

SOUTH AFRICA / JUDGMENT

Lennox Hamilton Price v Chantilly Trading 91 (Pty) Ltd ; Lennox Hamilton Price v Bowes Mcdougall Incorporated (5431/2017;713/2018) [2019] ZAECGHC 20 (5 March 2019)

[2019] ZAECGHC 20

COURT

Eastern Cape High Court, Grahamstown

BEFORE

Poswa-Lerotholi

CASE / FILE NUMBER

5431/2017;713/2018

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IN

THE HIGH COURT OF SOUTH AFRICA, EASTERN CAPE DIVISION, GRAHAMSTOWN
CASE

NO: 5431/2017

In

the matter between:

LENNOX
HAMILTON PRICE
Applicant/Plaintiff
and
CHANTILLY
TRADING 91 (PTY) LTD
Respondent/Defendant

In the matter between:

Case
No. 713/2018
LENNOX
HAMILTON PRICE
Applicant/Plaintiff
And
BOWES
McDOUGALL INCORPORATED
Respondent/Defendant

JUDGMENT

Poswa-Lerotholi, AJ

- [1] This is an application in terms of Rule 11 of the Uniform Rules of Court for the consolidation two actions, Lennox Hamilton Price v Chantilly Trading 91 (Pty) Ltd, Case No. 5431/2017 and Lennox Hamilton Price v Bowes McDougall Incorporated, Case No. 713/2018. The applicant, Lennox Hamilton Price, (“Mr Price”) seeks an order to consolidate two actions which emanate from the sale of immovable property to Chantilly Trading 91 (Pty) Limited (“Chantilly”). Bowes McDougall Incorporated (“Bowes McDougall”), acted as conveyancers appointed by Mr Price, in the transaction. Both Chantilly Trading and Bowes McDougall opposed the application for consolidation. Bowes McDougall lodged a counter-application to stay the action in Case No. 713/2018 set down for the 19 March 2019, pending the finalisation of the action against Chantilly.
- [2] The following facts are common cause. The actions arose from the sale of the Nooitgedacht Farm No.13, Stormberg Divisional Council, Tarka Road (“the property”). The purchase price was R5 072 220. 00, a Deed of Sale was concluded between Mr Price and Chantilly. In terms of the said agreement Chantilly undertook to pay the value added tax (“VAT”) on the sale. The property was transferred to Chantilly on 4 June 2013. The VAT on the purchase price was not paid, as undertaken. On 9 December 2017, the South African Revenue Service (“SARS”) demanded the sum of R361 574.16 including interest and penalties, which Mr Price paid. In the action against Chantilly, Mr Price seeks to recover from Chantilly the sum of R361 574.16 together with interest and penalties imposed by SARS. Similarly, Mr Price seeks to recover from Bowes McDougall R361 574.16 the penalties and interest paid to SARS based on its failure to ensure the payment of VAT effecting the transfer of the immovable property. Only one of the Respondents can pay the Applicant’s claim, conversely the Applicant cannot recover the monies from both Respondents.
- [3] It was submitted on behalf of Mr Price that it is convenient to consolidate the matters as envisaged in Rule 11 of the Uniform Rules

of Court of in that the matters arise from the same transaction, the sale of immovable property. Additionally, the evidence in support of the claims will be the same, particularly the evidence relating to the failure to pay VAT. The essential facts are common to both actions, the fact that there are different causes of action is of lesser significance, as the same evidence will have to be tendered.

- [1] Furthermore, there are several advantages to consolidating the matters: avoiding the duplication of the evidence will result in a saving of costs; the evidence will be heard once, thus saving on court time; there will be a single finding of fact regarding the evidence. Therefore, it is convenient to consolidate the two applications.

- [4] In resisting the application, Chantilly and Bowes McDougall argued that it would not be convenient that the matters be consolidated. They conceded that there are some facts which are common to both actions. Nonetheless, there are fundamental differences in the actions in that they're premised on separate causes of action and separate contracts. The one is based on a Deed of Sale that involves Chantilly, the purchaser whilst the other action is based on the mandate between Mr Price and the conveyancer, Bowes McDougall's alleged failure to discharge professional obligations. Moreover, there is no lis between Chantilly and Bowes McDougall, if he succeeds in his action, Mr Price can only obtain an order from one of the Respondents.

However

- [5] Mr de La Harpe, on behalf of Chantilly argued that the facts in *Kayula N.O & Another v Department of Roads and Public Works, Province of the Eastern Cape*. Eastern Cape Division, Grahamstown
- [6] (Case No. 2944/2013) (unreported) are distinguishable in that the parties were the same and the issues of law were the same. Whereas in this matter, the claim against the purchaser is in respect of a contract of sale, which is distinct from the claim against Bowe McDougall which relates to a professional mandate. There is no convenience in the consolidation of the matters.
- [7] Ms Watt referred me to the case of *Scholes v Minister of Mineral Resources* 2016 JDR 0885 (GP) ("Scholes") at paragraph 28 where Rabie, J dismissed the application for consolidation on the grounds that the scope of the one application

was much wider than the other and in the final analysis, would result in inconvenience for one of the parties. I agree with Mr Smuts that the facts in *Scholes* are distinguishable from this matter in that the facts in both matters sought to be consolidated herein are very narrow. In the

Scholes matter however, there was a clear imbalance in that, although one matter sought to be consolidated had very narrow issues, the other related to a plethora of issues.[2]

- [8] Ms Watt further submitted that the in both matters there are preliminary issues in the pleadings. For example, the defences differ: Bowes McDougall raised a special plea of prescription, and Chantilly raises different issues in its replication. I am in agreement with Mr Smuts contention that that the defences relate only to legal issues, which can be dispensed with in argument.
- [9] Furthermore, Chantilly and Bowes McDougall argued that there is no nexus, no legal link between them. It was argued by Mr de La Hare on behalf of Chantilly that if the matters were to be consolidated, the Respondents would be prejudiced as each must sit through the hearing of the other in which it has no interest. The two actions are distinct and cannot be heard as one, thus the counter-application for the matters to be heard one after the other. I do not agree. It may be so that neither party is seeking any relief against the other. However, it would be imprudent for the one party to sit idly by, passively watching the proceedings

whilst the evidence concerning the other party is being led. The Deed of Sale will be an integral part of the proceedings as it is the primary cause of the trial. Chantilly and Bowes McDougall respectively, will have to prove that they are not liable for the debt claimed by Mr

Price.

[10] Consolidation will increase the costs for Mr Price should his claim against the defendants fail. Whereas, if the claim succeeds against the one matter, then the other falls away. *Mpotsha v Road Accident Fund*[3] is distinguishable in that at issue was only a single factual dispute; whether the accident occurred. It is not convenient for the parties or the court that the matters be consolidated.

[11] As to the counter-claim, the Bowes McDougell seeks a temporary stay of proceedings pending finalisation of Chantilly matter.

[12] Rule 11 of the Uniform Rules of Court reads-

“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 with regards to the further procedure, and may give on judgment disposing of all in matters in dispute in the said actions.”

[13] The Court has a wide discretion to grant consolidation. The onus rests on the applicant to prove convenience and that there will be no prejudice to the other side.[4] Convenience is paramount; therefore, the Court must first determine whether it is convenient to consolidate the matters. The objects of consolidation are convenience, prevention of a multiplicity of actions to save costs and prevention of conflicting

judgments.[5]

[14] Although convenience is paramount, substantial prejudice to the other side will trump convenience, as stated by Corbett AJ (as he then was) in *New Zealand Insurance Company Ltd v Stone and others* 1963 (3) SA 63 at 69.

“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 the consolidation, to satisfy the court upon these points.”

- [15] Matters in which substantially the same facts or points of law have to be pronounced upon, are tried at a single hearing in order to avoid duplication, save costs and expedite proceedings as per *Nel v Silicone Smelters (Edms) BPK en ander* 1981(4) SA 792 (A) 801-802.
- [16] As to convenience, Mr Price contends that the two matters are premised on the same transaction. The Respondents maintain that, that is where the similarity begins and ends, the nature of the alleged breach of contracts is different. The Defendants argued that should the two matters be consolidated they will be prejudiced as each party will be forced to sit through the trial of the other. This will result in additional costs implications in that the proceedings for two matters, instead of just one, will be longer.
- [17] I do not believe that the arguments raised against consolidation amount to substantial prejudice as envisaged in decided authorities. To the contrary, it will serve to avoid a duplication of evidence. The evidence will only be heard once and save the court's time; there will be a single finding of fact regarding the evidence. As established during argument, the only party that may be affected by an adverse cost order if there is consolidation Mr Price himself.
- [18] The dispute between the parties is crisp. The claim against Chantilly for the recovery of the penalties and interest imposed by SARS, following the non-payment of VAT to SARS as per the Deed of Sale. The claim against Bowe McDougall is founded on the failure to fulfil its professional mandate and ensure that VAT was duly paid to SARS before transfer of the property. Convenience is the paramount consideration. Having regard to the dicta of Musi, J in *Kayula*, "Convenience connotes not only facility or expedience or ease, but also that such consolidation is appropriate, if in all the circumstances it would be fitting to the parties concerned." [6] The fact that the one action is founded upon an Agreement of Sale, whereas the other breach of professional mandate is of no consequence. The Deed of Sale is common to both actions.
- [19] The congestion of the court roll in this Division is well-known, where there is a possibility to save court time through consolidation,

should be encouraged. There is no doubt that the consecutive enrolment of the actions in this Division would add to the problems

with the roll rather than alleviate the clogging of the rolls of the court. Due consideration must be given to the consequences of the dismissal of the application for consolidation. [7] The same witnesses will be called by the plaintiff in each of the actions. This would mean that the two judges of this Division will have to listen to the same witnesses giving basically the same evidence, on each occasion. Different Judges may have to consider and make findings on the credibility of these witnesses and virtually the same issues will come up for decision before different Judges in different actions.

- [20] Having regard to all the circumstances of the present application, I find that the balance of 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.
- [21] In paragraph 2 of the Notice of Motion, Mr Price prayed that the consolidated matters be heard on 19 March 2019, being the date on which Bowes McDougall matter was set down for hearing. In view of the fact that the judgment will be handed down on 05 March 2019, I am not certain about the trial readiness of Chantilly matter and would not want to impose stringent time limits on counsel in the matter. Therefore, I will not specify the date on which the consolidated trials will be heard, I leave that to the parties.
- [22] Having found in favour of consolidation, it is not necessary to consider the counter-application by Bowes McDougall, for the stay of proceedings in Case No. 713/2018.
- [23] Accordingly, the following orders are made:
1. The separate actions instituted in this Court under case no. 5431/2017 and 713/2018 be consolidated.
 2. The respondents are ordered to pay the costs jointly and severally, the one paying the other to be absolved.

S POSWA-LEROTHOLI

Acting Judge of the High Court

Appearances:

(In case no: 5431/2017)

For the plaintiff

: Adv Smuts SC

Instructed by

: Wheeldon Rusmere & Cole Inc

GRAHAMSTOWN

Ref: Mr Brody/Glyn/S20761

For the Defendant

: Adv De La Harpe

Instructed by

: De Jager & Lordan Inc

Ref: JJM Coetzee/an/C4111

(In case no: 713/2018)

For the Defendant

: Adv Watt

Instructed by

: Carinus Jagga Inc

Ref: Ms Carinus/Cornelia

Date heard

: 7 February 2019

Date delivered

: 5 March 2019

[1] Mpotsha v Road Accident Fund 2000

(4) SA 696 (C) at 700I-J

[2] Scholes supra paragraphs 25 – 26

[3] 2000

(4) SA 696 (C) at 700I-J

[4] New Zealand Insurance Co Ltd v Stone and Others 1963

(3) SA 63 (C), Corbett, AJ stated the following at 69A-C:

[5] Nel v Silicone Smelters (Edms) BPK en ander 1981(4) SA 792 (A) 801-802.

[6] Kayula supra at paragraph 5

[7] Maize Board v F.H Badernhorst and 18 Others (Case No. 3260/2001) Free State Provincial Division. (unreported) where the Court had regard to similar considerations.

[7] Maize Board v F.H Badernhorst and 18 Others (Case No. 3260/2001) Free State Provincial Division. (unreported) where the Court had regard to similar considerations.

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