

**REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG**

Case No: 7796/2021

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO

18 June 2025

In the matter between:

C[...] W[...] B[...]

(Identity number: 7[...])

Applicant

and

C[...] E[...] B[...] (BORN V[...] T[...])

(Identity number 8[...])

Respondent

IN RE:

Case No: 6524/2024

In the matter between:

C[...] E[...] B[...] (BORN V[...] T[...])

(Identity number 8[...])

Plaintiff

and

C[...] W[...] B[...]

Defendant

(Identity number: 7[...])

JUDGMENT

BARNES AJ

Introduction

[1] This is an application for consolidation in terms of Rule 11 of the Uniform Rules of Court in which the Applicant seeks the consolidation of:

- a. A divorce action brought by the Respondent (as Plaintiff therein) against the Applicant (as Defendant therein) under case number 7796/2021; and
- b. An action brought by the Respondent (as Plaintiff therein) against the Applicant (as Defendant therein), under case number 6524/22024, for the enforcement of an oral agreement allegedly concluded between the parties in terms of which the Applicant undertook to give the Respondent half of the proceeds of the sale of the former matrimonial home.

[2] In this judgment I shall, for the sake of convenience, refer to the aforesaid actions as “the divorce action” and the “oral agreement action” respectively.

[3] In what follows I set out, briefly, the relevant litigation history between the parties. Thereafter, I shall set out the applicable legal principles and assess, in the light thereof, whether or not the consolidation application ought to be granted.

The Litigation History

[4] The litigation history between the parties is a long and convoluted one.¹ I shall summarise only as much of that history as is necessary to determine the consolidation application before me.

The Divorce Action

[5] On 18 February 2021, the Respondent instituted an action for divorce against the Applicant under case number 7796/2021. The Applicant defended the action and filed a plea and counter-claim.

[6] Notably, the parties were married out of community of property, with the inclusion of the accrual system.

[7] Between 2021 and 2023, the Respondent effected various amendments to her claim. These amendments included a further separate claim for the enforcement of an oral agreement allegedly concluded between the parties. In this regard, the Respondent claimed payment of R1 850 000.00 from the Applicant, being half of the proceeds of the sale of the former matrimonial home.

[8] By November 2023 most of the issues in the divorce had fallen away and the only outstanding issue was the determination of the parties' respective accrual. In particular, arrangements regarding the care and custody of the parties' minor child, who is presently 17 years of old, were no longer a contested issue. The maintenance payable in respect of the minor child was also no longer contested.

[9] As far as the calculation of the parties' respective accrual was concerned, the Applicant, in his counter-claim requested that the Court order that a receiver and liquidator be appointed to calculate this. The Respondent agreed.

[10] The Respondent explains that, since, as at November 2023, there was no longer any triable *lis* in the divorce action, she elected to withdraw her claims. She did so on 2 November 2023 by filing a notice of withdrawal and a consent to the

¹ The litigation history includes a number of interlocutory applications and a Rule 43 application which are not directly relevant for present purposes.

relief sought by the Applicant.

[11] As matters currently stand, therefore, the divorce action is undefended.

The Oral Agreement Action

[12] On 24 January 2024, the Respondent instituted action against the Applicant for the enforcement of an oral agreement she contended had been concluded between the parties during the marriage. The Respondent pleaded that the terms of the oral agreement were the following:

- a. The Respondent would vacate the matrimonial home;
- b. The Applicant would market and sell the matrimonial home;
- c. Upon the sale of the matrimonial home, the Applicant would pay the Respondent 50% of the nett proceeds of the sale, alternatively 50% of the municipal value of the property, whichever was the lesser amount.

[13] The Respondent pleaded further that:

- a. She vacated the matrimonial home on 1 January 2021; and
- b. On or about 18 April 2023, the Applicant sold the matrimonial home for R3 700 000.00, which was less than the municipal value of the property.

[14] The Respondent accordingly claimed the amount of R1 850 000.00 from the Applicant pursuant the oral agreement.

[15] The Applicant defended the oral agreement action and filed a plea and conditional counter-claim. The Applicant denied the existence of the oral agreement, but claimed, in the alternative, if the court found that the agreement had been concluded, that the Respondent was liable to pay him 50% of the nett proceeds from the sale of a second immovable property registered in the Respondent's name.

The Parties' contentions in this Application

[16] The Applicant seeks the consolidation of the actions on the grounds that they overlap. This is so, says the Applicant, because *“the factual finding [pertaining to whether or not the alleged oral agreement was concluded] will be crucial to the calculation of the accrual and whether these monies are to be disregarded or not.”*

[17] The Applicant contends that it is therefore convenient to consolidate the actions. On the question of prejudice, the Applicant contends as follows:

“The divorce court will be unable to determine this dispute in the absence of a finding in the [oral agreement action]. The divorce action will therefore be delayed until the [oral agreement action] is finalised and the Applicant will have to continue paying interim maintenance for the full period in circumstances in which no such obligation further exists.”

[18] The Respondent opposes the consolidation application on two key grounds:

- a. First, the Respondent points out that the divorce action is undefended and that there is therefore no *“lis”*, *“dispute”* or *“quarrel”* before the Court, with which the oral agreement action can be consolidated.
- b. Second, the Respondent argues that since the Applicant’s claim against the Respondent has not been proven, it does not constitute a liability in his estate and therefore does not impact on the calculation of the parties’ accrual.

[19] There is merit in the Respondent’s arguments as will become evident below. Before evaluating the parties’ arguments, however, it is instructive to set out the applicable legal principles.

The Applicable Legal Principles

[20] Uniform Rule of Court 11 allows a court to consolidate separate cases *“where separate actions have been instituted and it appears to the court convenient to do so”*. The purpose of consolidation is to avoid a multiplicity of proceedings, based on the same or substantially similar facts or issues. By having one trial for related

matters, courts aim to save time and costs and prevent different courts from reaching inconsistent decisions on the same questions.²

[21] In the exercise of its discretion whether or not to grant consolidation, a court must weigh two primary considerations, namely: convenience and the absence of substantial prejudice.

Convenience

[22] The applicant in a consolidation application bears an onus to show that a single combined hearing will be more convenient in a broad sense. Convenience in this broad sense connotes not only expedience or ease, but appropriateness in the sense that the procedure would be convenient, if in all the circumstances of the case, it would be fitting and fair to the parties concerned.³ This typically requires a substantial overlap in the factual and legal issues concerned such that much of the same evidence would be relevant in both cases.⁴

Absence of Substantial Prejudice

[23] Even if some convenience is shown, a court must be satisfied that consolidation would not unduly prejudice the other party. The applicant in a consolidation application bears the onus to prove that the other side will not suffer significant harm or disadvantage as a consequence of having the cases combined. If consolidation would cause substantial prejudice to a party a court may refuse it even if there would otherwise be a balance of convenience in favour of consolidation.⁵

[24] Importantly, one recognised form of prejudice is delay. The courts have held that consolidation should be refused if it would involve considerable delay in the resolution of one of the matters.⁶

² *C v R* [2022] ZAGPJHC 1015 (15 December 2022) at para 38.

³ *Mpotsha v Road Accident Fund* 2000 (4) SA 696 (C) at 699.

⁴ See *C v R* generally.

⁵ *C v R* at para 32.

⁶ *C v R* at para 55.

Evaluation

[25] This is a case in which there is insufficient overlap between the two actions to justify consolidation. While both actions involve the same parties and relate broadly to the financial consequences of their divorce, the legal and factual issues involved in both cases are quite different. Not only are the issues different, but crucially, as the Respondent correctly points out, the divorce action is undefended. Both parties are desirous of obtaining a decree of divorce and are not in dispute regarding the arrangements pertaining to the care and custody of the minor child or the maintenance payable in respect of the minor child. The parties are further in agreement that the court should order the appointment of a liquidator in order to calculate their respective accrual. There is simply no dispute between the parties in the divorce action with which the oral agreement action could be consolidated.

[26] It is not correct, as the Applicant contends, that *“the divorce court will be unable to determine this dispute in the absence of a finding on the oral agreement action”*. Firstly, there is no longer any dispute for the divorce court to determine, and secondly granting of a decree of divorce in this case is not dependent on the resolution or outcome of the oral agreement action.

[27] The Applicant is correct when he states that *“the divorce action will be delayed until the finalisation of the oral agreement action”*. However far from this being a reason to grant consolidation, it is a reason, and a compelling one at that, to refuse it.

[28] The divorce action is undefended and a decree is, presently, ripe for the taking. Consolidating the actions at this stage would effectively put the divorce action on ice and shackle it, interminably, to the opposed oral agreement action as it wends its way through the court process. An uncontested divorce would be held hostage by a separate financial dispute between the parties. During that time the parties would remain in limbo, still married and unable to move on with their lives. The prejudice to the parties, to their 17-year-old son and to the administration of justice is evident.

[29] The courts have explicitly found such delays to be unacceptable. In *C v R* a

full bench of this Court overturned a consolidation application for precisely this reason. There the divorce action (which was defended) had been trial ready and consolidation served to put it on hold indefinitely. The Court ruled this to be prejudicial, holding that there are strong public policy reasons to finalise divorce matters promptly and that unnecessary postponements of divorce matters can be contrary not only to the interests of the parties but also to the interests of justice.⁷

[30] In this case then, neither the requirement of convenience nor that of the absence of substantial prejudice have been met and consolidation must therefore be refused.

[31] It should be emphasised that the refusal of consolidation will not prejudice the Applicant's legal rights in this case. The Applicant's main argument for consolidation is that the accrual calculation might be wrong or require revision depending on the outcome of the oral agreement action. But this argument is misconceived.

[32] Accrual is determined at the moment that the marriage is dissolved (here on divorce). At that point the proceeds from the sale of the matrimonial home are still fully in the Applicant's estate (since the oral agreement action has not yet been adjudicated) and must therefore be included in the Applicant's assets for purposes of the accrual calculation.

[33] If after the divorce, the Respondent succeeds in her separate claim to half the value of the former matrimonial home, then the Applicant will be required to pay that amount to the Respondent pursuant to the judgment. While this might enrich the Respondent beyond the initial accrual amount, this is a consequence not of the accrual system but of the Applicant's separate contractual undertaking (if proven). Legally the Applicant cannot use the pending contract dispute to stall the divorce action. He does however retain the ability to contest that claim in a separate action, and if he wins then no additional payment will be due beyond the accrual. If he loses and must give up half the value of the matrimonial home, then that stems from a valid independent agreement.

⁷ *C v R* at para 56.

Conclusion

[34] For all these reasons, the consolidation application stands to be dismissed. Counsel for both parties agreed that Scale C would be the appropriate scale for an award of costs.

[35] I accordingly make the following order:

Order

1. The application is dismissed with costs on Scale C.

BARNES, AJ
ACTING JUDGE OF THE HIGH COURT,
JOHANNESBURG

Heard: 13 February 2025

Judgment: 18 June 2025

Appearances:

Applicant:

Adv P J Greyling, instructed by William Tintinger Attorneys.

Respondent:

Adv N Strathern instructed by Ulrich Roux and Associates.