AFRICOM HOLDINGS (PVT) LTD
And
DR. SIBUSISO B. MOYO
And
CHONAKA HLABANGANE NDLOVU
versus
KWANAYI KASHANGURA
and
FERNHAVEN INVESTMENTS (PVT) LTD

HIGH COURT OF ZIMBABWE
DUBE J
HARARE, 28 May 2018 & 27 June 2018

Opposed Matter

C Mucheche, for the applicants
C *Kwaramba,* for the defendants

DUBE J: The rules allow consolidation of matters where the parties involved are the same, the matters are pending in the same court, are capable of being consolidated and the issues to be decided the same or similar. The rationale behind consolidation of matters is to avoid conflicting judgments, save time and money by clubbing together matters involving common questions of fact and law. The court has a discretion to order consolidation of an application for dismissal for want of prosecution of a matter with the matter sought to be dismissed and may order so where the interests of justice demand so. In this case, the applicants seek an order consolidating two applications for dismissal for want of prosecution with the two applications sought to be dismissed. The application for consolidation is brought in terms of Order 13 r 92 of our rules.

The first applicant is a telecommunications company. The second applicant is the board chairperson and director of the first applicant. The third applicant is one of first applicant's directors. The first respondent is a major shareholder and director of the second respondent.

The second respondent is a company that owns shares in the first applicant. Both the second and third applicants represent the second respondent's interests in the first applicant.

There has been a long and protracted dispute over control of the first applicant, [hereinafter referred to as Africom], resulting in several applications being issued in this court. The two applications filed under HC 2680/17 and HC 449/17 deal with the fight for control of Africom. The events leading to this litigation are as follows. On the 6th of April 2016, the second respondent resolved to remove second and third applicants as its directors and proposed the appointment of another director. The applicants resisted their removal and the second and third applicants continued to act as directors of Africom. 0n the 11th of January 2017, the second applicant called for an extraordinary general meeting of shareholders of Africom wherein a debt conversion agreement and a rights offer for the repayment of the company's debts was proposed. On 28 March 2017, the respondents filed an application under HC 494/17 challenging the proposal on the basis that that the dilution of shares would result in a reduction of its shares from 41% to 0.41%. They averred that the calling of this meeting was null and void as the second applicant was no longer a director of Africom and was acting in defiance of the resolution of the applicant company. The `first and second respondents seek an order declaring that the first and second applicants are no longer directors of Africom and declaring all acts undertaken by them from 6 April 2016 null and void.

The applicants continued to defy the resolution and in defiance of a court order held an extra ordinary general meeting of Africom on 22 February 2017 .The respondents filed an application under HC 2680\17 seeking an order declaring the Extra–Ordinary General Meeting of Africom held on 22 February 2017 null and void and invalidating any acts which may be done pursuant to such meeting. The applicants have since filled applications under HC4475/1 and HC4476/17 for the dismissal of the respective applications.

The applicants seek consolidation of the four applications on the basis of the following,

a) That all the cases relate to or involve the same or related parties.
b) The legal issues that arise for determination in all the cases are interrelated and interconnected.
c) There is a need for a wholesome resolution of the real dispute between the parties as opposed a piece meal fashion.

d) All the cases are before the High Court, making it more convenient for the same court to deal with all the cases as one to avoid confusion.
e) The consolidation of these matters will save costs and time for both the parties and the court.

The respondents resist the application. The respondents take issue with the request to consolidate applications for dismissal for want of prosecution with the matters sought to be dismissed. They argued that the hearing of the applications for dismissal ought to precede the main and substantive applications. Respondents queried why the applicants did not also seek consolidation of HC 1602/17, an application for rescission of judgment which they aver involves the same dispute between the parties. The respondent claimed that the applicants are not *bona fide* when they claim that they want the dispute over control of Africom resolved once and for all. The respondents submitted that if the purpose of the application is to bring finality to the matters pending in the High Court, that purpose will not be achieved as there is already an appeal pending under HC 541/17 where the Supreme Court is being called upon to determine the same issues and in effect decide whether or not the second and third applicants are still part of Africom. The respondents contended that lumping the matters together will not produce justice between the parties and that the consolidation is not convenient for all the parties.

Order 13 Rule 92 provides for consolidation of matters. It reads as follows;

> "92. **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 court may make any order which it considers proper with regard to the further procedure, and may give one judgment disposing of all matters in dispute in the said actions.
> [Paragraph amended by s.i. 368 of 1990]
> Provided that, with the consent of the parties to the actions, a judge may make an order consolidating the actions and any order which he considers proper with regard to the further procedure"

Rule 92 allows a court to order a joint hearing or consolidation of matters or actions . It is applicable in cases where separate actions have been instituted. The primary objective of consolidating matters is to void delays in hearing matters and duplication of trials. The

overriding factor in an application for consolidation is that of convenience. The court may consolidate matters where it has been shown that the cases sought to be consolidated involve

a) the same parties,

b) where the issues to be decided are related or common

c) the cases are pending in one court

d) or where the parties have causes that can be joined in a single action.

Rule 92 gives the court wide discretionary powers in dealing with consolidation of actions.

In *New Zealand Insurance Co Ltd v Stone* 1963 (3) SA 63 at p 69 A-C, the court applied r 11 of the South African Uniform Court Rules which is identical to our r 92 and said the following of consolidation of matters,

> "…the court, it would seem, has a discretion whether or not to order consolidation, but in exercising that discretion the court will not order 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 …. 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 consolidation to satisfy the court upon these points''

The case sets down general guidelines for consolidation of matters. A court ordering consolidation of matters must be satisfied that the balance of convenience favours the consolidation and that there is unlikely to be any substantial prejudice occasioned to any party by the consolidation sought. Consolidation may be ordered unless it is shown that either of the parties is likely to suffer not just any prejudice but substantial prejudice as a result of the consolidation. The prejudice likely to ensue must be sufficient to cause the court to decline to order the consolidation of the actions. Consolidation of matters helps to ensure the efficient and proper administration of justice. It must be shown that the consolidation promotes convenience for both the parties as well as the court. Consolidation has the effect of avoiding unnecessary costs for the parties and avoids unnecessary delays. The courts only order consolidation in a bid to promote efficient use of judicial resources and efficient handling of cases. Consolidation of matters should be ordered unless it is difficult to effect such a consolidation. The onus is on the party moving for consolidation to justify such a cause . He must show that the interests of justice demand that a joint trial be held.

The parties agree that the two main applications involve control of Africom Holdings (Pvt) Ltd. The matters filed under HC 2680/17 and HC 419\ 17 are based on the same facts and involve the same questions of law. An additional party is cited under HC 2680/17, being the Zimbabwe Asset Management Company. The company has been cited purely because it provided funding to Africom. It did not oppose the application. The fourth respondent was cited under HC 2801\17 only as a formality. It has not defended the proceedings under HC 2680/17. There is no legal obligation to join or involve the fourth respondent at this stage as it is barred.

What has exercised my mind is whether it is procedurally correct to consolidate the two applications under HC 494/17 and HC 2680/17 together with the two applications seeking their dismissal. Rule 92 does not classify the matters that may be consolidated. This consideration is left entirely to the discretion of the court. The rule gives the court a huge discretion in this respect. The discretion reposed on the court entitles it to make a decision that is convenient to the parties and which does not result in prejudice being suffered by any of the parties involved.

An application for dismissal for want of prosecution brought in terms of s 236(3) (b) of our rules. A court dealing with an application for dismissal for want of prosecution does this on the basis of an application filed separately from the application sought to be dismissed. The practice is that it is dealt with first a. It is capable of disposing of a matter without the need to deal with on the merits. An application for dismissal is akin to a preliminary point. The difference being that a preliminary point is usually taken on the papers. The way I see an application for dismissal for want of prosecution is that it basically raises a preliminary issue which requires to be dealt with before the main matters are entertained. Effectively, an application for dismissal for want of prosecution is a preliminary point that is raised before the merits of the matter are dealt with. Whether the application is dealt with separately or on the same day as the main matter, the application will still be required to be dealt with before the main application is entertained. Where an application for dismissal for want of prosecution has been consolidated with the main matter, the court will be required to have regard to the application for dismissal before it delves into the merits of the matter sought to be dismissed. This approach is desirable as it enables the court dealing with the substantive application to deal first with the application for dismissal at the same sitting. Should the court dismiss the application for dismissal , it can proceed and deal with the main application on the merits. In

the event that the application succeeds, that is the end of the matter. It is convenient to deal with both matters all at once .I see no legal impediment with regards this approach .

The application filed under HC 1602/17 involves a dispute over shareholding in the first respondent. The matter does not involve control of Africom. No justification has been shown for the consolidation of this matter with the applications that centre on the ownership and control of Africom. The court accepts that there is a similar matter pending in the Supreme Court, raising the same legal points. That matter is out of this court's hands. There is no bar to this court hearing a similar dispute filed separately in this court. The matters pending in this court are still required to be dealt with.

The parties to this dispute are substantially the same, the cause of action the same and the issues arising for decision the same. The applications sought to be consolidated are pending in the same court. It is convenient for the same court to deal with all the cases all at once. I agree with the applicant's approach of a wholesome approach to all cases pending in the High Court. The same set of evidence will require to be adduced in the two applications that deal with the merits of the dispute if dealt with separately. A consolidation will save the parties from adducing the same or similar evidence twice in two different applications. Two different courts may come up with conflicting decisions. Convenience demands that all matters pending in the High Court, raising the same legal points are dealt with once and for all. It will not be difficult to merge the pleadings in these applications. A holistic approach is called for in this instance.

In this day of escalating case backlogs, I do not see the need to engage four different courts to deal with four different records that could properly be dealt with all at once by one court. Allowing such a course would amount to a dire waste of human resources and time. Such an approach will also have the effect of delaying the hearing of the matters and unnecessarily burdening the parties with costs of four separate applications. It will be convenient for the parties to have the preliminary applications and the two main applications dealt with all at once, and by the same court. The fact that the applications for dismissal for want of prosecution do not deal directly with the subject of the control of Africom is of no consequence and does not hinder the consolidation requested as the applications have a bearing on the conduct of the two applications under scrutiny.

Once all the matters are put together and dealt with by the same court, the dispute between the parties will be speedily resolved. The rights of the warring parties in cases pending

in this court will be dealt with in in a single judgment. The interests of justice demand that these four applications be consolidated. I have decided, in the exercise of my discretion to consolidate the four applications which are the subject of this application. The court did not hear the respondents bemoan that such a consolidation will prejudice them in any substantial fashion. It will also be less costly to deal with the four applications all at once. Convenience and expediency calls for the consideration of the matters all at once. The applicant has shown an entitlement to the relief sought.

Accordingly, it is ordered as follows:

1. The application for consolidation of case numbers HC 494/17, HC 2680/17, HC 4475/17 and HC 4476/17 is granted.
2. The Registrar of the High Court is directed to ensure that the court records for the cases mentioned in paragraph one (1) above are consolidated to constitute one record.
3. The parties shall prepare a consolidated index for all cases mentioned in paragraph one (1) above.
4. Costs shall be in the cause.

Matsikidze and Mucheche, applicants' legal practitioners
Mbidzo, Muchadehama and Makoni, respondents' legal practitioners