

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE Number: **64872/2020**

54987/20201

- (1) REPORTABLE: YES/NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED: YES/NO

20245

03/20



In the matters between: -

RESILIENT PROPERTIES (PTY) LTD

FIRST APPLICANT

(Registration Number: 2002/016890/07)

SNOWY OWL PROPERTIES 300 (PTY) LTD

SECOND APPLICANT

(Registration Number: 2003/017970/07)

BRITS X 98 HOME OWNERS ASSOCIATION

THIRD RESPONDENT

NPC

(Registration number: 2008/009639/08)

AND

THE LEGAL PRACTITIONERS FIDELITY FUND FIRST RESPONDENT

MADIBENG LOCAL MUNICIPALITY SECOND RESPONDENT

JUDGMENT

BAQWA, J

Introduction

- [1] The applicants herein seek a consolidation of two actions pending before this court being case numbers 64872/2020 and 54987/2020.
- [2] Case 64872/2020 has been brought against the Legal Practitioners Fidelity Fund (FF) for the recovery of R28 196 848.86 (Twenty-Eight Million One Hundred and Ninety-Six Thousand Eight Hundred and Forty-Eight Rand and Eighty-Six Cents) which was entrusted by the applicants to the applicant's former attorney, Mr Gerard Jacques du Plessis (Du Plessis) for payment to the Madibeng Local Municipality (Madibeng) in respect of municipal charges and which was stolen by Du Plessis.
- [3] Case number 54987/2020 was instituted by the applicants during 2020 against Madibeng also for the recovery of stolen funds.
- [4] The consolidation application is opposed by Madibeng but it is supported by the FF which has filed an affidavit in support of consolidation.

The Law

- [5] The purpose of consolidation actions in terms of rule 11 is to have issues which are substantially similar tried at a single hearing in order to avoid the disadvantages attendant upon a multiplicity of trials. In many cases joinder is a form of consolidation and consolidation a form of joinder. *Nel v Silicon Smelter (Edms) Bpk.*¹
- [6] The convenience of consolidation includes matters such as commonality of parties and issues, limitation of costs and the more efficient use of court time and resources. It also serves to avoid the risk of contradictory outcomes on a single issue if the dispute were to be determined in separate actions, *Kriel No v Rockland Group Holdings (Pty) Ltd; Born Free Investments 247 (Pty) Ltd v Kriel NO.*²

Applicant's case

- [7] The claim against FF, case number 64872/2020 is based on section 26 of the old Act and on Section 55 (1) of the Legal Practice Act (the Act) Act and the effect of these provisions is that the FF is liable to reimburse persons who suffer monetary loss as a result of theft of money or property given in trust to an attorney or advocate or any person employed in that practice or supervised by that attorney or advocate. Liability will however ensue if the plaintiff has exhausted the possibility of recovering the pecuniary loss from a party other than the FF.

¹ 1981 (4) SA 792 (A) at 802.

² unreported, WCC case no 5417/2014, 9609/2014 and 12862/2019 dated 24 November 2021 at paragraph [22].

- [8] The issues for determination are whether the deposits into Du Plessis's account constitute an entrustment in terms of section 26 and 55 of the respective referenced legislation, the quantum of the claim and the alleged failure on the part of the plaintiffs to recover the damages suffered from the other person liable for such recovery.
- [9] *The fund pleads in paragraph 22 of the plea "The monies stolen by Du Plessis, were so stolen in collusion with an employee of Madibeng Municipality, Trevor Nkateko Mokhawana who was acting in the course and scope of his employment with that municipality."*

The action under case No 54987/2020

- [10] The above claim is instituted against Madibeng based on the allegation that Mukhawana, in the course of his employment with Madibeng with his conferred authority was sufficiently linked to the fraudulent conduct and his everyday scope of employment to result in vicarious liability of the Madibeng Municipality for the damages suffered as a result of the fraudulent scheme.

The link between the pending actions

- [11] Section 79 of the Act directs a plaintiff against the FF to first seek recovery of the amount claimed from any other person liable for such recovery. Section 49 of the old Act contains a similar provision regarding the exhaustion of all remedies at the plaintiff's disposal as a precondition to recovery of damages from the FF.
- [12] The applicants therefor, by statutory prescript, have an obligation to first attempt

recovery of damages from third parties that may also be liable with the logical implication that the vicarious liability of Madibeng will have to be canvassed in both actions against FF and the action against Madibeng.

- [13] Consequently, should the action not be consolidated, all of the evidence relevant to the vicarious liability of Mukhwana would have to be led separately in both actions, and witnesses testify and be cross-examined twice on the same issues with the resultant inconvenience, wastage of resources, unnecessary repetition of evidence, the possibility of contradictory outcomes and duplication of costs.

Proposed consolidated particulars of claim

- [14] A proposed consolidated particulars of claim have been annexured by the applicants in a format which first seeks judgment against Madibeng in the amount of R28 196 848.86. In the event of a court finding Madibeng not liable, judgment is sought against the FF being the party liable for damages in terms of the Act, suffered as a result of entrusted monies.

- [15] As provided in the Act the proposed particular of claim seek to ensure that the case against the FF would proceed only after the court has ruled out any claim against Madibeng.

- [16] It is the respondent's contention that if consolidation were to be granted, the result would be a merger of two separate trials into one which would prolong a fairly confined claim against Madibeng and that this would be the antithesis of what is contemplated in Rule II of the Uniform Rules of court and that such an outcome would constitute the opposite of convenience.

[17] A significant caveat has been issued by the Supreme Court of Appeal regarding consolidation of cases in *City of Tshwane Metropolitan Municipality vs Blair Atholl Homeowners Association*³ to this effect. Careful thought should be given to a separation of issues and that a full ventilation of all the issues is more often than not the better course which might ultimately prove expeditious. This calls for a closer look at the point of origin of the current application.

[18] The applicants lodged a claim with the FF on in February 2008 on the basis of its erstwhile attorneys, Du Plessis, having stolen money which had been entrusted to him for payment of monthly rates and taxes to Madibeng.

[19] *The FF rejected the applicant's claim on 22 January 2020 "on the grounds that there was no entrustment as contemplated for in section 26 of the Attorneys Act 53 of 1979."*

[20] Further correspondence was addressed to the applicant on 27 October 2020 which inter alia advise the applicants as follows:

20.1 Clients who had entrusted funds stolen in accordance with section 26 of the Attorneys Act enjoy protection by operations of the statute.

20.2 Not all moneys are covered by the fund's mandate as set out in the Attorneys Act and/or the Legal Practice Act 28 of 2014 which prescribes the Legal Practitioners Fidelity Funds powers and duties.

[21] The applicants instituted a claim against the FF under case number 64872/2020

³ [2019] 1 ALL 291 (SCA) para 2.

and challenged the FF's repudiation of the claim in December 2020.

[22] The basis of their claim was that in term of section 26 of the Attorney Act alternatively section 55 of the Act the FF is liable to reimburse persons who have suffered monetary loss given in a trust to a trust account practice in the course of the practice of the attorney under the circumstances defined in section 26 of the Attorney Act or section 55 (1) of the Act respectively.

[23] In its plea the FF stated that Du Plessis was merely a conduit for payment of the first and second applicants' debt to Madibeng and that as such, such monies had not been entrusted as contemplated in section 26 of the Attorneys Act.

The delay in applying for consolidation

[24] An important factor to be considered is the time it took for the applicants to reconsider their approach to the litigation against the FF and Madibeng. As stated above the initial action was in 2008.

[25] It took them three years after instituting two separate action to bring this application. This was after all pre-trial processes had been followed.

[26] It is however not just the delay in changing tact but more importantly failure by the applicants to explain the belated change of heart. The absence of an explanation militates against the granting of the explanation. *International Tobacco Company South Africa v United Tobacco Companies (South) Ltd.*⁴

⁴ 1953 (1) SA 241 at 243.

[27] Harms⁵ confirms that a factor that may count against a plaintiff is the fact that he chose to institute separate proceedings. A change of heart should be explained.

Acknowledgement by the applicant

[28] *Significantly the applicants seem to acknowledge the absence of relevance of the entrustment issues to Madibeng. In recognition of this difficulty they submit that "if the claims are consolidated, it will be in all parties' interests for a separation of issues to be ordered so that the court will be requested to rule on the liability of Madibeng."*

[29] This in my view is an important concession that there are material differences in the two action proceedings. Further, the suggestion of the possibility of a separation after a consolidation contradicts the very basis of Rule II of the Uniform Rules of Court in that trial is extended and the cost of the litigation is increased. This can hardly be said to constitute convenience for the parties have already taken steps to ensure that the matters are trial ready.

Conclusion

[30] In my view it cannot be argued in this application that there is sufficient overlap between the entrustment issue and whether or not an employee had acted within the course and scope of his employments at *Madibeng Municipality*.⁶ See *Chhita v Ranchod*.

⁵ *Civil Procedure in the Superior Courts*.

⁶ (A5002/2022) [2022] ZAGP JHC 1259 (15 December) para 57-58.

[31] The respondent has argued, and I accept that the two action proceedings do not concern the determination of substantially the same questions of law or fact, one is a vicarious liability issue whilst the other is an interpretation of statutes issue. The facts and evidential material required do not justify a consolidation of the actions.

[32] Another important consideration is that the two actions are ripe for hearing and that whilst the applicants might be constrained to excuse other claims before proceeding against the FF, Madibeng is not under that statutory constraint: what is convenient for the applicants is not necessarily convenient for Madibeng. The balance probabilities test would therefore weigh against the granting of the consolidation application.

[33] In the result I make the following order:

Order

The application for consolidation of the two actions is dismissed and the applicants are ordered to pay the respondent's costs on a party and party scale jointly and severally the one paying the other to be absolved.


SELBY BAQWA
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

Date of hearing: 10 February 2025

Date of judgment: 20 March 2025

Appearance

On behalf of the Applicants

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