REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 43466/2014

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

20/11/2018
DATE SIGNATURE

In the matter between:

GRACE, WAYNE ALLEN	First Applicant
AGRI-CHALLENGE SA (PTY) LIMITED	Second Applicant
TIDHAR, RAMY	Third Applicant
and	
DPI PLASTICS (PTY) LIMITED	First Respondent
BNOP AGRICULTURE SERVICES LIMITED	Second Respondent
and	
PIMA, JANANT DAJI N.O.	First Interested Party
STANDER, MONIQUE N.O.	Second Interested Party
BOTHA, MARTIN, DEON N.O.	Third Interested Party
VAN DEN HEEVER, THEODORE WILHELM N.O.	Fourth Interested Party
DAVID, GAIRONESA N.O.	Fifth Interested Party

In re:

BNOP AGRICULTURE SERVICES LIMITED	Plaintiff
and	
AGRI-CHALLENGE SA (PTY) LIMITED	First Defendant
TIDHAR, RAMY	Second Defendant
GRACE, WAYNE ALLEN	Third Defendant
RONNIE DENNISON AGENCIES (PTY) LIMITED t/a WATER AFRICA SA (In Liquidation) Registration 2002/012139/07)	Fourth Defendant
DPI PLASTICS (PTY) LIMITED	Third Party

SUMMARY:

Civil Procedure-Actions pending in two divisions of High Court- Transfer of actions- Rule 11 of Uniform Rules of Court, and section 27 of the Superior Courts Act 10 of 2013- when transfer of actions for consolidation may be granted- overriding considerations of convenience, and interests of the parties and costs- the discretion of court-application for transfer and/consolidation granted.

J U D G M E N T

MOSHIDI, J:

INTRODUCTION

[1] In this opposed matter, the applicants seek an order for the transfer of this matter, Case Number 43466/2014 ("*the Johannesburg matter*"), to the High Court of South Africa, Gauteng Division, Pretoria ("*the Pretoria High Court*").

[2] The Notice of Motion cited as interested parties the following: the first interested party is Janant Daji Pima NO, a major male liquidator, practising as such for Matatis Trustees (Pty) Limited, and his capacity as the duly appointed joint liquidator of Water Africa Systems (Pty) Ltd ("*Water Africa*"); the second interested party is Monique Standard NO in her capacity as the duly appointed joint liquidator of Water Africa; the third interested party is Deon Martin Botha NO, also a joint liquidator of Water Africa; the fourth interested party is Theodore Wilhelm van den Heever NO, and the fifth interested party is Gaironesa NO, both as joint liquidators also of Water Africa. Water Africa was previously called Ronnie Dennison Agencies (Pty) Ltd ("*Dennison*").

THE ISSUES

[3] In essence, the applicants seek the consolidation of the Johannesburg matter and the Pretoria matter to be heard together in the Pretoria High Court. Rule 11 of the Uniform Rules of Court provides as follows:

"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 meet with regard to the further procedure, and may give one judgment disposing of all matters in dispute in the said actions."

THE BACKGROUND

[4] The following background is necessary: DPI Plastics (Pty) Ltd ("*DPI Plastics*") was joined as a third party in the main action ("*the first respondent*"), whilst BNOP Agriculture Services (Pty) Ltd ("*BNOP*") is a company registered and domiciled in Zambia, but locally represented, is the plaintiff in the main action ("*the second respondent*"). The second respondent in the Johannesburg matter (Case Number 43466/2014) has instituted action against various defendants, namely the second applicant, the third applicant, the first Dennison, (In Liquidation), and the first applicant (Grace Wayne Allen) as the third defendant ("*the main action*"). The plaintiff also issued a third party notice to DPI Plastics (Pty) Ltd ("*DPI Plastics*"). The cause of action is for damages allegedly suffered by the second respondent (plaintiff) as a result of the alleged supply of defective of PVC pipes and ancillary piping products ("*the piping*"). In the main action, the plaintiff sued the second applicant for certain amounts, and as against the first applicant, also certain amounts therein specified.

[5] In the Pretoria matter, (Case Number 14216/2014), DPI Plastics sued the first applicant (Grace Wayne Allen) as the first defendant and Dennison as the second defendant, respectively, for payment of the sum of R6 848 337,35 (six million eight hundred and forty eight thousand three hundred and thirty seven rand and thirty five cents) with interest and costs. There, the cause of action arose from suretyship signed by the first applicant and Dennison in favour of the third respondent (DPI Plastics). In that action both the first and second defendants dispute both the quantum of the plaintiffs' (first respondent's here) claims and that they are liable to make any payment of any sums to the respondents.

[6] In support of the present application, the applicants contended that the issues to be determined presently (the Johannesburg matter) and the issues to be determined in the Pretoria matter, have significant commonality and overlap greatly. For this contention, the applicants argued that: central to the present dispute is the manufacture of a batch of irrigation piping ordered by Water Africa from the first respondent; the order for piping was received by Water Africa from the second applicant and the first defendant in the Johannesburg matter, and represented by the third applicant who is the second defendant in the Johannesburg matter; the piping was ultimately ordered by and intended for delivery to the second respondent (BNOP) in Zambia. Further that (according to the applicants) thereafter, and after the receipt of the order from the second respondent (BNOP), and second applicant, Water Africa ordered the piping from the first respondent (DPI

Plastics). The order was destined for delivery to a Zambian entity known as Green 2000 ("*Green 2000*"), for installation at various farms in Zambia. However, the consignment during both transportation en route to Zambia, and installation, failed. This was common cause between the parties. However, the cause(s) of the above failure must be determined by a trial court, probably with the assistance of various experts. As a result, the first respondent (DPI Plastics) has instituted action against the first applicant, the deponent to the founding affidavit here (Grace Wayne Allen); Water Africa; the second applicant; and the third applicant, in Johannesburg matter, for the relief described above.

[7] Based on the above, the applicants contended that central to the various claims and defences raised, the following issues have to be proved by the first respondent (DPI Plastics) as plaintiff, in the Pretoria matter and the third party in the Johannesburg matter: the nature, specification and quality of the piping that was ordered and which Water Africa instructed the first respondent to manufacture; whether or not the first respondent performed its obligations in the manufacture of the piping according to the instructions of Water Africa, which would involve expert testimony; the pricing and rates charged by the third party; and that the core issue in dispute between the parties will essentially require expert testimony. It was further contended by the applicants that, the issues in both the Johannesburg matter and the Pretoria matter overlap extents rely, and to pursue two (2) separate trials in two (2) different courts will be a duplication of evidence at unnecessary costs to all parties as well as the courts in question, and that this matter must

therefore be transferred to the Pretoria Division, and thereafter be consolidated with the Pretoria matter.

THE OPPOSITION

[8] The first respondent (DPI Plastics), in opposing the present application, filed an answering affidavit deposed to by its attorney of record (Corlia van Veijeren). . The first respondent is also the third party. In the answering affidavit, the first respondent also raised a point *in limine*, which I deal with immediately below.

[9] The point *in limine* came to this: that the issue raised by the applicants in the present matter, namely the transfer of the Johannesburg matter to the Pretoria High Court, is *res judicata*. That prior to the previous set down of the trial of the Pretoria matter on 15 August 2016, the first applicant (Grace Wayne Allen) and his co-defendants in the Pretoria matter applied for a transfer of the Pretoria matter to the Johannesburg High Court. The application was argued before Fabricius J on 8 August 2016. It is common cause that on the latter date, the application was dismissed. The respondents argued that the issues in that application (Pretoria application) were exactly the same as in the present application, decided upon, and therefore *res judicata* here. The respondents, at least the first respondent, sought an order that the present application be dismissed with costs on attorney and own client scale, and that the first applicant's attorney of record, Mr R C Christie, be ordered to pay those costs jointly and severally *de bonis propriis*, for his

conduct in these proceedings, in particular, for failing to bring to this court's attention that the same application had already been resolved and dismissed in the Pretoria High Court, as well as the failure of the first applicant to inform this court that the Pretoria matter had previously been set down for trial on 8 February 2017.

SOME COMMON CAUSE FACTS

[10] From the answering papers, it was common cause that: the second respondent (BNOP Agriculture Services Limited) is the plaintiff in the main action in the Johannesburg matter; the first respondent (DPI Plastics) was joined as a third party by the second and third applicants; the first respondent had taken an exception to both the third party notice and annexure thereto; the second respondent had also taken exception to the first applicant's plea; these exceptions are being opposed and still have to be argued in the Johannesburg matter; the liquidators of the fourth defendant/interested party, had not been joined in this matter in terms of the Insolvency Act; in the Pretoria matter, the first respondent sued the first applicant and Dennison, *inter alia*, as sureties for the debts of Water Africa (In Liquidation), and as stated elsewhere, in the present matter, the applicants are sued as sureties by the respondent (BNOP) for payment of the sum of R6 848 337,35 (six million eight hundred and forty eight thousand three hundred and thirty seven rand and thirty five cents) together with interest and costs. The applicants in the pleadings, disputed both the quantum of the respondents' claim, and that they are liable to make payment of any sum to the respondent. In short, it

appeared that central to the various claims, counterclaims, and defences raised, and to be proved by the respondent, as plaintiff in the present matter and third party, in the Johannesburg matter, included the following: the nature, specification and quality of the piping that Water Africa instructed the respondent to manufacture; whether or not the respondent performed its obligations in the manufacture of the piping as per the instructions of Water Africa. In discharging the *onus*, the respondent will be obliged to deal with the above issues, and in respect of which expert evidence may be required in order to adjudicate properly what appeared to be the core dispute. In closing argument, the applicants submitted that: the issues in both matters overlap greatly, and pursuing two (2) separate trials in two (2) different courts/divisions will be a duplication of evidence at unnecessary costs to all parties as well as the courts involved; and that the present matter must be transferred to the High Court of South Africa, Gauteng Division, Pretoria, and thereafter be consolidated with the Johannesburg matter in order that overlapping evidence will not be duplicated. The respondent argued otherwise, as shown immediately below.

[11] The respondent argued that, Dennison (trading as Water Africa) was subsequently liquidated, and that the revival of an appeal against the liquidation enrolled for September 2018, will not help matters. In addition, that, in the interim, Water Africa proceeded into business rescue, and book into liquidation, both the business practitioner and the liquidator accepted the first respondent's (DPI Plastics's) claim against Water Africa; that the liquidators of Water Africa were joined by the applicants as interested parties, namely the

first to the fifth interested parties here; that the applicants also attempted to joint DPI Plastics as a third party, but DPI Plastics launched an exception; that the second respondent, as plaintiff (BNOP) also delivered an exception against the defendant's plea. These are pending and the matter was subjected to case management since April this year.

[12] In the heads of argument, the respondent repeated its opposition that: the Johannesburg matter was not nearly ready for trial as there are still two exceptions to be argued; that the present application was an abuse of the process of the court, and it is employed as a time wasting tactic by the first applicant, who is a defendant in both the Johannesburg matter and Pretoria actions; that the Johannesburg matter and the Pretoria matter do not deal with the same issues, and therefore it will not be convenient to join these actions on a future date.

THE SUPERIOR COURTS ACT

[13] I have already at the commencement quoted the provisions of Rule 11 of the Uniform Rules. Section 27 of the Superior Courts Act 10 of 2013, provides as follows:

> "*(1) If any proceedings have been instituted in a Division or at a seat of a Division, and it appears to the court that such proceedings –*
>
> *(a) should have been instituted in another Division or at another seat of that Division; or*
>
> *(b) would be more conveniently heard or determined –*

(i) at another seat of that Division; or

(ii) by another Division,

that court may, upon application by any party thereto and after hearing all other parties thereto, order such proceedings to be removed to that other Division or seat, as the case may be.

(2) An order for removal under subsection (1) must be transmitted to the registrar of the court to which the removal is ordered, and upon the receipt of such order that court may hear and determine the proceedings in question."

THE RULE OF CONVENIENCE

[14] A careful reading of the above provisions, together with those of Rule 11, in my view, seems to suggest persuasively that, the main consideration in applications of this nature, is that of the general rule of convenience, or balance of convenience and/or equity. For example, in *Nel v Silicon Smelters (Edms) Bpk en 'n Ander* 1984 (1) SA 792 (A), it was held, *inter alia*, that on the facts of that case, and for various reasons, it was convenient for the parties if the two actions were heard as one, and that no party would be prejudiced thereby. See also *International Tobacco Co of SA Ltd v United Companies (South) Ltd* 1953 (1) SA 241 (W). The matter in *Rail Commuters' Action Group v Transnet Ltd* 2006 (6) SA 68 (C) concerned a class action by numerous plaintiffs, and others who had each instituted separate action for damages. The question for determination was whether or not the separate

trials of each one of the plaintiffs should be heard separately, or whether they should all be heard together as part of a single composite trial. In finally granting the consolidation of the actions, the Court said:

> *"The Court has a discretion to permit the joinder of parties or causes of action under Rule 10, or the consolidation of actions in terms of Rule 11, on grounds of convenience, especially in order to save costs or to avoid a multiplicity of actions: see Anderson v Gordick Organisation 1962 (2) SA 68 (D) at 72H, Khumalo v Wilkins and Another 1972 (4) SA 470 (N) at 475F-H and Erasmus (op cit) at B1-100. The overriding consideration, I think, at least for the purposes of this case, is that of convenience: of the parties, of witnesses, and, last but not least, of the Court."* (at p 88A-B).

At page 89I-J of the judgment; the Court said:

> *"The convenience which would follow if there were no separation of trials must also be considered. First, as I have said, each witness would have to give evidence only once, as opposed to possibly several or even many times. The undesirability of different courts making conflicting findings of fact or credibility would be excluded. The defendants would not have to be in several different courts at the same time, opposing the claims of various plaintiffs: all of their resources and manpower could be concentrated in one place, viz the court in which the single trial was being conducted."*

(*Cf International Tobacco Co of SA Ltd v United Tobacco Companies (South) Ltd, supra.*) See also *Mpotsha v Road Accident Fund and Others* 2000 (4) SA 696 (C) at p 699D-F. The cases of *Road Accident Fund v Rampukar* 2008 (2) SA 534 (SCA), and *Ngqula v South Africa Airways (Pty) Ltd* 2013 (1) SA 155 (SCA), dealt with, the removal of a trial from the Johannesburg High Court to the Pretoria High Court as envisaged in the Interim Rationalisation of Jurisdiction of High Courts Act 41 of 2004.

[15] From the above, it is plain that considerations such as the convenience of the parties, witnesses, the courts, and the saving of costs are weighty ones. These must apply in the present case, to a very large extent, in my view. If so, the present application must succeed, for several reasons as demonstrated immediately below.

[16] For starters, and briefly, as argued by the applicants: the matters in Pretoria and Johannesburg are inextricably intertwined and relate to the failure of the pipes, consequential damages, the non-payments and other claims. The slight difference is that the Pretoria matter is solely as between the two (2) sureties and DPI Plastics. The liability of the sureties would depend entirely on the liability of Water Africa. In turn, Water Africa's liability will depend on the alleged defective manufacture by DPI Plastics and proof of the claims by the second respondent. On a proper scrutiny of the pleadings, there was a probability that the potential liability of the sureties in the Pretoria matter may well be extinguished as a consequence of the claim of the interested parties (the liquidators). For this reason too, and based on the equity rule, the present matter must be transferred and consolidated with the Pretoria matter. In addition, the same enquiry, or substantially similar one, in the Johannesburg matter will overlap with that in the Pretoria matter. The respondents cannot be prejudiced by the consolidation sought, which is plainly a discretionary matter in the hands of the court. Both the respondents' claims have an interest component which will compensate them for any delay occasioned. The motive of the deponent in the answering affidavit in opposing the instant application on behalf of the first respondent only, was unclear in

the circumstances. Significantly, the second respondent had not filed any opposing papers despite filing a notice of intention to oppose.

[17] The opposition proffered to the present application on the basis that the matter of transfer or consolidation is *res judicata* had no merit at all, in my considered view. The previous application to transfer/consolidate the actions was interlocutory. The application for transfer/consolidation previously launched in Pretoria did not involve the same parties as in the present matter. For example, in the Johannesburg matter, the plaintiff (BNOP) is Zambian based. In the Pretoria matter, the plaintiff is DPI against two (2) sureties. The third party corresponded with the plaintiff in the Pretoria matter and the first applicant here, and cited as a director whereas in the Pretoria matter, he is' cited as a surety.

COSTS *DE BONIS PROPRIIS* ISSUE

[18] As regards the issue of costs *de bonis propriis* order now sought by the respondent, against the applicants' attorney, again, no persuasive basis was made for such a drastic/punitive order. In such a complex matter, accompanied by prolix papers, involving many parties, it was not readily easy to discern and apportion blame in the circumstances of prolonged litigation. The attorney targeted by such costs order was not present in court to defend himself, even though prior notice was given. I conclude therefore on this aspect that, no credible reasons have been advanced for the grant of such

costs order. If I did so, I would offend the *audi alteram partem* rule. In any event, it was a discretionary matter.

FINAL CONCLUSION

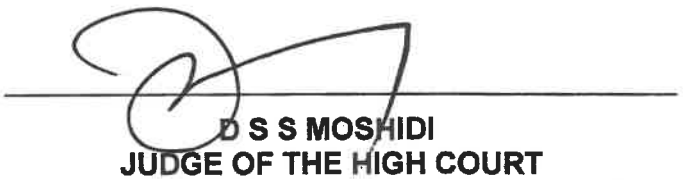
[19] In the end, on the main issue in dispute in the present matter, the overriding considerations of convenience, and balance of convenience prevailed. In short, the considerations were aimed at avoiding the overlapping of actions in different jurisdictions, avoiding witnesses giving evidence in different divisions, at different times, as well as, obviously, the sheer costs of oral evidence, attorneys' costs, counsel and expert witnesses. The multiplicity of actions must be avoided. See *Standard Bank of SA v Fire Equipment* 1984 (2) SA 693 (C) at page 699A-C. The costs of the application now under discussion, must follow the result.

ORDER

[20] The following order is made:

1. The present action issued under Case Number 43466/2014 in the Gauteng Local Division, Johannesburg, is hereby transferred to the Gauteng Division, Pretoria, and to be consolidated with the action under Case Number 14216/2014 in that Division.

2. The opposing respondent(s) shall pay the costs of this application.



D S S MOSHIDI
JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION, JOHANNESBURG

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Counsel for the Respondents:	P van der Berg SC
Instructed by:	Van Veijeren Inc
Date of hearing:	30 May 2018
Date of judgment:	22 November 2018