



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

REPUBLIC OF SOUTH AFRICA

CASE NO: 36225/2015

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED: NO
(4) DATE: 9 February 2023

SIGNATURE: **ML SENYATSI**

In the matter between:

POPPY KHOZA

First Applicant

JOHANNA FRANCINA OOSTHUIZEN

Second Applicant

JOHAN ARMSTRONG

Third Applicant

GAWIE BESTBIER

Fourth Applicant

and

CHRIS MARTINUS

First Respondent

JUDGMENT

SENYATSI J:

- [1] This is an opposed application for consolidation of three actions all initiated by different parties in 2015. The applicants were employed by the South African Civil Authority or related to the CAA through the Department of Transport.
- [2] More importantly the application for consolidation is brought by the second and third respondent who are plaintiffs in the main action against the first and second respondents under case number 36224/15 and the fourth applicant's against the first and second respondents under case number 36328/15 with the first applicant's action against the first and second respondents under case number 36225/15. These cases are related in that they are based on the same set of facts. Furthermore, the applicants have also brought it an application for strike out of what they say are irrelevant averments. The strike out application is not opposed and it is granted. The respondents brought a counter-application in terms of which they seek to join South African Civil Aviation Authority to the main suit. The application is opposed.
- [3] The actions were instituted by the applicants during October 2015. The causes of action were alleged damages suffered by the applicants as a result of the alleged defamatory made by the first respondent published on AVCom platform, which is the General Aviation social media website and, in respect of the first to third applicants, the SA Flyer Magazine.
- [4] The three actions were defended and the alleged defamatory statements were

admitted but they were denied to be false, malicious and unsubstantiated. The pleadings in all the actions are closed.

- [5] In all the three actions, the court in the main actions must determine whether the respondents are liable for the damages as acclaimed by the applicants in terms of *actio iniuriarum* and whether the statements were defamatory to the applicants as alleged.
- [6] The current application for consolidation is made in terms of Rule 11 of the Uniform Rules. The applicants aver that as the relief sought by all the applicants depends on the determination of substantially the same question of law and fact, it would be convenient for the court to have all the actions consolidated into one.
- [7] The respondents opposed the consolidation. They contend that because one of the plaintiff's in the main action had brought an application for consolidation and subsequently withdrew it, the current application stands to be dismissed.
- [8] The respondents also contend that the applicants in this application are seeking to "reboot" the actions by way of the second consolidation application. They contend furthermore that the consolidation application by virtue of being launched seven years after the proceedings in the main actions commenced, amount to abuse of the court process and that the court should exercise its discretion and dismiss the application.
- [9] The issue to be determined is whether or not it will be for the convenience of the court to adjudicate the three actions together.
- [10] Rule 11 of the Uniform Rules of Court states that 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, where upon-
 - (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 action.

[11] The learned author Erasmus¹, as to the phrase “it appears to the court convenient to do so” provides the following comment which is opposite in the circumstances of the matter before me:

“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

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.”

[12] Consolidation of actions will not be ordered if there is the possibility of prejudice being suffered by any party.⁵ By prejudice in this context is meant ‘substantial prejudice sufficient to cause the court to refuse a consolidation of action, even though the

¹ Erasmus: Superior Court Practice Vol 2 pg D1-133

² As it appears in Rule 11 of the Rules

³ See *Rail Commuters’ Action Group v Transnet* 2006 (6) SA 68 (C) at 68B

⁴ 1981 (4) SA 792 (A) at 801 D and 802 B

⁵ See Erasmus –supra pg D1 -134

balance of convenience would favour it.⁶

[13] In *Mbana v Balintulo and Others*⁷, Kubushi J stated as follows regarding prejudice:

“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 satisfy the court upon these points.

[14] The burden of proof lies on the requesting consolidation to show the court that convenience favours the consolidation and that such consolidation will not cause substantial prejudice to other parties.⁸

[15] In *City of Tshwane v Blair Atholl Homeowners Association*⁹, the Supreme Court of Appeal held as follows regarding the test to be applied in consolidation applications:

“The [Rule 11] procedure is aimed at facilitating the convenience and expeditious disposal of litigation. The word ‘convenient’ within the context of the sub-rule conveys not only the notion of facility of ease or expedience, but also the notion of appropriateness and fairness. It is not the convenience of any one of the parties or of the court, but the convenience of all concerned that must be taken into consideration.”

[16] As regard to the convenience of all concerned in the matter, it seems to me that the consolidation of all three actions will be for convenience of all concerned because the trial preparation for all three 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.

[17] In regard to the prejudice to be absent when consolidation is considered, it appears to be that preparation for trial will be one as opposed to three, the determination of facts will affect the outcome of the consolidated actions similarly and prevent the multiplicity

⁶ See *New Zealand Insurance Co Ltd v Stone* 1963 (3) SA 63 (C) at 71 D - H

⁷ [2021] ZAGPPHC at para 10

⁸ See *Mpontsha v Road Accident Fund and Another* 2000 (4) SA 696 (CPD) at 699 E - F and 701 C -D

⁹ 2019 (3) SA 398 (SCA) at para 50

of preparation. The court adjudicating the dispute will be required to do so in one seating as opposed to three.

[18] Accordingly, the applicants have succeeded in meeting all tests required for the consolidation.

ORDER

[19] The following order is made:

- (a) The actions in this Court by the second, third and fourth applicants against the first and second respondents under case number 36329/15 and case number 36224/15 are hereby consolidated with the action in this Court by the first applicant against the first and second respondent under case number 36229/15;
- (b) The aforesaid action shall proceed as one action under case number 36229/15;
- (c) The respondents are ordered to pay the costs of this application.

**ML SENYATSI
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG**

DATE APPLICATION HEARD: 6 February 2023

DATE JUDGMENT DELIVERED: 9 February 2023

APPEARANCES

Counsel for the Applicant: Adv N Chesi - Buthelezi

Instructed by: Werksmans Attorneys

For the Respondent: In Person