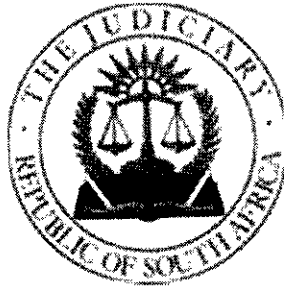


REPUBLIC OF SOUTH AFRICA



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

CASE NO: 89232/2015

- (1) REPORTABLE: no
(2) OF INTEREST TO OTHER JUDGES: no
(3) REVISED

19 MAY 2017

GB ROME AJ

19/5/2017

In the matter between

MABOTWANE SECURITY SERVICES CC

Applicant

and

PIKITUP SOC (PTY) LIMITED

First Respondent

FIDELITY SECURITY SERVICES (PTY) LIMITED

Second Respondent

IMVULA QUALITY PROTECTION (PTY) LIMITED

Third Respondent

And in CASE NO. 11547/2016

In the matter between:

MABOTWANE SECURITY SERVICES CC

Applicant

And

PIKITUP SOC (PTY) LIMITED

First Respondent

SIDAS SECURITY GUARDS (PTY) LIMITED

Second Respondent

J U D G M E N T

ROME AJ:

Introduction and Factual Context

- [1]. This is an interlocutory application by the first respondent in two application matters for the consolidation for the hearing of the two matters.
- [2]. The two applications that are the subject of this consolidation application are the applications by Mabotwane Security Services CC ("MSS") against Pikitup SOC (Pty) Ltd ("Pikitup") *et al* under case number 89232/2015 and case number 11547/2016.
- [3]. For convenience the applications are referred to in this judgment as "the first application" and the "second application", respectively and are collectively referred to as "the applications". The present interlocutory application is referred to as "the consolidation application".
- [4]. The principal actors in both the first and second applications are the same. In each instance the applicant is MSS. The principal respondent in each application is Pikitup. Both applications are review applications and in both matters the review is directed against a decision of Pikitup regarding the provision of security services to it.
- [5]. The events giving rise to the first application, as set out in MSS' founding affidavit, occurred during October 2015.
- [6]. The first application was launched on 4 November 2015.
- [7]. The events pertinent to the second application occurred at the end of

November 2015. MSS instituted the second application in January 2016.

- [8]. It is common cause that prior to 30 November 2015 (and pursuant to the terms of a written contract) MSS had provided security services to Pikitup. That agreement was for a fixed period, expiring at the end of November 2015.
- [9]. Shortly prior to the termination of that agreement, Pikitup as was required of it as an organ of state had embarked upon a competitive bidding process. Pikitup as a result of (according to Pikitup) various irregularities, then decided to cancel that process. MSS was aggrieved by this decision, and this precipitated the first application.
- [10]. The events giving rise to the second application are closely linked to the first application.
- [11]. As at month's end of November 2015, the position was that the agreement between MSS and Pikitup was about to terminate (by the simple passage of time) and MSS had already launched the first application.
- [12]. Pikitup then appointed the second respondent¹, Sidas Security Guards (Pty) Ltd ("Sidas") to provide security services to it on an interim basis. According to Pikitup, the appointment of Sidas on an interim basis was necessitated largely as a consequence of the first application. Once again MSS felt aggrieved by a decision made by Pikitup about the provision of security services to it. MSS accordingly launched the second application, the purpose of which is to review and set aside the interim appointment of Sidas.
- [13]. The first application is set down for hearing on 21 June 2017. The second application is presently set down for hearing in August 2017. Pikitup effectively asks that the two applications be consolidated with the result that the consolidated application be heard on 21 June 2017.

Applicable legal principles

- [14]. The consolidation of actions (and applications) is provided for under Rule 11.

¹ In the second application

The Rule reads as follows

11 Consolidation of Actions

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.*

[15]. Erasmus² describes the purpose of consolidation as follow

"The purpose of a consolidation of actions under this rule and the joinder of a third party under rule 13 is in broad terms the same: to have issues which are substantially similar tried at a single hearing so as to avoid the disadvantages attendant upon a multiplicity of trials"

[16]. It is fairly trite that the decisive consideration in an application for joinder is that of convenience³. The same is true of an application for consolidation of actions.

[17]. As to what factors inform the consideration of convenience and what must be taken into account in determining whether it is appropriate to grant a consolidation, I am in the fortunate position of having recourse to a comprehensive judgment of Satchwell J (which strangely is unreported). That judgment is Placecol (Pty) Ltd v Absa Bank Ltd and SARS & Absa Bank Ltd v Mounties 2012 SA (GSJ).⁴

² Superior Court Practice, vol 2 at D1 -133

³ Nel v Silicon Smelters (Edms) Bpk 1981 (4) SA 792 (A) at 802 B - C

⁴ and can be found on the SAFLI website Placecol Cosmetics (Pty) Ltd v Absa Bank Ltd, Absa Bank Ltd v UTi South Africa (Pty) Ltd (Mounties Division) [2012] ZAGPJHC 193 (4 October 2012)

[18]. In Placecol Satchwell J set out the law on consolidation as follows:

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 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] A distinction is to be drawn between two types of consolidation - "the consolidation of actions separately instituted at the pleading stage and a consolidation of actions separately pleaded merely for the purposes of hearing". To my mind the application in the present matter is for "consolidation of separate actions for the purposes of trial". In International Tobacco Co v United Tobacco Co 1953 (1) SA 241 W, the applicant sought to amend its two declarations alternatively to incorporate by amendment the one into the other which the court found would "bring about the joint trial of the actions in what seems to me to be a far more effective manner than would a consolidation of the actions". In New Zealand v Stone supra, Corbett AJ (as he then was) commented that the approach in International Tobacco v United Tobacco supra exemplified consolidation for purposes of the hearing.

[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. "

Application and analysis

[19]. Having regard to the above judgment and the cases referred to therein it is clear that the applications ought to be consolidated for (what is referred above as) "purposes of hearing". The relevant factors indicating convenience are the following.

- [20]. The facts in both applications are intertwined, so much so that Pikitup has filed the same answering affidavit (which Pikitup describes as its "consolidated answering affidavit") in each of the first application and the second application. Pikitup's approach to the filing of its answering affidavit was manifestly appropriate. This is so because in the founding affidavit to the second application MSS expressly refers to, incorporates and relies on the contents of its founding affidavit in the first application.
- [21]. Pikitup is the first and principal respondent in both applications. None of the other respondents object to consolidation. Moreover apart from being factually intertwined the applications also give rise to the adjudication of the same or (at least very similar) legal and factual issues. It appears undesirable for two Courts to adjudicate separately on these issues, as this, could apart from anything result in conflicting findings on the same or similarly issues.
- [22]. MSS, represented by its counsel Mr M Snyman, contended that a consolidation would indeed entail prejudice. Remarkably the arguments as to prejudice focussed on prejudice not to MSS, but rather prejudice which would potentially inure the second respondent in the first application, i.e. Fidelity Security Services (Pty) Limited.
- [23]. The contention as to prejudice is without merit.
- [24]. If Fidelity were to perceive that it would incur prejudice as a result of the consolidation, it would be for Fidelity (and not MSS) to invoke such prejudice in opposition to the consolidation application. It has not done so. In any event Fidelity's role in the hearing would appear to be limited to submission it wishes to make on aspects of costs.
- [25]. The other grounds advanced in opposition to the application [for example that consolidation would entail a burden on the Court since the judge in the second application would not need to have regard to the first application (and presumably vice versa)] do not appear to me to bear scrutiny.
- [26]. The record in the second application, as a result of the incorporation of the founding affidavit in the first application into the founding affidavit of the

second application, is already intertwined with the record in the first. In any event MSS' contention loses sight of the fact that the issues for determination are similar in both applications and are grounded in what MSS contends to have been an unlawful cancellation of a tender process.

- [27]. Given the close procedural proximity of the applications to each other and the intertwined nature of the facts and issues in both applications, this matter is par excellence one where a consolidation of the applications for hearing is appropriate.
- [28]. As to costs. Pikitup has been successful in the application. While it did not seek costs initially (presumably on the assumption that the consolidation was not contentious and would not be opposed) in its heads of argument (as was pointed out by its counsel at the hearing, Mr B Leech SC) Pikitup had indicated its intention to seek costs. As the issues in the applications are such as to justify the retention of two counsel, it follows that to the extent that Pikitup engaged two counsel herein it would be entitled to the costs of same.

[29]. In the result the following order is made:

[1]. *The consolidation application brought by Pikitup SOC (Pty) Ltd ("Pikitup") for the consolidation of two applications brought by Mabotwane Security Services CC against Pikitup et al in this Court under case number 89232/2015 and case number 11547/2016, is granted.*

[2]. *The two applications shall be heard together as one application.*

[3]. *The consolidated ~~applicant~~ application shall be heard on the date on which the application under case number 89232/2015 has already been set down for hearing.*

[4]. *Pikitup is awarded the costs of this consolidation application, including the costs of two counsel, where so employed*


 G B ROME
 ACTING JUDGE OF THE HIGH COURT