

IN THE HIGH COURT OF SOUTH AFRICA
(ORANGE FREE STATE PROVINCIAL DIVISION)

Application No.: 3260/2001

In the matter between:

THE MAIZE BOARD Applicant

and

F.H. BADENHORST & 18 OTHERS Respondents

CORAM: HANCKE, J

HEARD ON: 14 FEBRUARY 2002

JUDGMENT BY: HANCKE, J

DELIVERED ON: 28 FEBRUARY 2002

This is an application for the consolidation of 19 separate actions, involving about R38-million, instituted in this Court against the 19 respondents, together with ancillary relief.

It appears from the application that during 1994 each of the respondents concluded two contracts with the company, Rainbow Chicken Farms (Pty) Ltd, namely a contract described as “agreement of lease, purchase and sale (broiler)” in which Rainbow leased or purported to lease to each of the respondents broiler houses for periods of approximately 49 days which are referred to as “growing cycles”. At the same time Rainbow sold to each of the respondents its entire stock of day-old chickens situated at the broiler house on the first day of each such growing cycle. At the end of the growing cycle the parties agreed that the respondent would sell to Rainbow the now 49-day old chickens for a price to be agreed upon between the parties. The other contract is described as a “management agreement (broiler)” in which each of the respondents appointed Rainbow to manage the broiler operation created by the agreement of lease, purchase and sale. All these contracts concluded between Rainbow and the respondents are in exactly the same terms and were concluded, on behalf of Rainbow, by the same person during the period May to July 1994.

It is the applicant's case in each of the main actions that these two contracts were simulated and were concluded between each of the respondents and Rainbow with the intention of (i) disguising the fact that Rainbow in fact purchased, and each of the respondents in fact sold, yellow maize to Rainbow and (ii) evading the payment of levies promulgated in terms of the maize marketing scheme by pretending that each of the respondents was a producer of maize concerned for his/her own use to feed his/her own chickens and therefore exempt from the payment of levies.

Approximately 260 summonses were issued against maize farmers who concluded similar contracts in a number of Magistrate's Courts and in the various Provincial Divisions of the Orange Free State, Natal, Northern Cape and Transvaal. Each of the respondents is defending the action and each of them appointed the same firm as attorneys of record as well as locally in Bloemfontein.

It also appears from the application that the respondents filed a plea in which they deny that the contracts were simulated. A further issue which appears from all the pleadings is whether or not the statutory structure for the imposition of levies is unconstitutional.

The rule relating to the consolidation of action provides as follows:

“11. *Consolidation of actions*

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.”

It appears that the word “convenient” in the context of rule 11 is not intended to convey only the notion of “facility or ease or expedience”, but also the notion of “appropriateness”. In **MINISTER OF AGRICULTURE v TONGAAT GROUP LTD 1976 (2) SA 357 (D)**, Miller, J said the following at **363C-D**:

“The word “convenient” in the context of rule 33(4) is not used, I think, in the narrow sense in which it is sometimes used to convey the notion of facility or ease or expedience. It appears to be used to convey also the notion of appropriateness; the procedure would be convenient if, in all the circumstances, it appeared to be fitting, and fair to the parties concerned.”

In an application in terms of the said rule, the Court has a discretion whether or not to grant the application. In **NEW ZEALAND INSURANCE CO LTD v STONE AND OTHERS 1963 (3) SA 63 (C)**, Corbett, AJ stated the following at **69A-C**:

“In such an application for consolidation the Court, it would seem, has a discretion whether or not to order consolidation, but in exercising that discretion the 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. 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.”

The purpose of joinder under Rule 11 is to ensure that issues which are essentially the same are heard and determined in one trial so as to avoid a multiplicity of actions with the concomitant disadvantages and prejudice. The paramount test in regard to consolidation of actions is convenience. Convenience would usually dictate that a

multiplicity of actions and the costs incidental thereto should be avoided. In **NEL v SILICON SMELTERS (EDMS) BPK EN 'N ANDER 1981 (4) SA 792 (A)** the following is said at **802B-C**:

“Die doel van konsolidasie kragtens Hofreël 11 en van voeging kragtens Hofreël 13 is hoofsaaklik dieselfde, dit is, naamlik om geskilpunte wat wesenlik dieselfde is, saam in een saak te laat bereg sodat ‘n veelvuldigheid van verhore met gepaardgaande nadele vermy kan word.”

See also **JACOBS v DEETLEFS TRANSPORT BK 1994 (2) SA 313 (O) at 320A-B.**

Mr Van Schalkwyk, counsel for the respondents, submitted that a consolidation of actions in the instant case will not be convenient other than to the applicant, and will prejudice one or more or all of the respondents. In argument he referred to the fact that the principal and fundamental issue in each of the actions between the parties is whether or not each of the agreements concluded between Rainbow and each particular respondent was a simulated agreement. The applicant bears the *onus* of proving in each case that the agreement between Rainbow and the particular respondent was a simulated or disguised transaction. In order to discharge this onus, the applicant must, in the case of each respondent, establish that -

“... there is a real intention, definitely ascertainable, which differs from the simulated intention. For if the parties in fact mean that a contract shall have effect in accordance with its tenor, the circumstances that the same object might have been attained in another way will not necessarily make the arrangements other than what it purports to be.”

per Innes, CJ in **ZANDBERG v VAN ZYL 1910 AD 302 at 309.** See also

COMMISSIONER OF CUSTOMS AND EXCISE v RANGLES, BROTHERS AND

HUDSON LTD 1941 AD 369 at 381; BIRD v LAWCLAIMS (PTY) LTD 1976 (4) SA 726 (D) at 728F; DIE REGISTRATEUR VAN AANDELEBEURSE v ALDUM,
(unreported SCA case no. 320/2000 delivered 28 November 2001, paragraph [4]).

Mr Van Schalkwyk disputed the applicant's estimate that its own case will last five days and submitted that it will last substantially longer. He pointed out that on the assumption that other witnesses are to be called on behalf of the respondents, the evidence in a consolidated trial will, at best for the applicant, last at least 24 days, which he regarded as "very optimistic". The previous matter of this nature before Bam, AJP (**THE MAIZE BOARD v P.W. MICHAU, O.P.D.**, case no. 2814/96, decided on 20 December 2001) lasted six days. According to counsel the estimated legal costs amounted to R150 000,00 per day, i.e. roughly R900 000,00 over six days. The cost involved in a consolidated trial which lasts for 24 days will be approximately R3,6-million. On the assumption that the respondents are unsuccessful, the burden of the costs would be divided by 19 in which case it will amount to approximately R189 473,68. Even if the costs amount to R200 000,00 it will represent about 22% of the costs of R900 000,00. If the respondents are successful in the consolidated trial the applicant will bear the costs in which case they will enjoy a similar saving. In **NEL v SILICON SMELTERS (EDMS) BPK EN 'N ANDER** (*supra*) the following was stated at **801D-E**:

"Ten tweede is dit om verskeie redes vir die partye gerieflik dat die twee aksies as een verhoor sal word; geen party word daardeur benadeel nie, intendeel, dit skyn tot voordeel van al drie partye te wees. Omdat die aksies as een voortgesit gaan word is die gedingskoste laer en die tydsverloop korter; daar sal ook net een bevinding ten opsigte van dieselfde feitegeskil wees en aldrie partye het belang by die beregting van daardie geskil."

Mr Van Schalkwyk submitted that it will be necessary for all 19 respondents to attend the

proceedings in Bloemfontein. As appears from the summonses issued in the various actions, 12 of the respondents farm in the Harrismith district, 2 are from Warden, 2 from Bethlehem, 2 from Reitz and 1 from Kranskop. This would require them to be absent from their farms for a considerably longer period than would be the case if separate trials were to be run. It is doubtful whether it would be necessary for the respondents to be present during the whole trial.

Mr Gordon submitted on behalf of the applicant that the respondents will be represented by the same legal team during the trial who will be able to provide each one with advice concerning the allegations which may have a bearing on the particular respondent. He also suggested that by providing a typed record, the legal representatives of the various respondents can obtain proper instructions from the respondents without each of them necessarily having to attend the trial during the full duration thereof. In my view it must be accepted that the respondents will have to attend the trial at least when the applicant adduces evidence. According to the applicant's estimate, its own case will last about 5 days, while Mr Van Schalkwyk submitted that it will last substantially longer. Be that as it may, one must accept that each of the respondents will have to be absent from their farms for a longer period than would be the case if separate trials were to be run and that it will involve some inconvenience.

Mr Van Schalkwyk submitted that in a consolidated trial different evidence may be required to meet the case against different respondents, and that the trial will be prolonged for those respondents who require little or no evidence. It may be necessary to call particular witnesses on behalf of certain respondents while it might not be in the interest of other respondents to adduce such evidence. He also submitted that in a consolidated trial it would be tantamount to compelling certain respondents to call witnesses against their own interests. He mentioned the possibility of a conflict of interest which may develop during the trial. Mr Gordon referred to these possibilities as "imaginative speculation". The possibilities mentioned by Mr Van Schalkwyk in his argument appear to me to be academic and very theoretical. Having regard to the judgment in the case of **THE MAIZE BOARD v MICHAU** (*supra*), I am of the view that it is very improbable that any of these possibilities would cause prejudice. They

appear to me to be more apparent than real.

Mr Gordon submitted on behalf of the applicant that if the application for consolidation is not granted, the applicant will experience huge logistical problems to ensure that the dates upon which the various actions are to be enrolled do not coincide. In view of the fact that the same advocates appear on behalf of all the parties, it is impossible to hear more than one at the same time. As far as the preparation of the trials are concerned, separate pre-trial conferences will have to be held in each of the different main actions. Furthermore, the applicant will have to subpoena the bank officials of the bank at which Rainbow opened bank accounts for each of the respondents *duces tecum* in each of the actions, with concomitant cost of service and conduct fees, whilst should the actions be consolidated, one such a subpoena would be sufficient to obtain the documentation relevant to each of these bank accounts. It is clear that the applicant will suffer great inconvenience if the present application is not granted.

Apart from the possible convenience (or inconvenience) of the parties, the convenience of the Court should also be considered. Consecutive enrollment of the actions in this Division would cause serious disruption of the rolls of the court. Having regard to the previous matter which lasted 7 days, it could last some 57 court days to hear the 19 matters, if all of them proceed. It is important to note that the same witnesses will be called by the plaintiff in each of the actions. This would mean that the various Judges of this Division will have to listen to the same witnesses giving basically the same evidence on 19 different occasions. Various Judges may have to consider and make findings on the credibility of these witnesses and the same issues will come up for decision before different Judges in 19 different actions.

Having regard to all the circumstances of the present application, I am of the view that the convenience occasioned by a consolidated trial far outweighs any prejudice, or potential prejudice, or inconvenience which the respondents may suffer if such consolidation is ordered. A consolidation will save substantial legal costs to the benefit of all parties concerned, including the respondents. Applicant is therefore entitled to the relief claimed.

Accordingly the following orders are made:

1. An order is granted in terms of prayers 1, 2, 3 and 4 of the notice of motion.
2. The respondents are ordered to pay the costs jointly and severally, the one paying the other to be absolved.

S.P.B. HANCKE, J

On behalf of Applicant: _____ Adv. D.A. Gordon, SC
instructed by
Bezuidenhout & Milton Earle Incorp.

On behalf of Respondents: _____ Adv. G.D. van Schalkwyk, SC and
Adv. D. Mitchell, SC
instructed by
Webbers

/scd