REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
(LIMPOPO DIVISION, POLOKWANE)

CASE NO: 1971/2018
REPORTABLE: YES/NO
OF INTEREST TO OTHER JUDGES: YES/NO
REVISED
Date: 21 September 2023

In the matter between:

MANGANYANE ANDRONICA PHALANE N.O.	**First Applicant**
MANGANYANE ANDRONICA PHALANE	**Second Applicant**
And	
DEPARTMENT OF CO-OPERATIVE GOVERNANCE, HUMAN SETTLEMENTS AND TRADITIONAL AFFAIRS OF THE LIMPOPO PROVINCIAL GOVERNANCE	**First Respondent**
THE MUNICIPAL MANAGER OF THE LEPELLE NKUMPI LOCAL MUNICIPALITY	**Second Respondent**
CYNTHIA JULIET PHALANE N.O.	**Third Respondent**

CYNTHIA JULIET PHALANE **Fourth Respondent**

THE MASTER OF THE HIGH COURT, POLOKWANE **Fifth Respondent**

JUDGMENT

BRESLER AJ

Introduction

[1] The relief prayed for in this matter is essentially twofold:[1]

1.1 That the main application delivered under the above case number be referred to trial; and

1.2 That the above case number be consolidated with case number: 3480/2021.

[2] No determination on the merits of the matter is required at this stage and this application is purely aimed at the procedural aspects pertaining to the continuation of the matter.

[3] I find it apposite to make brief reference to the background and merits, and only in as far as it is relevant to the determination of the procedural aspects.

[4] The First Applicant is the Executrix in the Estate Late Makganyane Andronica Phahlane. The First Applicant is also the Second Plaintiff in the action instituted under case number: 3480/2021. She is also the Second Applicant in her personal capacity. For convenience sake, I shall refer to her as the 'Applicant'.

[1] See paginated page 17.

[5] The Applicant claims ownership of the immovable property situated at Erf 5[…] Lebowakgomo – A Township. The basis of her claim for ownership is irrelevant to the current proceedings before court.

[6] The property is currently registered in the name of the First Respondent, being the Department of Co-Operative Governance, Human Settlement and Traditional Affairs of the Limpopo Provincial Governance.

[7] The Third Respondent is cited herein in her capacity as the Executrix in the Estate of the Late Matsobane Gulbooi Phalane to whom she married in community of property. She is also cited herein in her personal capacity as the Fourth Respondent. She claims ownership of the property by virtue of the property forming part of the deceased estate of the Late Matsobane Gulbooi Phalane to whom she was married in community of property. For the sake of convenience I shall refer to her as the 'Third Respondent'.

[8] It is thus evident that the underlying dispute relates to an immovable property, occupied by the Applicant prior to her passing, but claimed by the Third Respondent as part of the deceased estate of the Late Matsobane Gulbooi Phalane. Suffice to state that the key witnesses in this matter, being the Late Makganyane Andronica Phalane and the Late Matsobane Gulbooi Phalane, have both passed since the institution of the main application under the above case number.

[9] On or about the 27th of March 2018, the Late Makganyane Andronica Phalane issued out the main application under the above case number claiming *inter alia:*

9.1 An order declaring her to be the lawful owner of the immovable property; and

9.2 Ordering the First Respondent to effect transfer in her name.

[10] On the 24th of April 2018, the Fifth Respondent (the Master of the High Court, Polokwane) filed a report wherein it was made known that the immovable property was included in the inventory lodged by the Third Respondent as forming part of the estate of the Late Matsobane Gulbooi Phalane.

[11] This prompted an application for joinder of the Third Respondent to the main application. This application for joinder was granted by the Honourable Judge Muller on the 12th of March 2019.

[12] On or about the 16th of May 2019, the Third Respondent delivered her answering affidavit to the main application.

[13] Having regard to the answering affidavit, it appears to be common cause between the parties that the Late Makganyane Andronica Phalane resided in the property for a considerable period of time.

[14] It is furthermore, common cause that the Late Makganyane Andronica Phalane passed away subsequent to the institution of these proceedings and presumably on the 29th of November 2019. The Applicant was appointed as her Executrix.

[15] On or about the 24th of May 2021, the Applicant (and Phahle Phalane), being the children of the Late Makganyane Andronica Phalane, issued summons against *inter alia* the First Respondent and the Third Respondent.

[16] The relief claimed in the summons is essentially the same as the relief claimed in the main application. The Applicants / Plaintiffs in the summons claim *inter alia*:

> 16.1 A declaratory order to the effect that the Late Makganyane Andronica Phalane is the lawful owner of the immovable property;

16.2 Authorising the transfer of the immovable property to the said Late Makganyane Andronica Phalane; and

16.3 Directing the First Respondent (Third Defendant) to effect transfer as aforesaid.

[17] During or about August 2021, the Third Respondent delivered her plea to the summons. Suffice to state that the Third Respondent raised a special plea of *lis alibi pendens* to the Applicant's claim. The remainder of the plea is not relevant to the current proceedings.

[18] On the 11th of February 2022, the Applicant launched the current application before court.

[19] The Third Respondent delivered her answering affidavit to the current application on the 15th of March 2022. The Third Respondent specifically remarked in her answering affidavit that:[2]

"*Both matters under case numbers 1971/2018 and 4380/2021 are currently ready for argument in court and be finalized and in both matters the applicants seek to be declared lawful owner of the property and that the property be transferred into the applicant's name arising from the same cause of action."*

[20] The Third Respondent furthermore submits that the duplication of the matters at hand can be avoided by withdrawing one of the cases and tendering the wasted costs.

[21] As to the referring of the main application to trial, the Third Respondent submits that oral evidence will not be required as the Late Makganyane Andronica Phalane testified by delivering the founding affidavit in the main application.

[2] See paragraph 7.9 of the answering affidavit on paginated page 237.

[22] The *crux* of the Third Respondent's opposition to the current application lies in the consequential cost implication. They state that, if the Applicant is successful in the consolidated action, the Applicant will be entitled to the legal costs pertaining to both the main application as well as the trial proceedings. According to the Third Respondent, the consolidation of actions is aimed at the convenience of all parties concerned and should not be utilized to avoid costs or a special plea of *lis alibi pendens.*[3]

Analysis of applicable law

[23] It is trite law that only actions can be consolidated. It must therefore first be determined if the main application can be referred to trial.

[24] Uniform Rule 6(5)(g) provides as follows:

> *"(g) Where an application cannot properly be decided on affidavit the court may dismiss the application or make such order as it deems fit with a view to ensuring a just and expeditious decision. In particular, but without affecting the generality of the aforegoing, it may direct that oral evidence be heard on specified issues with a view to resolving any dispute of fact and to that end may order any deponent to appear personally or grant leave for such deponent or any other person to be subpoenaed to appear and be examined and cross-examined as a witness or it may refer the matter to trial with appropriate directions as to pleadings or definition of issues, or otherwise."*

[25] The following comment in ***Erasmus, Superior Court Practice***[4], has often been quoted with approval by presiding officers:

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[3] See paragraph 10.5 of the answering affidavit on paginated page 242.
[4] Van Loggerenberg, **Erasmus Superior Court Practice**, Second Edition, Juta on page D1-70A.

"The subrule is of wide import and empowers the court, where an application cannot properly be decided on affidavit, to make such order as it deems fit with a view to ensuring a just and expeditious decision."

[26] In my view, it must be borne in mind that the original two characters in this proverbial drama, being the Late Makganyane Andronica Phalane and Late Matsobane Gulbooi Phalane, have now both passed away. Any evidence regarding direct conversations between them is limited to the founding affidavit and circumstantial evidence.

[27] One of the most important purposes of cross-examination is to undermine the credibility of the witness who is being cross-examined. This is an important tool in determining the true factual position, especially where witnesses were not directly involved in the incident. It follows that both parties can benefit immensely from having the opportunity to cross-examine witnesses *in casu.*

[28] As will be evidenced from what is alluded to herein under, the consequences of upholding a special plea of *lis alibi pendens,* is not the automatic dismissal of the second action. It merely suspends the hearing of the second action until the first action has been finalized.

[29] *In casu* upholding the special plea of *lis alibi pendens* will therefore have, as a consequence, that the main application will have to be decided on the papers before court. This cannot be in the interest of either party as I have already indicated that both parties can benefit from cross-examination of their respective witnesses.

[30] It is trite law that the court has a wide discretion to refer a matter to oral evidence or to trial. The court must carefully consider the disputed facts which cannot satisfactorily be determined without the aid of oral evidence.[5]

[5] See Van Loggerenberg, **Erasmus Superior Court Practice**, Second Edition, Juta on page D1 – 72.

[31] Although it is often stated that the court must take a 'robust, common-sense approach' to a dispute raised on motion, the court must however give due consideration to the potential advantage of hearing *viva voce* evidence. It must always be borne in mind that the affidavits are settled by legal practitioners with varying degrees of experience, skill and diligence.
To avoid a situation where the litigants are potentially prejudiced by the conduct of their legal representatives, and especially in an instance where the key witnesses are deceased, referring the matter to trial will be in the interests of justice.

[32] It now stands to be determined if the main application (having been referred to trial) should be consolidated with the pending action under case number: 3480/2021.

[33] As stated before, the Respondent's main objection to the consolidation of the two matters, is essentially the fact that the Applicant is utilizing the process to avoid the consequences of a special plea of *lis alibi pendens.*

[34] I therefore find it appropriate to first address the concept of a defense of *lis alibi pendens.*

[35] In ***Nestlé (South Africa) (Pty) Ltd v Mars Inc***[6], Nugent AJA said the following:

> *"The defence of lis alibi pendens shares features in common with the defence of res judicata because they have a common underlying principle, which is that there should be finality in litigation. Once a suit has been commenced before a tribunal that is competent to adjudicate upon it, the suit must generally be brought to its conclusion before that tribunal and should not be replicated (lis alibi pendens). By the same token the suit will not be permitted to revive once it has been brought to its proper conclusion (res judicata). The same suit between the same parties, should be brought once and finally."*

[6] 2001 (4) SA 542 (SCA).

[36] In ***Socratous v Grindstone Investments***[7], this court reaffirmed the principles referred to above.

[37] The defence is also available where the same *lis* is pending in two cases in the same court.[8] A defendant can raise the defence even though it is the plaintiff in the other proceedings.

[38] In ***Caesarstone Sdot-Yam Ltd v World of Marble and Granite***[9]***,*** the following was stated:

> *"On this basis the requirement of the same cause of action is satisfied if the other proceedings involve the determination of a question that is necessary for the determination of the case in which the plea is raised and substantially determinative of the outcome of that latter case."*

[39] It must also be borne in mind that a plea of *lis alibi pendens* is a dilatory plea and, if upheld, merely delays the resolution of the matter and does not dispose of it. The party raising the defence must discharge the onus of establishing: (a) pending litigation; (b) between the same parties or their privies; (c) based on the same cause of action; (d) in respect of the same subject matter. Once these elements are established, the court still has a discretion whether to uphold or reject the defence.[10]

[40] In ***Cook and Others v Muller***[11] the following was said:

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[7] 2011 (6) SA 325 (SCA).
[8] See ***Michaelson v Lowenstein*** 1905 TS 324 at 328; ***Van As v Appollus & Andere*** 1993 (1) 606 (C) at 609G-610B.
[9] Per Wallis JA in ***Caesarstone Sdot-Yam Ltd v Worl of Marble and Granite 2000 CC and Others*** 2013 (6) SA 499 (SCA) para 21.
[10] ***Caesarstone Sdot-Yam Ltd v Worl of Marble and Granite 2000 CC and Others*** 2013 (6) SA 499 (SCA) para 12 – 36.
[11] 1973 (2) SA 240 (N).

"It is clear from this passage that the plaintiff in Wolff's case had been the defendant in the Transvaal High Court and had accordingly filed a claim in reconvention. The Court nevertheless held that lis alibi pendens could properly be raised. Even if this does not strictly constitute a defence of lis alibi pendens, it is clear that the Court may, in the exercise of its discretion in controlling the proceedings before it, debar a person from ventilating a dispute already decided against him under the guise of an action against another party."

[41] It has often been stated that a court has the inherent power to regulate its own proceedings. The constitutional basis relating to the inherent powers of the court is premised on section 173 of the Constitution, which provides that:

"The Constitutional Court, Supreme Court of Appeal and the High Court of South Africa each has the inherent power to protect and regulate their own process, and to develop the common law, taking into account the interests of justice."

[42] *In casu* it is evident that there is, at the very least, a *prima facie* possibility that the special plea of *lis alibi pendens* will succeed, resulting in the trial of the action under case number: 3480/2021 to be suspended pending the finalisation of the trial in the above matter.

[43] Uniform Rule 11 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 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."

[44] It is quite clear that both Rule 11 as well as a dilatory plea of *lis alibi pendens* has at its core, preventing the duplication of proceedings.

[45] The *crux* of the conundrum currently before court, is the question whether Uniform Rule 11 can be employed in an instance where a dilatory plea of *lis alibi pendens* was raised but not yet determined.

[46] In the matter of ***Van den Berg NO v Suidwes Landbou (Pty) Ltd***[12] the law pertaining to consolidation applications was aptly summarised as follows:

"[16] I now turn to the law applicable to consolidation applications.

1. The critical elements of a Rule 11- application are convenience and no substantial prejudice to the other party.

2. The object of the rule is to prevent multiple trials or applications based on the same facts proceeding independently of each other. (Nel v Silicon Smelters (Edms) Bpk 1981 (4) SA 792 (A) at 801)

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[12] ***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 [16].

3. The rule does not make provision for the consolidation of issues, only of trials. (Jacobs v Deetlefs Transport BK 1994 (2) SA 313 (O) at 317)

4. Convenience is a paramount consideration in applications of this nature. The avoidance of a multiplicity of actions and attendant costs are considerations. (Mpotsha v Road Accident Fund 2000 (4) SA 696 (C) at 699E–F)

5. The party requesting the consolidation bears the onus of showing that the consolidation will not cause substantial prejudice to other parties. (Mpotsha supra at 701C-D, Belford v Belford 1980 (2) SA 843 (C) at 846)

6. The provisions of Rule 10 apply mutatis mutandis to Rule 11(b).

7. This is an interlocutory application brought on motion. Notice to all the other parties must be given. The Applicant must explain why separate actions were instituted that he now desires to have consolidated. (International Tobacco Company of South Africa Ltd v United Tobacco Companies (South) Ltd 1953 (1) SA 241 (W) at 243)

8. 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] pointed out that the Applicant must set out, among others, why separate actions were instituted, why there has been a change of heart, the balance of convenience, that there is no substantial prejudice to other parties (London & Lancashire Insurance Co Ltd v Dennis NO 1962 (4) SA 640 (N) at 644) and whether there are issues common to the actions that may be decided

by an order in terms of Rule 33(4). (Jacobs v Deetlefs Transport BK supra at 317)

9. The Court has a wide discretion to grant or refuse the application. (Beier v Thornycraft Cartridge Company; Beier v Boere Saamwerk Bpk 1961 (4) SA 187 (N) at 191)

10. A Court may refuse the application even though the balance of convenience would favour it, if the prejudice to the other party is "substantial". (New Zealand Insurance Co Ltd v Stone 1963 (3) SA 63 (C) at 69).'

[47] It is evident that the overriding consideration is prejudice. When exercising the discretion as to whether to grant or refuse the order for consolidation, the court must consider the likelihood of convenience weighed against the possible prejudice. The prejudice must be substantial.
It must be sufficient to warrant the court to refuse the consolidation even if the balance of convenience favours it, particularly when considering the costs of both actions from the preparation and leading of evidence stages, the nature and history of the cases and the benefit of arriving at the same decision as opposed to obtaining different orders, for the similar or continuous cause of action.

[48] In the unreported matter of ***Placecol (Pty) Ltd v Absa Bank Ltd and SARS & Absa Bank Ltd v Mounties***[13] the following was stated by Satchwell J:

"[7] The test for consolidation in terms of Rule 11 is that of "convenience" to the parties, witnesses and to the court. The approach of our courts to "convenience" appears to be similar in questions of joinder of parties or actions, separation of

[13] ***Placecol Cosmetics (Pty) Ltd v Absa Bank Ltd and Another, Absa Bank Ltd v UTi South Africa (Pty) Ltd (Mounties Division)*** (08/34502, 10/04104) [2012] ZAGPJHC 193 (4 October 2012).

issues or consolidation. Convenience, broadly and widely understood connotes "not only facility or expedience or ease, but also appropriateness in the sense that procedure would be convenient if in all the circumstances of the case, it appears to be fitting and fair to the parties concerned ...

[8] ...

[9] In exercising its discretion in respect of the consolidation for purposes of the hearing, it was held in New Zealand Insurance v Stone supra (and since frequently followed) that:" ... 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.

[10] In exercising its discretion on what is "convenient" the court must have regard to a number of factors including the saving of costs and the avoidance of a multiplicity of actions particularly where there is "the danger of the same questions tried twice with possibly different results"."

[49] As indicated herein before, the only prejudice raised by the Third Respondent is the fact that the consolidation of the two matters will render the special plea of *lis alibi pendens* moot, thus resulting in an adverse cost order against the Third and Fourth Respondents should the Applicant be ultimately successful in the main case.

[50] At the conclusion of the hearing, I invited both counsels to submit supplementary heads of argument with specific reference to available authority prohibiting the consolidation of actions where *lis alibi pendens* was raised. I thank both counsels for their effort. It appears that only one unreported matter was identified by Adv Snyman SC

being the judgment delivered in the case of ***Mc Neill v Williams*** (5643/11) [2012] ZAKZDHC 28 (1 May 2012).

[51] It stands to be noted that the *crux* of this case corresponds substantially with the current conundrum before court. More specifically, the court explicitly remarked that the cause of action is identical in both matters and the same parties are involved. The following remarks made by the Honourable Lopes J is of importance to the matter at hand:

> *"[14] Mr Marais SC, who appears for the applicant, seeks an order for the directions regarding the completion of the pleadings in the second action, together with an order consolidating the two actions for hearing simultaneously. He submits that if I consolidate the actions, the effect would be to preclude the respondent from raising a plea of lis pendens in the second action, something I am in any event able to decide now, because there can be no merit in following a procedure which may lead to the duplication of evidence. If I decline to consolidate the actions, the respondent may seek the postponement of the second action until after the first action is determined. This would inevitably lead to the undesirable situation where witnesses will testify twice on the same issues, a duplication of costs and undue delay."*

[52] And further:

> *"[21] I agree with Mr Marais that the prejudice which will be occasioned to the respondent as a result of the consolidation will be that she will be precluded from raising the plea of lis pendens in the second action. That must follow as a logical consequence of an order for consolidation because, inter alia, rule 11(a) provides that upon consolidation "the said actions shall proceed as one action". If there is only one action before the Court there can be no question of lis pendens arising. In any event, the respondent has had every opportunity to deal with the allegations of lis pendens in her answering affidavit. The prejudice occasioned to the respondent as a result of the consolidation must bow to the benefits which will*

accrue if only one trial is heard. In any event, there would seem to be no basis for a defence of lis pendens because one of the central issues in the trial – i.e. jurisdiction – is different in each action and the respondent will not be precluded from raising whatever defence is available for her. Insofar as it is necessary for me to consider the balance of convenience (See Mpotsha v Road Accident Fund and Another 2000 (4) SA 696 (CPD), it clearly favours consolidation for the reasons set forth above. The same logic will apply to any suggestion of a possible plea of res judicata.

[22] As I understand rule 11, it enables me to consolidate actions where it could be convenient for the court to do so. What I have to bear in mind is whether the proposed procedure would be prejudicial to the respondent.

[23] There is no doubt that there would be considerable savings in preparation, costs and the time used in court proceedings were the two actions to be consolidated. The main issue to be decided in the two actions is the agreement concluded between the applicant and the respondent with regard to the monies advanced by the applicant to the respondent. The question of jurisdiction as it arises in each of the two actions may well be similar, although not identical, in that the apparent basis for the respondent's contention that she does not reside within the Republic, as set out in the answering affidavit, uses a historical starting point two years ago. In my view it would be most undesirable and a waste of time and resources were the same witnesses to testify in two different trials about the jurisdictional issues which existed at the time of the commencement of the two actions. That can all be done conveniently and expeditiously in one hearing."

[53] Having regard to the situation *in casu* I am respectfully in agreement with the remarks of Lopes J to the extent that it would be '*undesirable and a waste of time and resources were the same witnesses to testify in two different trials'.*

[54] As the Respondent only raised the potential cost implication of a consolidation of the two matters, I am of the view that the prejudice is insubstantial. The trial court will retain a discretion to grant a suitable cost order at the hearing of the consolidated matter in due course. Any costs potentially wasted as a result of the consolidation of the two matters can therefore be addressed at trial.

[55] The convenience of joining the two matters, especially in light of the passing of the two key witnesses, therefore outweighs any possible prejudice that the Respondents may suffer.

[56] I therefore see no reason why the consolidation of the matters cannot be ordered subject to an appropriate order as to the determination of costs in due course.

Appropriate cost order

[57] The Applicant applied for costs on an attorney and client scale against the Respondent in the event of opposition.

[58] I am however of the view that, in the absence of reported authority on the question if consolidation can be ordered when a special plea of *lis alibi pendens* has been raised, the opposition by the Respondents were not unreasonable to the extent of warranting a punitive cost order.

[59] This does not presuppose that I am of the view that the Applicant should be deprived of her costs of the application.

The Applicant was, after all, substantially successful.

Order

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

60.1 The main application filed under the above case number is hereby referred to trial.

60.2 The notice of motion and founding affidavit in the main application shall stand as a combined summons.

60.3 The answering affidavit shall stand as the plea.

60.4 The parties are entitled to supplement and / or amend their pleadings in terms of the Uniform Rules of Court.

60.5 The matters under case numbers 1971/2018 and 3480/2021 are consolidated under case number 1971/2018.

60.6 The Third and Fourth Respondent, jointly and severally, the one paying the other to be absolved, is ordered to pay the First and Second Applicant's costs on a scale as between party and party.

60.7 The determination of the wasted costs, if any, occasioned in the potential duplication of the proceedings, will stand over for determination at the trial of the matter.

M BRESLER
ACTING JUDGE OF THE HIGH COURT,
LIMPOPO DIVISION, POLOKWANE

APPEARANCES

Heard on : 24 July 2023
Judgment delivered on : 21 September 2023

For the Applicants	**:**	**Adv M Snyman SC**
Instructed by	**:**	**Elliot Attorneys Inc**
For the Respondents	**:**	**Mr. G Hlongwane**
Instructed by	**:**	**PMK Tladi & Associates**