

SOUTH AFRICA / JUDGMENT

Forsyth v Botha; Forsyth v Liebenberg and Others (17357/15; 17359/15) [2019] ZAWCHC 19 (27 February 2019) [2019] ZAWCHC 19

COURT

Western Cape High Court, Cape Town

BEFORE

Seale AJ

CASE / FILE NUMBER

17357/15; 17359/15

Source: saflii.org · Research copy typeset by Esheria. Not court-issued or certified.

Source record

IN

THE HIGH COURT OF SOUTH AFRICA

WESTERN

CAPE DIVISION, CAPE TOWN

Case

No.s 17357/15 and 17359/15

ALASTAIR

JAMES FORSYTH

Applicant

and plaintiff in both actions

And

DAVID

HERCULAS BOTHA

First

Respondent

Defendant

in case no. 17359/15

CARL

LIEBENBERG Second

Respondent

DUNVEGAN

WEALTH MANAGEMENT (PTY)

LTD Third

Respondent

ARCAY

CAPITAL PARTNERS (PTY)

LTD Fourth

Respondent

First

to Third defendants in case no.17357/15

CORAM:

SEALE AJ

JUDGMENT

DELIVERED ON WEDNESDAY, 27 FEBRUARY 2019

1. This is an application in terms of Rule 11 of the Uniform Rules for the consolidation of two actions instituted by the same plaintiff against different defendants. The principle question is whether consolidation of the actions would be convenient.

THE PLAINTIFF'S CLAIMS

2. Under case number 177359/15, the plaintiff claims damages from one David Botha in his personal capacity arising from his conduct as the director of two investment companies, both of which have been placed under business rescue. The investment companies operated an investment scheme in which the plaintiff placed funds.
3. It is alleged that Mr Botha breached his duties as a director and that under his directorship the investment companies conducted the investment scheme in breach of their obligations. Mr Botha is also accused of fraud. It is alleged that this conduct caused the plaintiff's losses and occasioned Mr Botha's personal liability in terms of sections 22(1), 76(3) and 218(2) of the Companies Act.
4. These allegations are denied by Mr Botha, who nevertheless does not oppose the consolidation application.
5. The defendants under case number 17357/15 are Mr Liebenberg, who is a financial adviser, and two companies of which he is a director, being the second and third defendants. The defendants under this case number will be referred to as "the Liebenberg defendants". They oppose the consolidation application.
6. The plaintiff alleges that the Liebenberg defendants, in addition to providing investment advice, represented that they would provide

certain supervisory and monitoring services to ensure the security of the plaintiff's investments while under the control of Mr Botha and the investment companies managed by him.

7. It is furthermore alleged that they failed to scrutinise, analyse and monitor the performance of the investment scheme and permitted or acquiesced in conduct which breached the investment companies' obligations to the plaintiff. It was also argued at the hearing that the Liebenberg defendants had acted in concert with Mr Botha and the investment companies.
8. The Liebenberg defendants have denied that the plaintiff has any valid claim, whether against them or against Mr Botha and the investment

companies. This necessarily means that the plaintiff would have to prove the failure of the investment scheme and the reasons therefore

in both the trial against the Liebenberg defendants and the trial against Mr Botha.

9. There is thus a considerable overlap in the triable issues in both matters and without proof of the claims against Mr Botha and the two companies there can be no claim against the Liebenberg defendants.
10. In this judgment I make reference to the parties' allegations as the application will be decided on the basis of the issues as pleaded and which are required to be proved at trial. In deciding this application, however, I make no findings on the merits of the pleaded allegations.

THE APPLICANT'S GROUNDS FOR CONSOLIDATION

11. The applicant claims that it will be convenient to consolidate the two actions so that the issues in common between them, which are substantially similar, may be tried together so as to avoid a multiplicity of actions.
12. Mr Louw, who appeared for the plaintiff, argued that the same underlying facts give rise to both claims and that, if the matters are not consolidated, the plaintiff will have to prove these issues twice in two separate hearings. The result would be that the same witnesses would give evidence twice, the same documents would be entered into evidence twice and that two different courts would be required to decide the same issues on two separate occasions.
13. Furthermore, it was argued that any successful judgment would be required to take into account that the defendants in both actions will be jointly and severally liable to the plaintiff. There is thus a relationship between the orders that will be required to give effect to successful judgments in favour of the plaintiff.

RESPONDENTS' GROUNDS FOR OPPOSING CONSOLIDATION

14. In the answering affidavit, the Liebenberg defendants oppose consolidation on the grounds that it will not be convenient or appropriate and will occasion them "substantial prejudice". The Liebenberg defendants accept that a successful opposition requires a finding of substantial prejudice.

15. In dealing with the issues of convenience and appropriateness in his affidavit, Mr Liebenberg conceded that there are overlapping elements between the two actions. He attempted, however, to emphasise the differences between the claims and he avoided dealing

meaningfully with the similarities as they pertain to the issue of convenience.

16. While it is true that there are differences between what must be proved in the two matters, the opposing affidavit did not pertinently address the fact that the Liebenberg claim requires proof of the debt giving rise to the claim against Mr Botha and the investment companies as a first step to proving the liability of the Liebenberg defendants. In my view, therefore, the conclusion that consolidation of the actions would be convenient is not seriously disputed.
17. The second ground of opposition raised in the opposing affidavit concerns prejudice. The objection is that the Liebenberg defendants will be tainted by the fraud allegations levelled against Mr Botha.
18. During argument, however, a slightly different approach was adopted to that which had been pursued in the opposing affidavit. Convenience, it was argued, should be reduced to a question of costs and whether there is a prospect of a multiplicity of actions. Prejudice was argued on the basis that the plaintiff was required to prove that there is no possibility of prejudice being suffered by any party.
19. It was argued that the Liebenberg defendants would, upon consolidation of the actions, be subjected to increased legal costs because the duration of their trial would be extended by the inclusion of evidence pertaining to the proof of the claim against Mr Botha.
20. The final point raised in argument against consolidation was that the plaintiff's initial election to institute two separate actions precludes him from asking for the consolidation of the separately instituted actions.
21. During argument, it was conceded on behalf of the Liebenberg defendants, correctly in my view, that relevant factors which favour

consolidation include the prospect of a multiplicity of actions and the potential for different decisions on material issues common to both matters.

DISCUSSION

22. Rule 11 of the Uniform Rules of Court provides that:

'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.'

23. Before the introduction of the Rule it had been established that the courts had a wide discretion to grant or refuse an application for the consolidation of actions[1]. The wording of the Rule reaffirms, to my mind, the court's wide discretion and places the test of convenience at the centre of the examination.

CONVENIENCE – MULTIPLICITY OF ACTIONS

24. The general approach[2] is that the court, in exercising its discretion to grant or refuse an order of consolidation, should consider whether there is a likelihood of a multiplicity of actions and the costs attendant upon more than one trial. The correct approach is to consolidate actions where-ever possible in order to avoid a multiplicity of actions.
25. It is apparent from what has been set out above that several of the same issues will arise for decision in both matters and will require evidence from the same witnesses using the same documents.
26. In addition to the waste of resources that would be required by such repetition, there is a possibility, should two trials be held, that the two courts hearing the actions separately may come to contradictory conclusions. This is in itself undesirable.

The courts should not be placed in a position where there is a possibility of conflicting orders being granted by different courts

on the same issues[3].

27. Convenience is the primary consideration for consolidation, and it has been held to connote not only facility, expedience or ease, but also appropriateness in the sense that the procedure is convenient if, in all of the circumstances, it appears to be fitting and fair to the parties concerned[4].
28. In my view therefore, it would be convenient to consolidate the actions so that the exercise will not have to be repeated during a second hearing before a second court. Not only will it be convenient to the parties, but a consolidated trial requiring one judgment[5] will prove to be convenient to the court as well.
29. It is now necessary to consider the opposition to the consolidation based on the assertion that consolidation will cause the Liebenberg

defendants to suffer prejudice.

PREJUDICE – DEGREE OF PROOF REQUIRED

30. The Liebenberg defendants place reliance on the judgment of Corbett AJ, as he then was, in *New Zealand v Stone*[6], where the learned judge held as follows:

“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.”

31. The argument advanced on behalf of the Liebenberg defendants was that the onus rests on the plaintiff to prove that there is no possibility of prejudice being caused to any party.
32. I do not understand the learned judge to have intended to use the word “possibility” in the sense that any possible prejudice which “may happen or be the case”[7] would be sufficient to cause the refusal of the relief. I consider that the word “possibility”, as used in this context, means that there should be likelihood of prejudice occurring.
33. In the premises, I am of the view that once it is found that consolidation would be convenient, a court should be satisfied that there is a likelihood of substantial prejudice being caused to any party before it will refuse to consolidate the actions.
34. This brings me to the question of onus. In the appellate division, as it then was, Corbett JA, as he then was, said the following about onus in *South Cape Corporation (Pty) Ltd v Engineering Management Services (Pty) Ltd*[8]:

“As was pointed out by Davis AJA in Pillay v Krishna 1946 AD 946 at pp 952 – 3, the word onus has often been used to denote, inter alia, two distinct concepts: (i) the duty which is cast on the particular litigant, in order to be successful, of finally satisfying the court that he is entitled to succeed on his claim or defence, as the case may be; and (ii) the duty cast upon a litigant to adduce evidence in order to combat a prima facie case made by his opponent. Only the first of these concepts represents the onus in its true and original sense. In Brand v Minister of Justice 1959 (4) SA 712 (AD) at p 715 Ogilvie Thompson JA called it the overall onus. In this sense the onus can never shift from the party upon whom it originally rested. The second concept may be termed, in order to avoid confusion, the burden of adducing evidence in rebuttal (weerleggingslas). This may shift, or be transferred in the course of the case, depending upon the measure of proof furnished by the one party or the other.”

35. In accordance with these principles, the plaintiff retains the overall onus of satisfying the court in the application. However,

having shown that consolidation will be convenient, the burden of adducing evidence in rebuttal shifts to the Liebenberg defendants who must show that consolidation will cause them to suffer substantial prejudice.

36. This approach is, furthermore, in accordance with the broader principle that:

“... our law generally does not require a party to prove a negative”[9].

THE MERITS OF THE PREJUDICE ARGUMENT

37. As mentioned already, the primary argument for prejudice arises out of concerns that the fraud claims against Mr Botha will taint the Liebenberg defendants in the eyes of the court. The allegations against Mr Botha are serious and include dishonesty, fraud and theft and, it was argued, that the court hearing the evidence might be influenced against the Liebenberg defendants by the atmosphere of fraud.
38. This objection fails to consider that the plaintiff is required to establish his claim against Mr Botha and the investment companies in order for him to prove his claim against the Liebenberg defendants in the Liebenberg action. Furthermore, the duties of supervision and monitoring were imposed so as to prevent fraud or losses. Fraud therefore forms an integral part of the claims against the Liebenberg defendants.
39. During argument, Mr Kantor SC, appearing for the Liebenberg defendants, conceded that proof of the fraudulent conduct of Mr Botha will be necessary for the claims in both trials. He also stated that the Liebenberg defendants would not accept any finding in a separate trial against Mr Botha as definitive of the fraud claims.
40. The spectre of Mr Botha's alleged fraud will therefore rise to face the Liebenberg defendants irrespective of whether the actions are consolidated or whether they are heard separately.
41. As a consequence, consolidation of the actions will occasion no greater reputational prejudice to the Liebenberg defendants than would separate hearings. There is, furthermore, no real likelihood of substantial prejudice arising out of the consolidation of the actions as, in my view, a court will not be influenced against one party by evidence of fraud on the part of another.
42. As far as allegations of financial prejudice are concerned, Jali J held that this concern will "... be cured by an appropriate costs order in the end. On the other hand, there might be substantial financial prejudice and harm which might be suffered by the plaintiff if the two actions were not to be consolidated"[10].
43. I therefore find that there will be no substantial prejudice occasioned to the Liebenberg defendants should the actions be consolidated.

THE PLAINTIFF'S EARLIER ELECTION TO INSTITUTE TWO ACTIONS

44. The election to institute two actions is raised as a "militating factor against consolidation", which I understand to be something less than an absolute barrier to consolidation. Reliance is placed on the judgment of Clayden J in *International Tobacco*[11] which predates the introduction of Rule 11.
45. The Liebenberg defendants rely on the learned judge's obiter comment that "[i]n England before the introduction of a special rule, the practice was that consolidation of actions would not be granted at the instance of a plaintiff who had sued the same defendant in two different actions".

46. There are therefore important differences between the present matter and the scenario sketched in the judgment relied upon. Firstly, this application concerns different defendants in each action and, secondly, Rule 11, which has codified the earlier common law principles, contains no such prohibition. On the contrary, the permissive wording of the rule states explicitly that “any party” may apply for consolidation.
47. In the premises, I find that this objection cannot stand in the path of the consolidation of the actions.

COSTS

48. The usual order as to costs granted in these applications is that, should consolidation be granted, costs stand over for determination at the trial[12].
49. Nothing has been placed before me that might distinguish this matter from the application of the general rule. I can accordingly find no good reason at this stage to deviate from the usual order.

ORDER

50. I accordingly make the following order:

50.1 The two actions instituted under case numbers 17357/15 and 17359/15 are consolidated.

50.2 The question of costs shall stand over for determination at the hearing of the consolidated trials.

SEALE, AJ

- [1] International Tobacco Co of SA Ltd v United Tobacco Companies (South) Ltd 1953
- (1) SA 241 (W) @ p 243A; Beier v Thornycroft Cartage Company; Beier v Boere Saamwerk Bpk 1961 (4) SA 187 (D) at 191 D-E;
- [2] Beier v Boere Saamwerk Bpk 1961 (4) SA (D&CLD) at 191 D-E; International Tobacco supra at p 243B-C
- [3] MEC for Health and Social Development, Gauteng v DZ OBO WZ 2018 (1) SA 335 (CC) at para 15 and 16; Prinsloo NO and Others v Goldex 15 (Pty) Ltd and Another 2014 (5) SA 297 (SCA) para 23
- [4] Mpotsha v Road Accident Fund and Another 2000 (4) SA 696 (C) at 700 I to 701A; Quelane v Minister of Justice and Constitutional Development 2015 (S@) SA 493 (GJ) at 497D
- [5] Nel v Silicon Smelters (Edms) Bpk en ‘n Andere 1981 (4) SA 792 (A) at 801D-E
- [6] New Zealand Insurance Co Ltd v Stone and Others 1963 (3) SA 63 (C) at p 69

- [7] Oxford Online Dictionary definition of possibility: “1. A thing that may happen or be the case. 1.1 The state or fact of being possible; likelihood.”
- [8] South Cape Corporation (Pty) Ltd v Engineering Management Services (Pty) Ltd 1977 (3) SA 534 (A) at 548A – C.
- [9] ST v CT 2018 (5) SA 479 (SCA) at para 40
- [10] Mpotsha v Road Accident Fund and Another 2000 (4) SA 696 (C) at 702 B-D
- [11] International Tobacco Co (SA) Ltd v United Tobacco Co (South) Ltd 1953 (1) SA 241 (W) at p 243
- [12] Beier p 191 E-F and 192E
-

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.saflii.org/za/cases/ZAWCHC/2019/19.html>

CASE PAGE <https://chat.esheria.ai/case-law/south-africa/forsyth-v-botha-forsyth-v-liebenberg-and-others-unknown-topic-awchc-2019>

Prepared on 11 October 2026 · Esheria