

SOUTH AFRICA / JUDGMENT

Kayula N.O. and Others v Department of Roads and Public Works, Province of Eastern Cape and Others, Kayula N.O. and Others v Department of Roads and Public Works, Province of Eastern Cape and Others (2944/2017, 3026/2017) [2017] ZAECHGC 129 (12 December 2017)

[2017] ZAECHGC 129

COURT

Eastern Cape High Court, Grahamstown

BEFORE

M.J. Lowe

CASE / FILE NUMBER

2944/2017, 3026/2017

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IN

THE HIGH COURT OF SOUTH AFRICA

EASTERN

CAPE DIVISION, GRAHAMSTOWN

CASE

NO: 2944/2017

Date

heard:

07

December 2017

Date

delivered:

12

December 2017

In

the matter between:

JOHN
MULENGA KAYULA N.O.
First
Applicant
VUYOKAZI
KAYULA
N.O.
Second
Applicant
JONATHAN
ANDREW RADEMAN AS
NOMINEE
OF F&J ADMINISTRATORS TRUST
Third
Applicant
(in
their representative capacities as trustees of
The
MK Consulting International (MKCi) Trust)
(Respondents
in the Consolidation Application)
and
DEPARTMENT
OF ROADS & PUBLIC WORKS,
PROVINCE
OF THE EASTERN CAPE
First
Respondent
ESDA
PROPERTIES (PTY) LTD
Second
Respondent
(First
Applicant in the Consolidation Application)
HEMIPAC
INVESTMENTS (PTY) LTD
Third
Respondent
STHATHU
FUNDING (PTY) LTD
Fourth
Respondent
(hereinafter
referred to as “the first application”)
AND
CASE
NO: 3026/2017
JOHN
MULENGA KAYULA
N.O.
First

Applicant
VUYOKAZI
KAYULA
N.O.
Second
Applicant
PROVINCE
OF THE EASTERN CAPE
First
Respondent
STHATHU
FUNDING (PTY) LTD
Fourth
Respondent
(hereinafter
referred to as “the second application”)

JUDGMENT

LOWE, J

[1] In this matter, Second Respondent in case numbers 2994/2017 and 3026/2017, as Applicant in an interlocutory application (for convenience hereafter I will refer to the parties as they are in the main application), seeks an order that the two applications referred to above be consolidated to proceed as one application, and that the cost of the application to consolidate be costs in the consolidated application.

[2] The matter is opposed by Applicants in the main applications in their representative capacities as trustees of the MK Consulting

International Trust.

[3] The two applications referred to above seek in the first instance, in Part A of the Notices of Motion an order (pending the final determination of Part B thereof) interdicting First and Second Respondents (in the main application) from implementing the award of a tender in respect of certain office accommodation to Second Respondent (in the main application). Part B seeks the review and setting aside of the decision to award the tender (referred to in Part A) to Second Respondent in the main application together with ancillary relief.

[4] It is common cause that Rule 11 of the Uniform Rules of Court is of application, and that the principal question to be considered is whether it would be convenient for the applications to be so consolidated. The provisions of this rule are applicable to applications by virtue of Rule 6 (14).

[5] The real test, as suggested above, is convenience, which connotes not only facility or expedience or ease, but also that such consolidation is appropriate, if in all the circumstances it would be fitting and fair to the parties concerned. If the consolidation

would cause prejudice to any of the parties consolidation will not be ordered. *Mpotsha v Road Accident Fund and Another*.^[1] The Court has a “very wide discretion to grant or to refuse an application for consolidation” though the onus remains upon Applicant, in the application to consolidate, to establish that the balance of convenience favours

consolidation and that no party will suffer substantial prejudice. *New Zealand Insurance Co Limited v Stone and Others*.^[2]

[6] There was no dispute between the parties in argument as to the appropriate test but rather as to the application thereof on the

facts.

[7] The suggestion in Applicants’ heads of argument, that lack of prejudice has not been sufficiently raised or canvassed by Second

Respondent in the founding affidavit, and that I cannot have regard to the reply in this regard, is over technical in a matter such as this and I do not intend to accede thereto.

[8] What is necessary is for me to consider are the real issues relevant to the question of convenience and any prejudice that may arise to any of the parties in order to reach a proper and just decision.

[9] As to convenience Applicants contend that the two tenders in this matter are not inextricably linked having regard to the difference in the identity of the tenants, the different bid numbers and the difference in usable space required by each of the tenants and the on-site parking requirements of each tenant. Whilst this is true, it does not seem to me in any way to be determinative of convenience.

[10] There is also no doubt that the tenders must be dealt with individually and that it was initially necessary to seek an interim interdict in respect of each. That too in my view does not necessarily dictate any convenience or otherwise. In essence the real issues relied upon by Applicants resisting consolidation are the following: that the factual issues forming the basis of the applications are different having regard to the differences in tender requirements; that the record upon review for each application differs and would have to be separately considered; that each application would have to be adjudicated upon separately; that the applications have already been filed and will need to be considered and argument heard on each separately.

[11] This seems to me to be much merit in the argument by Mr Smuts SC for Second Respondent that the above is almost inevitably the case in any action or application in respect of which consolidation is sought.

[12] Applicants on the contrary contend that the following considerations go to convenience:

[12.1] the parties in both applications are the same;

[12.2] both applications involve the review of decisions made by First Respondent to award tenders to Second Respondent (the Applicant in this application);

[12.3] as it happens the same building has been identified in both tenders;

[12.4] with isolated differences the tender specifications and documents are the same in both;

[12.5] the tenders whilst not necessarily “inextricably linked” will feature prominently in both matters in a similar vein; both bids were submitted by the same juristic person;

[12.6] this being the case, and having regard to the similarities between the two matters between the same parties there will be a significant time and cost saving upon consolidation;

[12.7] many of the documents in the two applications are the same or substantially similar and this should save reading time, let alone the consideration of similar or identical submissions in respect of each.

[13] It seems to me having carefully considered all the papers, the facts and argument, that it is clear that consolidation brings convenience in the sense required. Not only are the same parties involved in substantially similar applications and reviews but these are dependent upon similar documentation, will form the basis of the same or similar submissions in respect of each, the parties being

represented in each case by the same legal representatives, the matter then being able to be dealt with in one judgment with separate

references to each matter as might be appropriate.

[14] As to prejudice, I am entirely unpersuaded that there is any prejudice at all to any party as a result of consolidation, on the contrary it would seem to me almost inevitably that there would be a considerable saving of costs as demonstrated in Second Respondent’s reply.

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

1. The two applications with case numbers 2944/2017 and 3026/2017 are consolidated and shall proceed as one application;
2. Insofar as may be necessary, and upon application therefore, the Registrar shall assign a date for the hearing of the applications hereby consolidated;
3. The costs of and incidental to this application are to be costs in the consolidated application.

M.J. LOWE

JUDGE OF THE HIGH COURT

Obo the Applicant:

Adv I J Smuts SC

Instructed by:

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119 High Street

GRAHAMSTOWN

Obo the Respondent: Adv D H de la Harpe

Instructed by:

Netteltons Attorneys

53 African Street

[1] 2000 (4) SA 696 (C) at 700 E-F.

[2] 1963 (3) SA 63 at 69A – B.

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Prepared on 12 October 2026 · Esheria