

**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION – MAKHANDA)**

CASE NO.: 3384/2017

Matter heard on: 02 February 2023

Judgement delivered on: 14 February 2023

In the matter between: -

JOHANNES HENDRIK VAN ZYL

First Applicant

LOUIS JACOBUS VAN ZYL

Second Applicant

and

PJ CLOETE

First Respondent

THE HOLLARD INSURANCE COMPANY LIMITED

Second Respondent

In re:

CASE NO.: 3384/2017

PJ CLOETE

Plaintiff

and

JOHANNES HENDRIK VAN ZYL

First Defendant

LOUIS JACOBUS VAN ZYL

Second Defendant

And in re:

CASE NO.: 2876/2021

In the matter between: -

JOHANNES HENDRIK VAN ZYL

First Plaintiff

LOUIS JACOBUS VAN ZYL

Second Plaintiff

And

THE HOLLARD INSURANCE COMPANY LIMITED

Defendant

JUDGMENT

SMITH J:

[1] The applicants apply for the consolidation of two actions in terms of Uniform Court Rule¹¹. In the one matter (case number 3384/2017), the first respondent instituted action against the applicants for damages suffered as a result of a veldfire that originated on their farm, which is adjacent to his farm. During March 2019, the parties' respective attorneys allegedly entered into a settlement agreement in terms of which, inter alia, the merits were conceded on the basis of an 80/20 apportionment in favour of the first respondent. When it subsequently became apparent that the applicants denied that they gave instructions to their attorneys to settle the matter, he amended his particulars of claim to place reliance solely on the agreement. He thereafter set the matter down for adjudication of the issue as to whether the agreement was valid and binding on the applicants.

[2] On 12 February 2020, the applicants brought a substantive application for the matter to be postponed sine die. The postponement was sought on the grounds that they intended instituting proceedings against their insurers, the Hollard Insurance Company Limited (Hollard), in Gauteng, and thereafter to apply for the matter to be transferred to the Eastern Cape Division and consolidated with case 3384/2017. The applicants thereafter issued summons against Hollard in the Gauteng High Court and successfully applied for the transfer of the case to the Makhanda High Court, under case number 2876/2021.

[3] In terms of Rule 11, the court may order the consolidation of separate actions if it appears to it convenient to do so. The main considerations are the convenience to the court and the parties, the avoidance of multiple actions and attendant costs, and the possibility of substantial prejudice to any of the parties. (*New Zealand Insurance Co Ltd v Stone* 1963 (3) SA 63 (C), at 69A-C)

[4] The applicants' claim against Hollard is premised on a contract of insurance. They aver in their particulars of claim that Hollard is obliged to render them harmless in the event of fire damage to a neighbouring property and Hollard's repudiation of their claim pertaining to damages suffered by the first respondent is unlawful.

[5] Ms *Beard*, who appeared for the applicants, submitted that the first respondent's pleaded case in case number 3384/2017 is that his claim has been compromised in terms of an agreement reached by the First Respondent's attorney and Honey Attorneys, who acted for Hollard. If the evidence in case number 2876/21 shows that Hollard had unlawfully repudiated the applicants' claim, then the former will be obliged to indemnify the applicants in respect of the first defendant's claim. The settlement agreement, if established by the first respondent, will then be enforceable against Hollard as the subrogated defendant in case number 3384/2017.

[6] If, however, the evidence establishes that Hollard lawfully repudiated the applicants' claim and their version is accepted that Honey Attorneys did not represent them and were accordingly not mandated to conclude a settlement agreement on their behalf, then subrogation could not have occurred and no valid settlement agreement could have been concluded.

[7] She argued that the same evidence regarding the compromise will be required in both actions and the same witnesses will be required to testify. It is thus manifest that the applicants will incur unnecessary legal costs if the actions are not consolidated. In addition, the court will be seized with two separate actions in which similar issues fall for adjudication. There will then also be the real risk of different courts making differing findings in respect of the same facts or issues of law. She

submitted that it will thus be convenient for the cases to be consolidated and heard together.

[8] Mr *Janse van Rensburg*, who appeared for the first respondent, submitted that after the amendment to the latter's particulars of claim, it is the first respondent's pleaded case that Honey Attorneys acted on behalf of the applicants when they concluded the agreement. He submitted that the adjudication of the issue regarding the conclusion of the agreement by the applicants' attorneys and the first respondent's attorneys will thus only involve two witnesses, namely the attorneys who represented them when the settlement agreement was concluded. The issues to be tried between the applicants and Hollard are thus fundamentally different to the very confined issue that will fall for decision in his case against the applicants. The former action involves the adjudication of the insurance agreement, an issue in which he has no interest.

[9] He submitted, in addition, that the first respondent has already been substantially prejudiced by the delays caused by the applicants' attempts to consolidate the matters and it is inevitable that consolidation will result in further delays. The court will be loath to order consolidation in the face of such manifest and substantial prejudice to one of the parties, or so he argued.

[10] The first respondent, in terms of his amended particulars of claim, aver that the settlement agreement was concluded between Mr Buchner of Honey Attorneys, representing the applicants, and Mr van Biljon, who represented him. This is therefore the only issue that will fall for adjudication at the trial in respect of case number 3384/2017.

[11] As mentioned earlier, the applicants' claim against Hollard is premised on a contract of insurance. They aver in their particulars of claim that Hollard's repudiation of their claim on 25 June 2019, was unlawful. They consequently did not accept that repudiation and hold Hollard liable in terms of the contract of insurance to indemnify them or pay a contribution in respect of any damages proved by the first respondent. They therefore seek an order, inter alia, that in the event that judgment is granted in

favour of the first respondent, Hollard will be liable to indemnify them, alternatively to make a contribution in terms of the contract of insurance.

[12] I therefore agree with Mr *Janse Van Rensburg* that the court will not be required to adjudicate the same disputes when trying the cases and that different witnesses will most likely be required to testify in each case. To my mind, the prejudice to the first respondent if the matters are consolidated will be substantial. There has already been a delay of almost three years, which had been caused by the applicants' endeavours to apply for consolidation. And it appears unavoidable that there will be further substantial delays. The first respondent will therefore effectively be forced to stand around and 'kick his heels' while the applicants' claim against Hollard grinds along, waiting for the adjudication of an issue in which he has no interest.

[13] There is nothing before me to show that the consolidation of the cases will be convenient to the court or the first defendant. There is no indication that consolidation will serve to expedite proceedings, reduce costs or that the court will only be required to make one finding in respect of the factual disputes or legal issues involved in both cases. On the contrary, the cases involve disparate issues which would best be adjudicated separately. The first respondent's claim against the applicant, after the amendment of his particulars of claim, hinges on the adjudication of very confined issue and will probably only last for a day. There can therefore be little doubt that consolidation will result in a substantial increase in legal costs for him. To my mind, it is manifest that the prejudice he will suffer cannot not be ameliorated by a costs order. I am therefore not convinced that it will be convenient to order consolidation of the two cases.

[14] In the result the following order issues:

- (a) The application is dismissed with costs.

JE SMITH
JUDGE OF THE HIGH COURT

Appearances:

Counsel for the Applicants	:	Adv. M Beard
	:	Whitesides
		53 African Street
		MAKHANDA
		(Ref.: Nunn/sw/C10664)
Counsel for the 1 st Respondent	:	Adv. FG Janse Van Rensburg
	:	Neville Borman & Botha
		22 Hill Street
		MAKHANDA
		(Ref.: J Powers/Rene)