the respondents that applicant had failed to discharge such onus;
- 18.2. Respondents' appended a letter from applicant's attorney to their answering affidavit. In the said letter applicant's attorney expressed the view that: "...this action is independent of any other litigation between the parties and cannot be consolidated with any such litigation." On behalf of the respondents it is contended that this letter from applicant's attorney is not reconcilable with the allegations now contained in the present application;

⁸ Above at 69C.

- 18.3. On the authority of *International Tobacco Company of South Africa Ltd v United Tobacco Companies (South) Ltd*⁹ respondent submitted that applicant had not explained why it had instituted two separate actions in the first place and that in such circumstances a consolidation should not be ordered;
- 18.4. Lusern Koning is not a party to case number 964/14;
- 18.5. The factual and legal issues are not similar though some allegations are repeated in the two matters;
- 18.6. The respondents do not know at this stage whether there will be any clash of interest and/or whether the Trust and Lusern Koning will use the same attorney and Counsel;
- 18.7. Respondents believe that findings in regard to the allegations of underhand dealings in case number 964/14 may be prejudicial to either the Trust or Lusern Koning.

19. The applicant had raised the issue as to whether both the Trust and Lusern Koning were properly authorised to oppose this application in its affidavits. Having regard to the approach that a litigant's authority should be challenged by using the procedure contemplated in Rule 7, I do not need to discuss this aspect of the case further, save to state that applicant had not used the procedure contemplated in Rule 7.

⁹ 1953 (1) SA 241 (W) at 243F.

20. Turning now to a consideration of arguments raised by the respondents.

Firstly, the submission that the onus of establishing that the respondents would not suffer substantial prejudice lay with the applicant. This is obviously a correct statement of the law, but one has to consider what it means. Here, obviously, context is relevant. If the prejudice is evident from the pleadings or surrounding circumstances, then applicant will have to deal with such potential prejudice and will need to discharge the onus of showing that if there is prejudice it is not substantial.

21. However, if the potential prejudice is not evident from the pleadings and surrounding circumstances then respondents must have an evidential burden to raise the grounds of potential prejudice in their answering affidavits. Otherwise, how would one reasonably expect the applicant to deal with the grounds of potential prejudice the respondents might suffer.

22. In the present case, there are no grounds of potential prejudice that emerge from the pleadings and the surrounding circumstances. The only potential ground of prejudice raised by the respondent appears in paragraph 18.7 above, namely, that a finding on the alleged underhand dealings might prejudice Lusern Koning or the Trust.

23. Since that ground of prejudice has been raised it is convenient to deal with it now. Mr Lotz SC who appeared for the applicant, in dealing with

the respondents' contentions that it would be prejudiced in this way, referred to court to the applicants replying affidavit where the applicant contends if it is found if there is no dishonest conduct on the part of the respondents then clearly neither Lusern Koning or the Trust suffers any prejudice. Applicant then goes on to contend that if the allegations of generally dishonest conduct and collusion are in fact established, then it is not prejudice that either Lusern Koning or the Trust can lawfully complain of in the present application to join the two actions.

24. In my view the contentions of applicant in this regard have substance and I uphold its argument. Since no other grounds of potential prejudice appear from the pleadings or surrounding circumstances and no other grounds of potential prejudice were pertinently raised by the respondents, I find that the applicants have discharged the onus of establishing that the respondents will not suffer substantial prejudice by consolidating the two actions.

25. The next argument raised by the respondent relates to the letter from the applicant's attorney that the matter in case number 1388/14 can be decided independent of any other litigation between the parties. Mr Snellenburg SC who appeared for the respondents conceded that applicant's attorney would not be bound by a mistake in law. In my view, even if the applicant's attorney was mistaken and formed his opinion on the facts, it would not without more preclude the applicant from reconsidering its position. Respondents have not made any

allegations which would, as a consequence, preclude the applicant from reconsidering its position. Accordingly, I do not find this to be a valid ground to oppose the application to consolidate the said actions.

26. Turning now to the point raised by respondents that applicant had not explained why it had initiated two different actions and that consequently the consolidation should be refused. In the circumstances of this case it is not necessary to consider whether the International Tobacco Company case¹⁰ is still good authority in our law, because on the facts of the present case, case number 964/14 was instituted by another party, Suidwesfin, as an interpleader. On these facts, applicant did not make a decision to institute two separate actions. Accordingly, there is no substance to this ground of opposition to the application to consolidate.

27. The next ground for opposing the consolidation application is that Lusern Koning is not a party to case number 964/14. In this regard, the applicant has shown that the conduct of Lusern Koning is so intimately wound up in the issues to be traversed in case number 964/14 that in my view it would be both convenient and beneficial to consolidate the two actions.

28. Then on respondents' behalf, it was argued that the factual and legal issues are not similar though some of the allegations are repeated in

¹⁰ Above.

both matters. On this argument, all I need to do is to refer to the analysis of the issues that emerge from the pleadings set out above. From such analysis, it emerges that the majority of issues to be decided are common to both actions, that it is only two issues that are not common to both actions. The facts do not support this ground for opposing the consolidation application.

29. The last argument raised by the respondents that still needs to be considered is that respondents are not sure if there is a clash of interest between them and they are not sure if they would be using the same legal team. In case number 1388/14 the Trust and Lusern Koning filed a combined plea. In consulting to take instructions to draw such plea it would have been incumbent upon their legal representatives to establish whether there was a clash or potential clash of interests. No such clash prohibited them from filing a combined plea.

30. In the affidavits filed in the present application, neither the Trust nor Lusern Koning drew attention to any specific or potential clash of interest. In these circumstances, to raise this issue in argument is speculative at best and does not establish a basis for either prejudice or inconvenience.

31. The applicant argued that a consolidation will eliminate the risk inherent in multiple actions, being the risk of conflicting findings on fact and credibility in the same Division of this Court. In these circumstances the

applicant has established that it is convenient to consolidate the two matters. As set out above, the applicant has established that there will not be substantial prejudice to either Lusern Koning or the Trust if both matters are consolidated.

32. Considering the issues outlined above I find that it would be convenient to consolidate the relevant actions.

33. The last issue to consider is the question of costs of the application to consolidate. In its Notice of Application to consolidate dated 19 September 2016, the applicant seeks a costs order, whose effect is to reserve the question of costs for the court that hears the consolidated trial.

34. In an application for consolidation this is the appropriate costs order to make, because such court is best placed at the end of the day to determine whether the consolidation was in fact convenient to the parties and the court. However, in the heads of argument filed on behalf of the applicant, it gave notice that it was now seeking a punitive order for costs on an attorney and client scale, including the costs of Senior Counsel.

35. In my view a punitive costs order against the respondents is not justified in the present circumstances and the appropriate court to make a just and equitable costs order would be the court who entertains the consolidated action.

In the circumstances, the following order is made:

- 1) That the actions pending in this Court between the abovementioned parties under Case No: 1388/14 and Case No: 964/14 be and are hereby consolidated in terms of Rule 11 and that the said actions shall hereafter proceed as one action.
- 2) That the costs of this application shall be reserved for determination by the trial Court hearing the consolidated action.



Lawrence Lever

Acting Judge

Northern Cape Provincial Division

On behalf of Applicant :

Attorney's on Record :

On behalf of Respondents:

Attorney's on Record :

Adv. G.M.E Lotz SC

Duncan & Rothman Inc

Adv N. Snellenburg SC

Haarhoffs Inc

Date of hearing:

18 November 2016

Date of Judgment:

31 March 2017