

**SPENCER’S CREEK (PRIVATE) LTD**

**Versus**

**ZIMNAT GENERAL INSURANCE**

**AFRICA ALBIDA TOURISM (PRIVATE) LIMITED**

**And**

**VICTORIA FALLS SAFARI LODGE HOTEL (PRIVATE) LTD**

**Versus**

**ZIMNAT GENERAL INSURANCE**

IN THE HIGH COURT OF ZIMBABWE

DUBE-BANDA J

BULAWAYO 13 February 2024 & 22 February 2024

**Consolidation of matters for trials**

*D. Tivadar with D. Coltart & Ms. K. Mpofu* for the plaintiffs  
*J. Moyo* for the defendant

**DUBE-BANDA J:**

[1] The two matters *Spencer’s Creek (Private) Ltd v ZIMNAT General Insurance* HC 1801/22 (“HC 1801/22”) and *Africa Albida Tourism (Private) Limited and Victoria Falls Safari Lodge Hotel (Private) Limited v ZIMNAT General Insurance* HC 1800/22 (“HC 1800/22”) were placed before me one after the other for a further pre-trial conference in terms of r 49(5) of the High Court Rules, 2021. In both matters the plaintiffs claim payment allegedly due to the plaintiff in terms of the insurance contract between the plaintiffs and the defendant. The difference only relates to the amount claimed in that in HC 1801/22 the amount claimed is USD\$ 1 400.000.00 and in HC 1800/22 the amount claimed is USD\$ 1 066 239.00. In both matters the pleadings are identical.

[2] In both matters the parties attended a pre-trial conference in terms of r 49(1) of the Rules. Upon the conclusion of each pre-trial conference the parties, in terms of r 49(3) of the Rules drew a joint pre-trial minute which was signed by their legal practitioners. In each matter the

parties agreed on the issues for trial, and the issues are identical word for word for the two matters. In both matters the parties agreed that the issues for trial are these:

- i. Whether the statement of claim was submitted out of time, if yes, whether the defendant granted an extension for the submission of the statement of claim.
- ii. Whether COVID 19 arose at plaintiff's premises, Victoria Falls Safari Lodge?
- iii. If so, what is the quantum of damages suffered by plaintiff.

The only difference being that in HC 1800/22 item (ii) refers to Victoria Falls Safari Lodge and in HC 1800/22 item (ii) refers to IlaIa Lodge.

[3] Prior to attending the pre-trial conference in terms of r 49 (1), the plaintiffs on 12 October 2023 in both matters filed a draft pre-trial minute and stated that it will seek that the trials of the two matters be consolidated as the cases involve the same defendant, the same legal practitioners and identical issues. The issue of consolidation does not appear in the joint pre-trial minute. At the pre-trial conference before me the plaintiff took up the issue of consolidation and the parties were unable to agree on this issue. The plaintiffs' counsel sought that I direct that the two matters be consolidated for trial. The defendant opposed that the matters be consolidated. At the conclusion of each pre-trial conference, I referred each matter to trial in terms of the joint pre-trial minute drawn and filed of record by the parties. I reserved judgment in respect of the issue for consolidation of the matters for trial.

[4] I now turn to the issue of consolidation of trials. Mr *Tivadar* counsel for the plaintiffs in both matters made an application for a consolidation of the two matters. Mr *Moyo* counsel for the defendant in both matters opposed the application. Mr *Tivadar* submitted that because the parties have failed to agree on the issue of consolidation of trials, as the presiding judge I have the competence and jurisdiction to give directions in terms of r 49(10)(c) of the Rules. Counsel submitted that I must direct that the trial be consolidated in terms of r 34.

[5] The starting point is to determine whether a judge presiding over a pre-trial conference can direct the parties in the manner sought by the plaintiff in this matter. Rule 49(10)(c) provides that:

(10) Upon the conclusion of a pre-trial conference held before a judge, the judge—

- (c) may give directions as to any matter referred to in subrule (2) upon which the parties have been unable to agree.

[6] Rule 10 (c) states that a judge presiding at a pre-trial may give directions as to any matter referred to in r 49(2) upon which the parties have been unable to agree. In *casu* the parties have been unable to agree on the issue of consolidation of trials and this issue is referred to in r 49(2) of the Rules. I agree that it is a matter that a judge presiding over a pre-trial conference may give directions in terms of r 10(c).

[7] Mr *Tivadar* submitted that the defendant was given notice in the plaintiff's draft minute filed on 12 October 2023 that a consolidation of trials of the two matters was being sought. Counsel further submitted that plaintiffs were making an application and that such application was sanctioned by r 34 of the Rules. Mr *Moyo* submitted that no notice was given that at the pre-trial conference before a judge an application for consolidation of trials would be made. Counsel considered it an ambush, worse still in that he is a correspondent attorney for the defendant's legal practitioners.

[8] Rule 34 of the Rules provide that:

*Consolidation of actions*

34. 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 provisions of rule 32(25) shall with the necessary changes apply with regard to the action so consolidated; and
- (c) the court may make any order which it considers fit with regard to the further procedure, and may give one judgment disposing of all matters in dispute in the said actions.

[9] The empowering rule is clear that upon an application by any party and after notice to all interested parties an order for consolidation of actions may be made. The import of the rule is that an order for consolidation cannot be made by the court *mero motu*, it must be by

application. The first issue for consideration is whether notice was given to the defendant that an application for consolidation of the two matters would be made at the pre-trial conference presided by a judge. The plaintiffs in both matters in their draft pre-trial minute stated as follows:

“Consolidation of trials

The plaintiffs seek that the trials of the matters in HC 1800/22 and HC 1801/22 be consolidated as the cases involve the same defendant, the same legal practitioners and identical issues.”

[10] The rule requires that notice be given to all interested parties. Generally giving notice means to notify or warn a party that something will happen. The plaintiffs stated in the draft pre-trial conference minutes that they seek a consolidation of trials. The fact that this issue was stated in a draft pre-trial minutes meant that the consolidation would be sought at the pre-trial conference. I say so because there is no suggestion that the plaintiffs abandoned the desire to seek a consolidation of the two matters. The defendant had knowledge that the plaintiff would seek a consolidation. I take the view that the defendant was notified that at the pre-trial a consolidation of trials would be sought.

[11] Further, it is trite that in terms of r 57 (1) of the Rules an application may be made either in writing or orally during a hearing. The rules do not provide that an application in terms of r 34 must be made in writing. The effect of this is it can either be made in writing or orally during a hearing. In *casu* the application was made orally during the course of the hearing of a pre-trial conference. Therefore, the r 34 procedural requirements i.e., of a notice and an application have been complied with.

[12] Mr. *Tivadar* submitted that it is convenient to consolidate the two matters for trial, in that in the two matters the issues; the witnesses; and the legal practitioners for the parties are the same. Mr *Moyo* contended that consolidating these two matters would be prejudicial to the defendant in that it might wish to brief different counsel for the two matters.

[13] In an application in terms of r 34, in the context of a pre-trial conference the judge has a discretion whether or not to direct that the matters be consolidated for trial.

In exercising that discretion, the judge should not direct a consolidation of trials unless satisfied that the balance of convenience favours a consolidation and that there would be no prejudice that would be suffered by any party to the litigation. The *onus* is on the party seeking a consolidation to satisfy the judge that it is convenient to consolidate the matters for trial.

[14] It appears that the word “convenient” in r 34 is the magic word. The paramount test in regard to consolidation of actions is convenience. The consolidation procedure would be convenient if, in all the circumstances it is fair to the parties concerned. See *Minister of Agriculture v Tongaat Group Ltd* 1976 (2) Sa 357 (D). The purpose of a consolidation is to ensure that issues which are essentially the same are heard and determined in one trial so as to avoid a multiplicity of trials with the concomitant disadvantages and prejudice. In *Africom Holdings (Pvt) Ltd v Moyo & Ors* HH 357/18 DUBE J (as she then was) said:

“The primary objective of consolidating matters is to avoid 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.”

[15] In *casu* in the two matters that are sought to be consolidated, the issues for trial; the witnesses; and the legal practitioners for the plaintiffs; and the legal practitioners for the defendant are the same. In my view it would be convenient for the parties that the two matters be consolidated for trial. See *Chakumhara (nee Mukwekwe) v Bvitira & Anor* HH 48/24; *New Zealand Insurance Co Ltd v Stone* 1963 (3) SA 63 at p 69 A-C.

[16] Apart from the convenience or inconvenience of the parties, the convenience of the court should also be considered. It is important to note that in both matters the same issues will be considered and be determined. Placing the matters before two judges might result in conflicting decisions on the same issues. Two conflicting decisions on the same issues is something that, if possible, must be avoided. Again, the plaintiff will call the same witness in both matters, and the defendant will also call the same witnesses in both matters. This would

mean that two judges of this court presiding over two different courts will have to listen to the same witnesses giving basically the same evidence. In addition, the two judges may have to consider and make credibility findings of these witnesses and there is a possibility of conflicting credibility findings. Even if the two matters are placed before the same trial judge, it would mean that judge will consider and determine the same issues twice, and listen to the same witnesses twice, and make credibility findings on the same witnesses twice. Furthermore, the court will have to deploy the same amount of resources twice for the purposes of hearing the same witnesses and considering and determining the same issues argued by the same legal practitioners. Such would not be convenient to the court.

[17] There is also a logistical problem to consider. The court has to ensure that the date and time upon which the two matters are set down do not coincide. This is in view of the fact that the same legal practitioners appear for the plaintiffs and the same legal practitioners appear for the defendant. The same witnesses would testify for the plaintiffs in both matters and the same witnesses would testify for the defendant in both matters. Again, such would not be convenient to the court.

[18] Having regard to all the circumstances of the two matters, I am of the view that the convenience occasioned by a consolidated trial far outweighs any prejudice, or potential prejudice, or inconvenience which the defendant may suffer if such consolidation of trials is directed. In fact, this is a text-book case for a consolidation for trial.

#### Disposition

In the circumstances, I direct in terms of r 49(10)(c) of the High Court Rules, 2021 that the two cases i.e., *Spencer's Creek (Private) Ltd v ZIMNAT General Insurance HC 1801/22 and Africa Albida Tourism (Private) Limited and Victoria Falls Safari Lodge Hotel (Private) Limited v ZIMNAT General Insurance HC 1800/22* be consolidated for the purposes of trial.

*Webb Low & Barry Inc. Ben Baron & Partners*, plaintiffs' legal practitioners

*Atherstone & cook*, defendant's legal practitioners