IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	**YES/NO**
Of Interest to other Judges:	**YES/NO**
Circulate to Magistrates:	**YES/NO**

Case No. 184/2022

In the matter between:

INNOVATIVE FLEXIBLES (PTY) LTD **APPLICANT**

(Registration Number: 2015/165640/07)

and

ITAU MILLING (PTY) LTD **RESPONDENT**

(Registration Number: 2010/0070/07)

CORAM: GUSHA, AJ

HEARD ON: 25 MAY 2023

DELIVERED ON: This judgment was delivered electronically by circulation to the parties' representatives by way of email and by release to SAFLII. The date and time for delivery is deemed to be at 15h00 on 05 SEPTEMBER 2023.

JUDGMENT

INTRODUCTION

[1] The applicant seeks an order that the two actions instituted in this Honourable Court under case numbers 184/2022 and 5441/22 be consolidated and proceeded with as one action under case number 184/2022, essentially as a claim in convention and reconvention.

[2] The respondent opposes this interlocutory application.

[3] The respondent opposes consolidation of the two actions on the following basis;

(a) That it has a right to have its special plea (*Lis alibi pendens*) determined first;

(b) The application for consolidation is premature

(c) The adverse cost implications, the respondent holds the view that two separate trials will be more cost effective than the consolidated proceedings.

(d) Prejudice

(e) The respondent contends that the applicant lacks *locus standi* to launch this application and seek relief in terms of Uniform Rule 11. I hold the view that this opposition is misplaced as this court is seized with the main action/s between the parties.

THE PARTIES

[4] The applicant and the respondent are both duly registered and incorporated private companies.

[5] The applicant in the present matter is the plaintiff in the action instituted under case number 5441/2022 (the Innovative action) and the respondent is the defendant.

[6] The respondent in the present matter is the plaintiff in the action instituted under case number 184/2022 and the applicant is the defendant.

[7] The parties shall be referred to as cited herein.

FACTUAL MILIEU

[8] The facts giving rise to the present application are largely common cause between the parties. In summation they are as follows; On 18 January 2022 the respondent issued summons against the applicant under case 184/2022 (the Itau action) wherein it claimed debatement of its account with the applicant. In this action the respondent's cause of action is premised primarily on an oral agreement for goods sold and delivered for certain packaging materials.

[9] The applicant entered its notice to defend and delivered its plea on the 31st March 2022. On the 8th April 2022 instead of filing a counterclaim, the applicant launched a liquidation application under case number 1661/2022. Said application has since been withdrawn.

[10] Consequent to the withdrawal of the liquidation application, the parties engaged in countless correspondence and or negotiations relating to the late filing of the counterclaim by the applicant. Upon these not bearing the desired result, the applicant instituted action under case number 5441/2022 (the Innovative action), essentially premised on a written agreement.

[11] It bears mentioning that both the Innovative action and the Itau action are based on the same cause of action, the disputed oral / written agreement entered into between the parties for goods sold and delivered.

APPLICABLE LAW

[12] It needs no restating that in terms of the Uniform Rules a court may, if it appears convenient to the court to do so, order consolidation of separate actions.[1]

[1] **11. Consolidation of actions**
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 provision 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 meet with regard to the further procedure, and may give one judgment disposing of all matters in dispute in the said actions.

Convenience is a paramount provision for the consideration in applications for consolidation of actions. A further consideration being the avoidance of a multiplicity of actions and attendant costs.[2] It further needs no restating that the party requesting the consolidation bears the *onus* of showing that that the consolidation will not cause substantial prejudice to the other party.[3]

[13] The learned author Erasmus[4] provides the following apposite elucidation as to the phrase "it appears to the court convenient to do so":

> "The paramount test in regard to consolidation of actions is convenience. It has been held2 that the word 'convenient' connoted not only facility or expedience or ease, but appropriateness in the sense that procedure would be convenient if, in all circumstances of the case, it appears to be fitting and fair to the parties concerned. The overriding consideration is that of convenience of the parties of witnesses and last but not least, of the court.3
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> Convenience of actions will in general be ordered in order to avoid multiplicity of actions and attendant costs. In *Nel v Silicon Smelters (Edms) Bpk*4 convenience was formed, inter alia, in the fact that (i) the consolidated prosecution of the case would reduce costs and expedite the proceedings; (ii) there would be one finding concerning a factual dispute involving a number of parties and (iii) the plaintiff's various claims arising from the same cause of action would be heard in one action." (Footnotes omitted)

[14] A court has a wide discretion to grant or refuse the application for consolidation and may refuse same albeit the balance of convenience favours consolidation if the prejudice to the other party is substantial.[5]

SUBMISSIONS BY THE PARTIES

[15] The parties filed comprehensive heads of argument I shall therefore for the sake of brevity not replicate same herein, save to only briefly refer to the salient aspects thereof. Truncated the arguments are as follows; the applicant contends that the opposition by the respondent is ill-founded in law and fact as it does not

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[2] *Nel v Silicon Smelters (Edms) Bpk* 1981 (4) SA 792 (A), *Mpotsha v Road Accident Fund* 2000 (4) SA 696.
[3] Mpotsha *supra* at 701 C-D.
[4] Erasmus: Superior Court Practice Vol 2 page D1-133.
[5] *Beier v Thornycraft Cartridge Company; Beier v Boere Saamwerk Bpk* 1961 (4) SA 187 (N) at 191), *New Zealand Insurance Co Ltd v Stone* 1963 (3) SA 63 (C) at 69), *Mbana v Balintulo and others* [2021] ZAGPPHC at para 10.

cater for the merits of the litigation and the practical implications of conducting two actions on the same similar issues and facts. Moreover, the applicant contends that save to mention prejudice no facts substantiating same have been placed before the court.

[16] The respondent in turn contends that the applicant has not made out a case for the relief it seeks as it has failed to explain why separate actions were instituted that it now desires to have consolidated. Furthermore that the applicant has not passed muster of the jurisdictional facts for consolidation.

APPLICATION TO THE FACTS

[17] As regard to the convenience of all concerned in the matter, I hold the view that the consolidation of all two actions will be for the convenience of all concerned because the actions are based primarily on the same cause of action, thus the trial preparation for all the actions would be one; the witnesses to be called will be required to give similar evidence on the same set of facts and the attendant costs will be significantly reduced for all parties concerned.

[18] Consolidating the two actions into one will facilitate expedience and ease of process[6] and I daresay will be cost effective, as such will of necessity result in all the issues being addressed without the need for multiple hearings, possible divergent judgments, duplicated costs etc. The respondent argued that a remedy to the impasse between the parties would be a debatement of the account, this they submitted would be dispositive of the litigation between them. Regrettably I cannot agree. The nub of the issue between the parties in the respective actions is the nature of the agreement entered into. Consequently, the debatement of the account will have no value without consideration to the overarching disputes relating to the *causa* for the business between the parties, which is essential and can only be properly ventilated through the consolidated action.

[6] *City of Tshwane v Blair Atholl Homeowners Association* 2019 (3) SA 398 (SCA) at para 50

[19] I further hold the view that the applicant has in its papers and during arguments sufficiently explained the reasons why it was necessitated to launch a separate action which it now seeks to consolidate.

[20] As regards the aspect of prejudice I am not persuaded that substantial prejudice will result to the respondent if the actions are consolidated. If the claims are consolidated the dispute between the parties will proceed as a claim in convention and reconvention. This will result in the expeditious disposal of the litigation between the parties.

CONCLUSION

[21] Resultantly I hold the view that the applicant has sufficiently explained the interlocutory application for leave to file a further affidavit is dismissed with no order as to costs.

COSTS

[22] With regards to what constitutes an appropriate costs order, it is a well-established principle of our law that the general rule regarding costs is that the unsuccessful party pays the costs of the successful party on the party and party scale. Equally established is the principle that the court exercises a discretion when considering an appropriate costs order and should, of necessity, exercise same judiciously.[7] In the present matter I am not persuaded that the respondent ought to be visited with a punitive cost order.

ORDER

[23] In the result I make the following order;

1. The actions instituted in this court under case numbers 184/2022 and 5441/2022 are consolidated under case number 184/2022.

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[7] *Trencon Construction (Pty) Limited v Industrial Development Corporation of South Africa Limited and Another* [2015] ZACC 22 at para 85.

2. The respondent to pay the costs of this application on the party and party scale, such costs to include the costs of counsel.

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NG GUSHA, AJ

On behalf of the applicant	Adv. G.D Harpur SC
Instructed by:	Kramer Weihmann Attorneys BLOEMFONTEIN
On behalf of the respondent:	Adv. P. Zietsman SC
Instructed by:	Noordmans Inc BLOEMFONTEIN