

**REPORTABLE**

**IN THE HIGH COURT OF LESOTHO**

**Held at Maseru**

**CIV/T/192/2011**

In the matter between:

**RELEBOHILE MOTSOMI**

**PLAINTIFF**

And

**SEABATA TSEHLOANE**

**1<sup>ST</sup> DEFENDANT**

**LESOTHO ENERGY RESOURCE**

**2<sup>ND</sup> DEFENDANT**

**CORAM:** S.P. SAKOANE CJ

**HEARD:** 30 NOVEMBER 2021

**DELIVERED:** 03 March, 2022

Neutral Citation: Motsomi v Tsehloane and Another [2022] LSHC 37 Civ (03 March 2022)

**SUMMARY**

Civil Procedure –joinder of parties and consolidation of trials – propriety where full disclosure not made and inconvenience and prejudice to other parties real – application dismissed.

## **ANNOTATIONS**

### **CITED CASES:**

#### **Lesotho**

Metsing v Director of Public Prosecutions (C of A) (CIV) No. 8 of 2021 LSCA 21 (14 May 2021)

Minister of Trade and Industry v Lesotho National Development Cooperation (C of A (CIV)78/19) [2020] LSCA 46 (30 October 2020)

#### **South Africa**

Mpotsha v Road Accident Fund and Another 2000 (4) SA 696 (C)

New Zealand Insurance Co Ltd v Stone and Others 1963(3) SA 63 (C)

Trust Bank of Africa and Another v Western Credit Ltd 1966 (2) 577 (A.D)

Standard Bank of SA (Pty) Ltd and Another v Lesotho National Life Assurance Co. Ltd and Another (4064/2002) [2003] ZAFSHC 4 (13 March 2003)

### **STATUTES:**

High Court Rules, 1980

### **BOOKS:**

Daniels, H. (2003). Morris Technique in Litigation. 5th Edition. Juta & Co. Cape Town, South Africa

## JUDGMENT

### I. INTRODUCTION

[1] This is an interlocutory application for joinder, by which the 1<sup>st</sup> plaintiff seeks the joinder of 2<sup>nd</sup> defendant in the main trial *CIV/T/192/2011* as the 3<sup>rd</sup> defendant. The plaintiff further prays that cases *CIV/T/192/2011* and *CIV/T/384/2012* be consolidated.

[2] The plaintiff seeks the following prayers:

- “1. The Second Respondent be joined as Third Defendant in case number CIV/T/192/2011.*
- 2. Cases CIV/T192/11 and CIV/T/384/2012 be consolidated.*
- 3. In the event that any of the Respondents oppose the application, such Respondent/s shall pay the costs of the application.*
- 4. Further and/ or alternative relief.”*

### II. BACKGROUND

[3] For purposes of clarity it is worth mentioning that this matter was duly filed before this court exactly ten years and eight months ago, as per the court’s date stamp on the civil summons that is, on the 23 March, 2011. This court inherited the matter following the unfortunate passing of the trial judge (*Hlajoane, J.*). Despite that the matter remained dormant until it being activated before me on the 08 November, 2019.

[4] Deponent to the founding affidavit pleads that due to the close proximity between the vehicles involved in the accident there should be joinder and consolidation. Hence due to the respective negligent conduct of the parties the matters are inseparable. In substantiating the prayer for joinder paragraph 26 reads:

*“The parties to the accident that is the subject of both case numbers are exactly the same. The negligence of the Applicants and the Respondents are to be determined from the same evidence in respect of the accident. The conclusions to be drawn from the evidence are dependent on the same questions of law and fact.”*

### III. SUBMISSIONS

[5] Ms. Taka’s submits that since the matters arise out of a chain collision or same chain of events, the parties should be joined and cases consolidated to save costs.

[6] In response, Mr. Lefikanyane submits that in considering the application, the court should ensure that no prejudice is suffered by any of the parties. He submits that the prejudice caused to his client is that the application is meant only to delay the proceedings as it is filed years after closure of the pleadings in 2012. The plaintiff did not do anything and waited for the matter to be set for PTC in 2019. He further submits that the party seeking consolidation bears the onus of disclosure to the satisfaction of the court and in this instance the plaintiff has failed to do so.

#### IV. THE LAW

[7] Joinder of parties and causes of action under Rule 10 (3) of the **High Court Rules, 1980** reads as follows:

“10 (3) Several defendants may be sued in one action either jointly, jointly and severally, separately or in the alternative, whenever the question arising between them or any of them and the plaintiff or any of the plaintiffs depends upon the determination of substantially the same question of law or fact which, if such defendants were sued separately, would arise in each action.”

[8] Consolidation of actions under Rule 11 (1) reads as follows:

“11 (1) Where separate actions have been instituted, the court may order, upon the application of any party thereto and after notice to all interested parties make an order consolidating such actions if it considers it convenient to do so.”

[9] Intervention of parties as plaintiffs or defendants under Rule 12 (1) reads as follows:

“12 (1) Any person entitled to join as a plaintiff or liable to be joined as a defendant in any action, may on notice to all parties, at any stage in the proceedings before judgment, apply to court for leave to intervene as a plaintiff or a defendant. The court may, on such application, make any order, including any order as to costs which it thinks fit and may, if granting such order, give such directions as to further pleadings or other procedure in the action as it thinks fit.”

#### V. DISCUSSION

##### **Joinder**

[10] It is trite that joinder of parties in terms of Rule 10 (3) is the act of bringing additional parties into a lawsuit. In *Trust Bank of Africa*<sup>1</sup>, the

---

<sup>1</sup> Trust Bank of Africa and Another v Western Credit Ltd 1966 (2) 577 (A.D) at 592 A-B

South African rule equivalent to Rule 10 (3) was commented on by *Ogilvie Thompson JA* as follows:

“In terms of Rule 10 (1), several plaintiffs may join in one action against the same defendant if each

*“has a claim, whether jointly, jointly and severally, separately or in the alternative”.*

The prerequisite to such joinder is that the right to relief

*“depends upon the determination of substantially the same question of law or fact which, if separate actions were instituted, would arise on each action.”*”

[11] However, there is a further requirement. The disclosure of causes of action in favour of all plaintiffs and against all defendants must also be made. *Daniels* in reference to the method of pleading states that:

*“In cases where the plaintiffs join in an action under rule of court 10, and, it is suggested, equally where the defendants are joined under the rule, you should have careful regard to the disclosing of causes of action in favour of all the plaintiffs (or against all the defendants) even alternatively....”*<sup>2</sup>

[12] The plaintiff’s application does not make full disclosure of the causes of action in CIV/T/384/2012 which is pending before *Monapathi, J.* That matter was filed after CIV/T/192/11 before me. No reason is given for not seeking joinder soon after closure of pleadings.

---

<sup>2</sup> Daniels, H. (2003). *Morris Technique in Litigation*. 5<sup>th</sup> Edition. Juta & Co. Cape Town, South Africa. Pg. 83

[13] Although counsel for the applicants claims joinder, the net effect of the application will essentially be to usurp the function of another court by seeking *Monapathi J* to surrender a file legitimately allocated to him under the individual docket system or case management system. This cannot be what the rules of court could have anticipated. I am not even told at that stage the matter before *Monapathi J* is.

### **Consolidation**

[14] It also generally accepted that consolidation of actions is the act of combining multiple lawsuits into a single suit. In *New Zealand Insurance<sup>3</sup> Corbett AJ* held that:

“The decisions to which I have referred, and to which I should like also to add the case of *International Tobacco Co of S.A. Ltd v United Tobacco Companies (South) Ltd., 1953 (1) S.A. 241 (W)*, and other cases to which I have referred, appear to establish that there is a distinction between the consolidation of actions separately instituted at the pleading stage and a consolidation of actions separately pleaded merely for the purposes of the hearing... In this particular matter it is clear that the court is concerned with the latter type of consolidation, namely, the consolidation of actions merely for the purpose of the hearing. In such an application for consolidation the Court, it would seem, has a discretion whether or not to order consolidation, but it 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”.

[15] The above cited passage makes reference to the phrase ‘balance of convenience’. It further makes reference to the phrase ‘there is no

---

<sup>3</sup> *New Zealand Insurance Co Ltd v Stone and Others 1963 (3) SA 63 (C) at 68H -69 C*

possibility of prejudice being suffered by any party.’ This suggests, with respect, that the phrases literally means convenience to the court avoiding the risk of doing an injustice to the parties. This means that if consolidation of trials is likely to prejudice a party, then the balance of convenience dictates that the court should not allow the application.

[16] In discussing the two phrases in **Standard Bank of SA**<sup>4</sup> the court held as follows:

“[5] The two prerequisites that must be satisfied before consolidation of the actions can be ordered are the balance of convenience of the parties and the Court and that the consolidation must not substantially prejudice any of the parties. If the balance of convenience does not favour consolidation or there is substantial prejudice to any of the parties, the Court will not order consolidation.

...

#### Convenience

[7] In the case of *The Maize Board v F. H. Badenhorst and 18 Others Case number 3260/2001*, an unreported judgment of the Free State Provincial Division delivered on the 28<sup>th</sup> of February 2002, Hancke J, When discussing convenience said:

‘It appears that the word ‘convenient’ in the context of rule 11 is not intended to convey only the notion of facility or ease or expedience’, but also the notion of ‘appropriateness’. In *Minister of Agriculture v Tongaat Group Ltd 1976 (2) SA 357 (D) Miller, J*, said the following at 363C-D:

‘The word ‘convenient’ in the context of Rule 33(4) is not used, I think, in the narrow sense in which it is sometimes used to convey the notion of facility or ease or expedience. It appears to be used to convey also the notion of appropriateness; the procedure would be convenient if, in all the circumstances, it appeared to be fitting, and fair to the parties concerned.’

...

---

<sup>4</sup> Standard Bank of Sa (Pty) Ltd and Another v Lesotho National Life Assurance Co. Ltd and Another (4064/2002) [2003] ZAFSHC 4 (13 March 2003)



[13] The fact that all possible witnesses would probably testify in one trial, as advanced by Mr. du Plessis in paragraph [8](c) supra, is not a factor that should be taken into consideration when deciding whether consolidation would be convenient to the Court. It is not for the Court to influence proceedings, so that certain witnesses are compelled to testify in a trial, to enable the Court to come to a just decision. It is for the Court to decide the case on the evidence placed before it, as it is not authorised to call witnesses in a civil trial. Therefore it is not a trial Court's duty or privilege to be able to decide a case with all the possible witnesses having testified, but to decide the case on the evidence of those witnesses that the parties elect to call.

...

### Prejudice

[15] Prejudice also exists if a party is forced to forego the advantages that the Rules and the law of evidence provide. In *London and Lancashire Insurance Co Ltd v Dennis NO and Others 1962 (4) SA 640 (D&C)* at 646D-F Wessels J stated:

'I am further of the opinion that if a consolidation of the actions were to be ordered the respondents (or one of them at least) might be prejudiced in not being in a position at the trial to avail themselves of the provisions of the Rules of Court dealing with the procedure at the hearing of actions. It is to be borne in mind that in both actions the burden of proof relating to the matters in issue is upon the plaintiffs. In the normal course of events the plaintiffs would have been entitled and indeed required to lead their evidence first. This Rule further contemplates that a plaintiff will be in a position to place on record the evidence which he wishes to adduce in support of his case. He will be entitled at the conclusion of the case to address the Court first and will moreover have the last word. If the actions were to be consolidated a question might well arise as to the order of precedence as between the different plaintiffs. One or other of the plaintiffs is bound to find himself in a position where evidence destructive of his case is placed on record before he has any opportunity of leading his own evidence. There will in effect be a trial in the sense that in so far as the issue of negligence is concerned the respondents will in turn be plaintiff and defendant. The applicant has not satisfied me that the respondents are not likely to be prejudiced in the conduct of their separate cases by virtually being forced to join as co-plaintiffs in circumstances where their interests do not run together but conflict.'

[19] From the reading of Rule 11 (1) and the authorities, the determinative factors are convenience and prejudice. In *casu*, the applicants failed to aver and/ or prove that consolidation is for the convenience of all parties. It is discernible from the founding affidavit in support of the application

that its sole basis is that the matters should be heard holistically for the convenience of the applicants and to avoid incurring unnecessary costs. No consideration is given to the court's inconvenience and prejudice that might arise against the respondents.

[20] Ms. *Taka* refers to the case of *Metsing v Director of Public Prosecutions*,<sup>5</sup> where the Court of Appeal held that the aim of consolidation is to adjudicate on issues that are substantially similar and the test being convenience. What counsel failed to distinguish is that firstly, the appeal court tries matters on the four corners of a record and does not hear *viva voce* evidence and determine credibility of witnesses. Secondly, before this court there are two different matters already allocated to two judges. The matters referred to in *Metsing* decision were before one court appearing in one roll session. Further, she cites the case of *Mpotsha v Road Accident Fund and Another*<sup>6</sup> by reference to financial prejudice, which betrays the applicant's stance on convenience being only to reduce costs. Both these cases do not advance the applicant's case.

## VI. DISPOSITION

[21] It is not a coincidence that the rules are drafted in the manner that they are. Rule 10 speaks to joinder of parties and causes of action, rule 11

---

<sup>5</sup> *Metsing v Director of Public Prosecutions* (C of A) (CIV) No. 8 of 2021 LSCA 21 (14 May 2021) at paragraph 3

<sup>6</sup> *Mpotsha v Road Accident Fund and Another* 2000 (4) SA 696 (C) at 702A-D

speaks to consolidation of actions while rule 12 speaks to intervention of parties either as plaintiffs or defendants.

[22] A failure to appreciate the different purposes they serve can lead to the undesirable situation, akin to what the Court of Appeal disapproved in ***Minister of Trade and Industry v Lesotho National Development Cooperation***,<sup>7</sup> where, in reference to the proper way of dealing with consolidation cases, *Chinhengo* AJA held as follows:

- “2. The sequence of events leading to the decision of the High Court is not entirely clear largely due to the failure of counsel to set out the facts in simple terms and to place before us the full record of proceedings... This way of handling the consolidation of two cases and the joinder of parties gave rise to at least two of the grounds of appeal, where the appellant complained that the respondents consolidated the two cases and joined the other respondents without the leave of court.
  
3. The proper way of dealing with consolidation of cases and joinder of parties is to ensure that the record of each case stands on its own and, until the court orders a consolidation upon application, the two cases must remain separate and distinct. In relation to joinder of parties, the application therefor must also stand on its own until the court orders joinder. What the respondents did in relation to consolidation of cases and joinder of parties created a thoroughly scrambled egg which has become very difficult to unscramble.”

[23] The applicants have not met the threshold of consolidating the two trials.

I am not persuaded that what they ask for is favoured by the balance of

---

<sup>7</sup> Minister of Trade and Industry v Lesotho National Development Cooperation (C of A (CIV)78/19) [2020] LSCA 46 (30 October 2020)

convenience and that there is no possibility of prejudice being suffered by any of the respondents.

**Order**

[24] In the result the following order is made:

1. The application is dismissed with costs.

---

**S.P. SAKOANE  
CHIEF JUSTICE**

**For the Applicants:** M. Taka

**For the Respondents:** L. Lefikanyana