

REPUBLIC OF SOUTH AFRICA



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

Case Number: 31596/2014

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED: NO
_____	_____
DATE	SIGNATURE

In the matter between:

MAKGABO KLAAS LAMOLA Applicant

and

MARY MMALETOOANE KEKANA First Respondent

SHERIFF OF THE HIGH COURT, SANDTON NORTH Second
Respondent

SHERIFF OF THE HIGH COURT, RANDBURG Third
Respondent

SHERIFF OF THE HIGH COURT VANDERBIJLPARK Fourth
Respondent

JUDGMENT

C BESTER AJ:

Introduction

1. This is an application to consolidate three pending High Court applications brought on behalf of the applicant under case numbers 2014/31596, 2015/28041 and 2015/31015. The applicant was represented by Mr BC Bester. The first respondent appeared in person and opposes the relief.

The Facts

2. The applicant is a senior manager at the South African Reserve Bank. He was previously in a relationship with the first respondent which ended several years ago.
3. According to the first respondent, she became the applicant's customary wife in approximately 2003. The legal status of their relationship is not important in the context of this application, but they acquired three immovable properties during the subsistence of their relationship which are registered jointly in their names and situated in Sunninghill, Randpark Ridge and Vanderbijlpark respectively.
4. Following the end of their relationship, the applicant was no longer interested in owning immovable property with the first respondent. He brought an application under case number 2014/31596 ("***the main application***") to compel the first respondent to:
 - a. place the Sunninghill property on the market, alternatively to dispose of the property by way of public auction in the event that no sale was realised after six months;
 - b. sign the necessary transfer documents to dispose of the Randpark Ridge and Vanderbijlpark properties, alternatively authorise the Sheriff to sign the necessary transfer documents in the event of her failure to do so.

5. The first respondent did not oppose the main application and on 15 June 2015, Ngalwana AJ granted an order in the applicant's favour in terms of which:
 - a. the first respondent was ordered to place the Sunninghill property on the market for sale for a period of six months, alternatively public auction whereafter the nett proceeds would be distributed to the first respondent after settling any amounts that may be due and owing to Investec Bank on the mortgage bond as well as such amounts owing to the applicant;
 - b. the first respondent was directed to sign the transfer documents in relation to the Randpark Ridge and Vanderbijlpark properties.
6. Dissatisfied with what he considered to be the first respondent's failure to give effect to the order of 15 June 2015, the applicant launched a contempt application on 5 August 2015 under case number 2015/28041. When the first respondent did not deliver an answering affidavit, the applicant enrolled the contempt application for hearing before this Court.
7. The contempt application came before Tsoka J on 9 October 2015. The learned judge postponed the proceedings *sine die* and ordered the first respondent to deliver her answering affidavit within fifteen days. The first respondent delivered her answering affidavit in the contempt application on 30 October 2015.
8. Not content with limiting his relief to the enforcement of the order of 15 June 2015, the applicant issued a further application on 2 September 2015 under case number 2015/31015 ("***the Sheriff's application***"). He sought an order that the Sheriff of each jurisdiction within which the properties are situated be authorised to sign the relevant transfer documents to ensure the properties were disposed of on the open market. This application similarly served before Tsoka J on 9 October 2015. The learned judge postponed the application *sine die* and ordered the first respondent to deliver her answering affidavit within fifteen days.
9. She did not deliver her answering affidavit.

10. The Sheriff's application was then enrolled for hearing before Wright J on 12 January 2016. The learned judge ordered the applicant to deliver a supplementary affidavit by 26 January 2016, with the first respondent ordered to deliver her answering affidavit by 19 February 2016.
11. It is not clear from the papers why the parties did not give effect to this order, or why the contempt application was not prosecuted to finality, but when the Sheriff's application next came before this Court on 30 March 2016, Dewrance AJ postponed the application pending the outcome of a rescission application which the first respondent had launched in the interim on 22 February 2016 under the main application's case number ("**the rescission application**").
12. The rescission application was enrolled for hearing on 7 September 2017 before Twala J who postponed the application *sine die* and ordered the respondent (i.e., the applicant in the main application) to deliver his answering affidavit by 19 September 2017. While the applicant delivered his answering affidavit, the first respondent has not yet filed a replying affidavit and no further steps appear to have been taken to prosecute the rescission application to finality.
13. It is therefore not surprising that the litigation appears to have meandered along aimlessly since 2017 without any real intent from the parties to resolve their disputes. In a further salvo, the applicant brought an application on 31 August 2021 under case number 21/35245 to vary the order of Ngalwana AJ in the main application to allow the Sheriff to sign the transfer documents in respect of all of the properties ("**the variation application**").
14. The first respondent replied with an answering affidavit delivered on 16 November 2021. The applicant has not delivered a replying affidavit in the variation application, but the relief is in substance the same as the relief claimed in the Sheriff's application.
15. As matters current stand, there are four applications pending before this Court:
 - i) the rescission application which seeks to rescind the order of 15 June 2015 granted in the main application;
 - ii) the contempt application;
 - iii) the Sheriff's application;
 - iv) the variation application.

16. Replying affidavits are still due in the rescission, contempt and variation applications while answering and replying affidavits remain outstanding in the Sheriff's application. The applicant curiously does not seek a consolidation of the variation application with the remaining three applications but instead submits that if the consolidation is granted, the variation application would most likely have to be withdrawn.

Discussion

17. Rule 11 of the Uniform Rules of Court makes provision for a consolidation of actions that have been separately instituted where it appears to the Court *convenient* to do so. The Rule applies to applications by virtue of Rule 6(14).
18. A Court has a wide discretion to grant or refuse an application for consolidation with convenience the overriding consideration.¹
19. Other important considerations include the avoidance of a multiplicity of applications and the attendant costs of the parties proceeding with separate applications.
20. The onus is on the party requesting a consolidation to show that the consolidation will not occasion substantial prejudice to the other party.² Where a party has brought two or more proceedings but had the right to proceed with the relief in a single action in the first place, a factor which the Court may take into account in granting a consolidation is the explanation for the change in approach.³
21. The relative adequacy of an explanation should however not be treated as dispositive. It is not uncommon for strategic decisions to be made at the

¹ **International Tobacco Co of SA Ltd v United Tobacco Companies (South) Ltd** 1953 (1) SA 241

(W); **Beier v Thornycroft Cartage Company; Beier v Boere Saamwerk Bpk** 1961 (4) SA 187 (D) at 190F-G.

² **Belford v Belford** 1980 (2) SA 843 (C) at 846.

³ **Van Den Berg N.O and Others v Suidwes Landbou (Pty) Ltd and Others; The Land and Agricultural Development Bank of South Africa and Another v Van Den Berg and Others; Suidwes Landbou (Pty) Ltd v Steyn Attorneys and Others** (1240/2020; 1955/2016; 765/2019) [2021] ZAFSHC 53 (10 March 2021) at para 16; Joffe [High Court Motion Procedure, Last Updated: August 2020 - SI 13 at page 1-24, <https://www.mylexisnexis.co.za/Index.aspx> on 3 March 2021] and Harms [Civil Procedure in the Superior Courts, Last Updated: October 2020 - SI 69 at Rule 11, <https://www.mylexisnexis.co.za/Index.aspx> on 3 March 2021].

commencement of litigation concerning the appropriate pathway to take, which on reflection may have been procedurally unwise with the benefit of subsequent insight that invariably comes with time as a more complete picture emerges of the facts through the benefit of subsequent pleadings and discovery.

22. The distinct possibility of this situation was recognised by Clayden J in **International Tobacco Company of South Africa Ltd v United Tobacco Companies (South) Ltd** 1953 (1) SA 241 (W) at 243F-H where the learned judge held as follows:

“The plaintiff considered it advisable to institute action immediately for the purpose of recovering damages and in the hope that by so doing it would stop the campaign or course of conduct from continuing, and consequently the first action was instituted. Thereafter much more detailed information and many more instances became known to the plaintiff which indicated that the campaign or course of conduct was of a more extensive nature than was at first thought, and it was therefore deemed desirable to institute a fresh action in which the cause of action was considerably widened in its scope, rather than to amend the cause of action in the first action. Hence the second action was commenced.”

23. The explanation for why separate proceedings were launched is therefore no more than a factor to be considered in assessing whether a consolidation would be convenient.⁴
24. The applicant does not proffer a detailed explanation for the multiplicity of applications launched on his behalf. He says that this was on the advice of his erstwhile legal representatives. His failure to provide a more fulsome explanation does not preclude the consolidation relief *per se* as there must be some leeway given for the fact that he acted on the advice of his erstwhile legal representatives who for whatever reason saw merit in litigating against the first respondent on various fronts.
25. From the papers, the following emerges. Should the rescission application be granted, it will render the contempt application academic, but should the rescission application for whatever reason fail, the contempt application may still be pursued as the order of Ngilwana AJ dated 15 June 2015 will remain

⁴ **Beier** *supra* at 191F.

extant. The status of the contempt application appears to me to be of less significance in deciding the merits of the consolidation relief though.

26. If the rescission application succeeds, the risk of a multiplicity of applications remains a real possibility. Different Courts would then be faced with the prospect of relief that is in substance the same but claimed under different case numbers. The main application, the Sheriff's application and the variation application all traverse the same factual matrix and seek to ensure that the three properties jointly owned by the applicant and the first respondent are sold. A single judgment would expedite proceedings and reduce costs but, most importantly, would eliminate the risk of conflicting factual findings which one can easily envisage should these applications serve before different Courts.
27. The following example illustrates this risk: should the first respondent succeed on the facts in defeating the Sheriff's application, it will produce an outcome that is destructive of the relief pursued in the variation application. Conversely, if she is successful in the rescission application and enters the fray in the main application, a successful outcome in the main application may potentially ensue, but if she loses the Sheriff's application the parties will be saddled with two mutually destructive outcomes.
28. Should the rescission application fail, the applicant would be left with enforcing the main application through the mechanism of the contempt application but his right to pursue the relief proffered in the Sheriff's application and the variation application remains undisturbed. As I have already indicated, the latter two applications in substance seek the same outcome. The risk of a disparity of outcome if they were to be determined separately cannot be excluded. If the first respondent overcomes the Sheriff's application, it cannot be excluded that a contrary conclusion may be reached should the variation relief ultimately be granted in favour of the applicant. The result would yet again be an incongruent outcome that does not advance certainty and finality which are the hallmarks of litigation.

29. Common sense and pragmatism dictate that this outcome be avoided, and constitute weighty considerations in my view apart from the fact that allowing the litigation to continue in four separate streams under four separate case numbers will result in an inefficient allocation of scarce judicial resources.
30. Whether the rescission application is entertained first makes no difference in my view since the risk of an overlap is present irrespective of the outcome of the rescission application. The order that I propose is to vary the order of Dewrance AJ of 30 March 2016 which directed that the rescission application be heard before the Sheriff's application.
31. It would in the circumstances be convenient for the parties if the four applications were heard as one.
32. I can envisage no prejudice to the first respondent. Her papers do not suggest that she would be truly prejudiced through a consolidation, and I am satisfied that the applicant has demonstrated that she stands to suffer no prejudice if a consolidation is ordered. She complains that the applicant is a vexatious litigant. While it is not necessary for me to express a view on this, a consolidation will address her complaint to some extent as one judge will be tasked with deciding the various applications on an integrated basis without exposing the first respondent to the risk of having to return to this Court to deal with separate applications.
33. While the applicant did not ask for the variation application to be consolidated, the discretion vested in me by Rule 11(c) allows me to make such an order to facilitate the orderly further prosecution and finalisation of the litigation between the parties in totality. The same discretion entitles me to put in place a regime to ensure that the proceedings, once consolidated, are prosecuted to finality without further delay.
34. Counsel for the applicant in any event submitted that I could deal with the variation application as I saw fit in the exercise of my discretion.

35. If the variation application is not addressed as part of this order, the risk of a multiplicity of findings remains a real one given that the relief is the same as claimed in the Sheriff's application.
36. Although the applicant explains that he may be minded to then withdraw the variation application, this is by no means certain and its inclusion as part of the consolidated application is necessary to avoid prejudice to the first respondent that will arise if she still has to face a related but freestanding application that substantially overlaps with the other applications.

Conclusion and Order

37. In these circumstances and in the exercise of the discretion which I have in these matters, I propose to make no order as to costs at this stage. The applicant could have avoided the need to bring this application had he claimed more comprehensive relief from the outset instead of opening new frontiers of litigation against the first respondent on a piecemeal basis. I however make no final pronouncement on the issue with the costs best left to the Court tasked with adjudicating the consolidated application.
38. The applicant's notice of application sought an order that he be entitled to deliver a supplementary affidavit in the main application. This relief is inappropriate in as a final order was granted in his favour on 15 June 2015. He has delivered an answering affidavit in the rescission application and unless the Court hearing the rescission application rules differently, he has no right to file a further affidavit in those proceedings.
39. I accordingly make an order in the following terms:
 1. The order of Dewrance AJ dated 30 March 2016 in case number 2015/31015 is varied to the extent set out in paragraph 2 hereunder.
 2. The applications pending under case numbers 2015/28041, 2015/31015 and 2021/35245 are consolidated with the proceedings pending in case number 2014/31596.
 3. The first respondent is ordered to deliver:

- 3.1 an answering affidavit to the founding affidavit in case number 2015/31015 within fifteen (15) Court days from the date of this order;
 - 3.2 a replying affidavit in the rescission application under case number 2014/31596 within fifteen (15) Court days from the date of this order.
4. The applicant is ordered to deliver a single replying affidavit responding to the first respondent's answering affidavits in case numbers 2015/28041, 2015/31015 and 2021/35235, which is to be delivered within fifteen (15) Court days from the delivery of the answering affidavit referred to in paragraph 3.1 above.
 5. The costs of the consolidation application are reserved for determination by the Court hearing the consolidated proceedings under case number 2014/31596.

**C BESTER AJ
JUDGE OF THE HIGH COURT
JOHANNESBURG**

Heard: 13 November 2023

Delivered: 27 November 2023

For the Applicant: Adv BC Bester

Chantel van Heerden Inc

For the First Respondent: In person