

In the KwaZulu-Natal High Court, Durban
Republic of South Africa

Case No : 5643/11

In the matter between :

Enid Daphne McNeill

Applicant

and

Judith Enid Williams

Respondent

Judgment

Lopes J

[1] The applicant seeks an order consolidating :-

- (a) an action brought by her against the respondent under case number 5643/2011 on the 16th May 2011 ('the first action'); with
- (b) an action brought by her against the respondent under case number 4216/2012 on the 25th April 2012 ('the second action').

I shall refer to this application as 'the consolidation application'.

[2] Save for jurisdiction, the cause of action is identical in each action, being monies lent and advanced by the applicant to her daughter, the respondent. The money has not been repaid. The respondent has pleaded in the first action, and denies that the money was advanced to her as a loan. She claims that it was a donation made to her by her mother. The respondent has not yet pleaded in the second action.

[3] The other point of departure between them is that, in a plea-in-limine, the respondent avers in the first action, that at the time the action was served on her, she was not resident within the Republic of South Africa. Accordingly this court has no jurisdiction to hear the first action against her.

[4] Indeed, in her answering affidavit in the consolidation application, she maintains that she was also not resident in the Republic of South Africa when the second action was served upon her, nor was she resident here when the consolidation application was served upon her. Accordingly, this court has no jurisdiction to hear either the second action or the consolidation application.

[5] The only difference between the two actions as pleaded by the applicant, is that the second one was instituted *ex abundante cautela* by the applicant because she feared that the respondent may succeed in avoiding the consequences of the first action by her plea-in-limine. In issuing the second summons the applicant was apparently confident that the respondent was now

residing in the Republic of South Africa and accordingly subject to the jurisdiction of this court.

[6] The applicant's allegations regarding jurisdiction as set out in the consolidation application may be summarised as follows :-

- a) the respondent moved temporarily to England to assist the applicant's granddaughter. This occurred about two years ago;
- b) when she did so, the respondent had a permanent place of residence at 8 Knightsbridge, 360 Essenwood Road, Durban;
- c) the respondent is married to John H Williams who resides at the same address;
- d) the respondent was appointed as an accounts administrator, manager or clerk in her husband's business, William Batwell & Co, in Musgrave Road in Durban;
- e) the respondent remains a South African citizen, in possession of a South African passport, resides permanently with her husband at the above address and remains employed by him.

[7] In those circumstances the applicant submits that the respondent was, and remains, ordinarily resident within the area of jurisdiction of this court, and is therefore subject to this court's jurisdiction in both actions and in the consolidation application.

[8] The respondent's averments may be summarised as follows :-

- a) she resides permanently in the United Kingdom and is domiciled there;
- b) she is presently in South Africa only for the purpose of attending the trial in the first action which was to have taken place on the 21st and 22nd May 2012;
- c) she denies residing permanently with her husband at 8 Knightsbridge, and further denies that she is permanently employed by him;
- d) she claims to have resided in England for some time, although she does not specify precisely when she went to the United Kingdom, nor does she disclose when she decided that that was her permanent place of residence and domicile.

[9] There is thus a stark dispute of fact on the papers as they stand with regard to the question of jurisdiction. The remaining issues in the case are simple ones, and can be disposed of by hearing the evidence of the applicant and the respondent respectively. That evidence has a very narrow ambit, and a court should be able to dispose of it quickly.

[10] Does the jurisdiction conflict mean that I am precluded from hearing this application? Mr *Stokes SC* who appeared for the respondent very properly drew to my attention the authority in the matter of *Standard General Insurance Co Ltd v Ever Safe Pty Ltd and others* 2000(3) SA 87 (WLD), a judgment by Vorster AJ in which the learned judge considered a similar problem. In that case the plaintiff

sought condonation, in terms of rule 27 of the Uniform Rules of Court, for the late filing of a replication. The defendant took the view that the court had no jurisdiction to entertain the application because the jurisdiction of the court had been denied in the pleadings. It was suggested that in those circumstances the proper procedure was to hold the plaintiff's application in abeyance, and to proceed firstly to determine the issue of the court's jurisdiction. The learned judge held that he could determine the application notwithstanding the jurisdictional challenge, because rule 27 fell within the court's inherent jurisdiction.

[11] Vorster AJ relied on the judgement of Flemming J in Chunguete v Minister of Home Affairs and others 1990 (2) SA 836 (W) where the learned judge analyzed what he referred to as the 'innate jurisdiction' of the high court to decide matters which fall within the 'procedural field' of the court's function.

[12] The present applicant seeks orders which in my view fall directly within the ambit of the procedural functions of this court. In the circumstances the fact that there is a dispute of fact on the question of this court's jurisdiction, does not prevent me from considering the consolidation application.

[13] The applicant seeks to consolidate the two actions in terms of rule 11 of the Uniform Rules of this court which 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 regard to the further procedure, and may give one judgment disposing of all matters in dispute in the said actions.'

[14] *Mr Marais SC*, who appears for the applicant, seeks an order for directions regarding the completion of the pleadings in the second action, together with an order consolidating the two actions for hearing simultaneously. He submits that if I consolidate the actions, the effect would be to preclude the respondent from raising a plea of *lis pendens* in the second action, something I am in any event able to decide now, because there can be no merit in following a procedure which may lead to a duplication of evidence. If I decline to consolidate the actions, the respondent may seek the postponement of the second action until after the first action is determined. This would inevitably lead to the undesirable situation where witnesses testify twice on the same issues, a duplication of costs and undue delay.

[15] The subject of undue delay is raised in the papers on the basis that the applicant is now 91 years old. She wishes to have the issue between her and her daughter resolved and, given her inevitably greatly limited life expectancy, wishes to do so as soon as possible. That she should wish to do so is not unremarkable, particularly given the fact that the resolution of the dispute between them may have some effect on her relationship with her daughter.

[16] *Mr Stokes* SC on the other hand submitted that I should not consolidate the actions, and I should not decide the question of *lis pendens* because the respondent has not yet pleaded to the second action. It was her intention to raise the defence of *lis pendens* in the second action, and the respondent should not be prevented from doing so. He submitted that were I to do so, it would be conflating the perception of delay with a genuine desire by the respondent to raise whatever defence she can to the actions by the applicant.

[17] If I grant the order sought by *Mr Marais* and deny the respondent the ability to raise the defence of *lis pendens*, what prejudice have I caused to the respondent? A similar situation existed in *International Tobacco Company of South Africa Ltd v United Tobacco Companies (South) Ltd* 1953 (1) SA 241 (WLD) where the applicant had instituted an action claiming damages suffered as a result of false statements made by an employee of the respondent. Later, more detailed information became available of additional instances of false and malicious statements, and the applicant instituted a second claim in a similar

amount of damages, basing its second claim on the later statements. The applicant sought to consolidate the actions, or alternatively, to incorporate by amendment the one action in the other and to have a date fixed for hearing.

[18] As is claimed by the applicant in this case, Clayden J in International Tobacco was of the view that it was highly desirable that the two actions be heard at the same time, given that the evidence would largely be the same in each case. The two actions involved the same questions of law between the same parties. The respondent suggested that it would be incorrect to consolidate the two actions because, essentially, the evidence of the false and malicious statements in the second action would colour the allegations in the first action. The respondent submitted that the two actions should be combined as one by amendment, with the one action to be withdrawn.

[19] Clayden J declined to allow the actions to be heard together by amending the pleadings, on the basis that the respondent had proposed an alternative course of conduct which would nullify the possibility of prejudice to the respondent. In those circumstances the suggestion of the respondent was followed because it could not be suggested that it was a method of trial which was prejudicial to the applicant. Clayden J ordered that the applicant be given leave to amend its summons and declaration in the second action, and stayed the first action pending the decision of the second action.

[20] Whilst the course of conduct followed by Clayden J in International Tobacco was workable in that case, it does not appear to be workable in this case, especially if the defendant's allegations of prescription are correct. In her answering affidavit the respondent has expressed her clear intention to plead prescription in the second action.

[21] I agree with Mr *Marais* that the prejudice which will be occasioned to the respondent as a result of consolidation will be that she will be precluded from raising the plea of *lis pendens* in the second action. That must follow as a logical consequence of an order for consolidation because, *inter alia*, rule 11(a) provides that upon consolidation "the said actions shall proceed as one action". If there is only one action before the Court there can be no question of *lis pendens* arising. In any event, the respondent has had every opportunity to deal with the allegations of *lis pendens* in her answering affidavit. The prejudice occasioned to the respondent as a result of the consolidation must bow to the benefits which will accrue if only one trial is heard. In any event, there would seem to be no basis for a defence of *lis pendens* because one of the central issues in the trial – i.e. jurisdiction – is different in each action, and the respondent will not be precluded from raising whatever defences are available to her. Insofar as it is necessary for me to consider the balance of convenience (See Mpotsha v Road Accident Fund and Another 2000 (4) SA 696 (CPD)), it clearly favours consolidation for the reasons set forth above. The same logic will apply to any suggestion of a possible plea of *res judicata*.

[22] As I understand rule 11, it enables me to consolidate actions where it could be convenient for the court to do so. What I have to bear in mind is whether the proposed procedure would be prejudicial to the respondent.

[23] There is no doubt that there would be considerable savings in preparation, costs and the time used in court proceedings were the two actions to be consolidated. The main issue to be decided in the two actions is the agreement concluded between the applicant and the respondent with regard to the monies advanced by the applicant to the respondent. The question of jurisdiction as it arises in each of the two actions may well be similar, although not identical, in that the apparent basis for the respondent's contention that she does not reside within the Republic, as set out in her answering affidavit, uses an historical starting point two years ago. In my view it would be most undesirable and a waste of time and resources were the same witnesses to testify in two different trials about the jurisdictional issues which existed at the time of the commencement of each of the two actions. That can all be done conveniently and expeditiously in one hearing.

[24] Insofar as it may be suggested that the consolidation order should not be granted because the respondent has not pleaded in the second case, and the pleadings are not closed, in my view this will make no difference. I say this because, in her answering affidavit, the respondent had every opportunity to

canvas whatever additional defences may be raised by her. The fact that her answering affidavit may have been prepared under some time constraints does not detract from the position. The two particulars of claim are identically pleaded by the applicant. The respondent has already pleaded to the first action and although prescription may be relied upon by the respondent in the second action, there is no reason why that cannot be pleaded and dealt with by her in the consolidated action. The view of Wessels J in Licences and General Insurance Co. Ltd. v Van Zyl and others 1961 (3) SA 105 (D) insofar as his findings in that matter may constitute authority for the proposition that one cannot order consolidation where the pleadings are not closed in both matters, seems distinguishable. The plea in the second action in that matter may have entailed different pleas and different witnesses. Rule 11 does not require that pleadings be closed, and where affidavits have been filed entitling the parties fully to ventilate the issues between them, as has been done in this case, there can be no prejudice to the respondent. (See also Standard General Insurance Co Ltd).

[25] I accordingly make the following order: -

- (a) the respondent is directed to deliver her plea to the applicant's particulars of claim in the action instituted under case number 4216/2012 on or before the 8th June 2012;
- (b) the applicant is directed to deliver any replication which she may be advised to do, within five (5) days of the receipt of the respondents plea in case number 4216/2012;

- (c) The action instituted by the applicant under case number 5643/2011 is consolidated with the action instituted by the applicant under case number 4216/2012 for hearing simultaneously;
- (d) The Registrar is directed to afford the applicant whatever preference she may be able to, with regard to the setting down of the consolidated action for trial;
- (e) Costs of this application are to be costs in the cause of the consolidated action.