

## 11 Consolidation of actions

RS 23, 2024, D1 Rule 11-1

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 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.

### Commentary

**General.** The provisions of this rule are applicable to applications by virtue of the provisions of rule 6(14).

The purpose of a consolidation of actions under this rule and of 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. In many cases joinder is a form of consolidation and consolidation a form of joinder. <sup>1</sup>

The following useful summary of the law applicable to consolidation applications under this rule is made by Opperman J in *Van den Berg NO v Suidwes Landbou (Pty) Ltd*: <sup>2</sup>

[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)
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,

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<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.)

**‘Where separate actions have been instituted.’** The rule makes provision for the consolidation of actions, not for the consolidation of issues. <sup>3</sup> The rule makes it clear that the actions may be consolidated upon the application of *any* party thereto. The rule of practice that consolidation of actions would not be granted at the instance of a plaintiff who had sued the defendant in two different actions no longer applies. <sup>4</sup> Consolidation in terms of rule 11 applies to the consolidation of actions instituted in the High Court and not to the consolidation of actions of which one has been instituted in the High Court and the other in the magistrate’s court, at least not without the consent of all the parties. <sup>5</sup>

Consolidation applications are not adjudicated with reference to the merits of the actions sought to be consolidated. They are adjudicated with reference to the pleadings in the two actions, the issues arising therefrom and the evidence which will be required to be led at trial in relation to matters in dispute on the pleadings. <sup>6</sup>

**‘It appears to the court convenient to do so.’** Rule 11 is concerned with convenience in relation to the conduct and management of court proceedings. <sup>7</sup> The paramount test in regard to consolidation of actions is convenience. It has been held <sup>8</sup> that the word ‘convenient’ connotes not only facility or expedience or ease, but also appropriateness in the sense that the procedure would be convenient if, in all the circumstances of the case, <sup>9</sup> it appears to be fitting and fair to the parties concerned. In *Rail Commuters’ Action Group v Transnet Ltd* <sup>10</sup> it

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was held <sup>11</sup> that the overriding consideration, at least for purposes of that case, was ‘that of convenience: of the parties, of witnesses, and, last but not least, of the Court’. Considerations that militate in support of the convenience of a consolidation of actions include matters such as a commonality of parties and issues, the limitation of costs and the more efficient use of court time and resources. It can also be convenient to consolidate actions to avoid the risk of an unwholesome disparity of outcome on a single issue were it to be determined in separate actions. There is no closed list of matters that could bear on what might make it appear to a court to make it convenient in a given situation that actions should be consolidated, but the criterion is always whether the efficient conduct of the proceedings or the court’s business would be assisted by consolidation. <sup>12</sup>

Consolidation of actions will in general be ordered in order to avoid multiplicity of actions and attendant costs. <sup>13</sup> In *Nel v Silicon Smelters (Edms) Bpk* <sup>14</sup> convenience was found, *inter alia*, in the fact that (i) the consolidated prosecution of the case would reduce costs and expedite proceedings; (ii) there would be one finding concerning a factual dispute involving a number of parties; and (iii) the plaintiff’s various claims arising from the same cause of action would be heard in one action.

Consolidation of actions will not be ordered if there is the possibility of prejudice being suffered by any party. <sup>15</sup> 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’. <sup>16</sup>

Consolidation has been refused where the defendant would have been prejudiced by the trial together of actions which the plaintiff had instituted separately; <sup>17</sup> where plaintiffs would have been prejudiced in the conduct of their separate cases by

as co-plaintiffs in circumstances where their interests did not run together but conflicted; <sup>18</sup> where there was a possibility of a conflict developing between the plaintiffs *inter se*, to their prejudice, on the question of the *quantum* of damages; <sup>19</sup> where a consolidation would involve considerable delay; <sup>20</sup> where the actions sought to be consolidated stemmed from statutory backgrounds which were completely foreign to one another; <sup>21</sup> and where it was not 'in any sense fitting or appropriate for an action for interim relief pending the determination of a principal case to be consolidated with the action in that principal case so that both actions can be determined contemporaneously'. <sup>22</sup>

Where a defence of *lis pendens* has been raised, there is nothing prohibiting a consolidation in the absence of substantial prejudice to the party who raised the defence. <sup>23</sup>

**'Upon the application of any party.'** The rule of practice that consolidation of actions would not be granted at the instance of a plaintiff who had sued the defendant in two different actions no longer applies. <sup>24</sup>

The application and order for consolidation may be made at any time. In some cases decided prior to the introduction of this rule in 1965, a distinction appears to be drawn between the consolidation of actions separately instituted at the pleading stage and a consolidation of actions separately pleaded merely for the purposes of the hearing. <sup>25</sup> In the rule no such distinction is drawn but the stage at which the application for consolidation is made, is obviously relevant to the evaluation of convenience and possible prejudice.

**'May . . . make an order consolidating such actions.'** Under the rule, the court has a discretionary power to order a consolidation of actions. The discretion is to be exercised within the context of convenience and prejudice, as to which see the notes s v 'It appears to the court convenient to do so' above.

**Paragraph (b): 'The provisions of rule 10 shall *mutatis mutandis* apply.'** The underlying intent of this paragraph seems to be that consolidated actions by two plaintiffs against a common defendant be treated on the same basis as a joinder of two plaintiffs against one defendant. <sup>26</sup>

Rule 10(4) which provides for the question of costs where parties have been joined in terms of rule 10 and makes specific provision for certain situations, does not provide for the situation where both plaintiffs are unsuccessful in a consolidated action. The court is thrown back on its general discretion and would normally order the costs of the successful defendant to be paid by the plaintiffs jointly and severally. <sup>27</sup>

In *Standard Credit Corporation Ltd v Strydom*, <sup>28</sup> where actions had been consolidated by consent, the court in the exercise of its discretion in terms of rule 10(4)(c) ordered the unsuccessful defendants to pay the costs of the successful plaintiff jointly and severally.

**Paragraph (c): 'Make an order . . . with regard to the further procedure.'** The fact that the court may make any order which to it seems meet in regard to the further procedure ensures the orderly conduct of the case. <sup>29</sup>

**Appeal.** Provided that, having regard to all relevant circumstances, it is in the interests of justice to hear an appeal against a consolidation order made in terms of rule 11, such an order is appealable. <sup>30</sup>

<sup>1</sup> *Nel v Silicon Smelters (Edms) Bpk* [1981 \(4\) SA 792 \(A\)](#) at 802B; *Jacobs v Deetlefs Transport BK* [1994 \(2\) SA 313 \(O\)](#) at 320A-B.

<sup>2</sup> Unreported, FB case no 1240/2020 dated 5 November 2021, reproduced here without editorial intervention. See also *C v R* (unreported, GJ case no A5002/2022 dated 15 December 2022 — a decision of the full court) at paragraphs [28]–[38]; *Phalane N.O. v Department of Co-operative Governance, Human Settlements and Traditional Affairs of the Limpopo Provincial Governance* (unreported, LP case no 1971/2018 dated 21 September 2023) at paragraph [46]; *Lamola v Kekana* (unreported, GJ case no 31596/2014 dated 27 November 2023) at paragraphs 17–23.

<sup>3</sup> *Jacobs v Deetlefs Transport BK* [1994 \(2\) SA 313 \(O\)](#) at 317G; *C v R* (unreported, GJ case no A5002/2022 dated 15 December 2022 — a decision of the full court) at paragraph [29].

<sup>4</sup> See *International Tobacco Company of SA Ltd v United Tobacco Companies (South) Ltd* [1953 \(1\) SA 241 \(W\)](#) at 243E.

<sup>5</sup> *PNM Short Hauliers (Pty) Ltd v Izusa Carriers CC* (unreported, MM case no 269/2019 dated 11 July 2022) at paragraph [32].

<sup>6</sup> *C v R* (unreported, GJ case no A5002/2022 dated 15 December 2022 — a decision of the full court) at paragraph [36].

<sup>7</sup> *Kriel NO v Rockland Group Holdings (Pty) Ltd; Born Free Investments 247 (Pty) Ltd v Kriel NO* (unreported, WCC case nos 5417/2014, 9609/2014 and 12862/2019 dated 24 November 2021) at paragraph [24].

<sup>8</sup> *Mpotsha v Road Accident Fund* [2000 \(4\) SA 696 \(C\)](#) at 700I–J; *Qwelane v Minister of Justice and Constitutional Development* [2015 \(2\) SA 493 \(GJ\)](#) at 497D–F. See also, in the context of subrule 33(4), *Minister of Agriculture v Tongaat Group Ltd* [1976 \(2\) SA 357 \(D\)](#) at 363D; *Braaf v Fedgen Insurance Ltd* [1995 \(3\) SA 938 \(C\)](#) at 940C; *Pepkor Holdings Ltd v AJVH Holdings (Pty) Ltd* [2021 \(5\) SA 115 \(SCA\)](#) at paragraphs [15]–[17]; *Innovative Flexibles (Pty) Ltd v Itau Milling (Pty) Ltd* (unreported, FB case no 184/2022 dated 5 September 2023) at paragraph [13].

<sup>9</sup> When it comes to a weighing of convenience for the purposes of rule 11, all (legally relevant) factors have to be judged in their particular context in the given case if the wide judicial discretion that is engaged in the adjudication of applications under the rule is to be properly exercised (*Pepkor Holdings Ltd v AJVH Holdings (Pty) Ltd* [2021 \(5\) SA 115 \(SCA\)](#) at paragraph [15]). See also *C v R* (unreported, GJ case no A5002/2022 dated 15 December 2022 — a decision of the full court) at paragraph [31].

<sup>10</sup> [2006 \(6\) SA 68 \(C\)](#).

<sup>11</sup> At 88B.

<sup>12</sup> *Kriel NO v Rockland Group Holdings (Pty) Ltd; Born Free Investments 247 (Pty) Ltd v Kriel NO* (unreported, WCC case nos 5417/2014, 9609/2014 and 12862/2019 dated 24 November 2021) at paragraph [22]; and see *C v R* (unreported, GJ case no A5002/2022 dated 15 December 2022 — a decision of the full court) at paragraphs [33]–[34].

<sup>13</sup> *Standard Bank of SA v Pechey Bros* (1902) 23 NLR 281; *Nel v Silicon Smelters (Edms) Bpk* [1981 \(4\) SA 792 \(A\)](#) at 801E and 802B; *Rail Commuters' Action Group v Transnet Ltd* [2006 \(6\) SA 68 \(C\)](#) at 88A; *Qwelane v Minister of Justice and Constitutional Development* [2015 \(2\) SA 493 \(GJ\)](#) at 497D–F; *C v R* (unreported, GJ case no A5002/2022 dated 15 December 2022 — a decision of the full court) at paragraphs [33], [37] and [38]; *Innovative Flexibles (Pty) Ltd v Itau Milling (Pty) Ltd* (unreported, FB case no 184/2022 dated 5 September 2023) at paragraph [13].

<sup>14</sup> [1981 \(4\) SA 792 \(A\)](#) at 801D; *Innovative Flexibles (Pty) Ltd v Itau Milling (Pty) Ltd* (unreported, FB case no 184/2022 dated 5 September 2023) at paragraph [13]. See also *Jacobs v Deetlefs Transport BK* [1994 \(2\) SA 313 \(O\)](#).

<sup>15</sup> *International Tobacco Company of SA Ltd v United Tobacco Companies (South) Ltd* [1953 \(1\) SA 241 \(W\)](#); *Beier v Thornycroft Cartage Company* [1961 \(4\) SA 187 \(N\)](#); *London & Lancashire Insurance Co Ltd v Dennis NO* [1962 \(4\) SA 640 \(D\)](#) at 644H–645E; *New Zealand Insurance Co Ltd v Stone* [1963 \(3\) SA 63 \(C\)](#) at 69B; *Belford v Belford* [1980 \(2\) SA 843 \(C\)](#) at 846B–F; *Nel v Silicon Smelters (Edms) Bpk* [1981 \(4\) SA 792 \(A\)](#) at 801D; *Pepkor Holdings Ltd v AJVH Holdings (Pty) Ltd* [2021 \(5\) SA 115 \(SCA\)](#) at paragraphs [14]–[15]; *Kriel NO v Rockland Group Holdings (Pty) Ltd; Born Free Investments 247 (Pty) Ltd v Kriel NO* (unreported, WCC case nos 5417/2014, 9609/2014 and 12862/2019 dated 24 November 2021) at paragraph [23]; *C v R* (unreported, GJ case no A5002/2022 dated 15 December 2022 — a decision of the full court) at paragraphs [30] and [32]; *Phalane N.O. v Department of Co-operative Governance, Human Settlements and Traditional Affairs of the Limpopo Provincial Governance* (unreported, LP case no 1971/2018 dated 21 September 2023) at paragraph [47].

- [16](#) *New Zealand Insurance Co Ltd v Stone* [1963 \(3\) SA 63 \(C\)](#) at 69B; *Kriel NO v Rockland Group Holdings (Pty) Ltd; Born Free Investments 247 (Pty) Ltd v Kriel NO* (unreported, WCC case nos 5417/2014, 9609/2014 and 12862/2019 dated 24 November 2021) at paragraph [23]; *Phalane N.O. v Department of Co-operative Governance, Human Settlements and Traditional Affairs of the Limpopo Provincial Governance* (unreported, LP case no 1971/2018 dated 21 September 2023) at paragraphs [47]–[48].
- [17](#) *International Tobacco Company of SA Ltd v United Tobacco Companies (South) Ltd* [1953 \(1\) SA 241 \(W\)](#) at 243H–244A.
- [18](#) *London & Lancashire Insurance Co Ltd v Dennis NO* [1962 \(4\) SA 640 \(D\)](#) at 645B–E.
- [19](#) *New Zealand Insurance Co Ltd v Stone* [1963 \(3\) SA 63 \(C\)](#) at 71D–H.
- [20](#) *Belford v Belford* [1980 \(2\) SA 843 \(C\)](#). See also *New Zealand Insurance Co Ltd v Stone* [1963 \(3\) SA 63 \(C\)](#) at 69H–70A.
- [21](#) *Belford v Belford* [1980 \(2\) SA 843 \(C\)](#) at 846B.
- [22](#) *Pepkor Holdings Ltd v AJVH Holdings (Pty) Ltd* [2021 \(5\) SA 115 \(SCA\)](#) at paragraph [16].
- [23](#) *Phalane N.O. v Department of Co-operative Governance, Human Settlements and Traditional Affairs of the Limpopo Provincial Governance* (unreported, LP case no 1971/2018 dated 21 September 2023) at paragraphs [50]–[55], following *McNeill v Williams* (unreported, KZD case no 5643/11 dated 1 May 2012) at paragraphs [14] and [21]–[23].
- [24](#) See *International Tobacco Company of SA Ltd v United Tobacco Companies (South) Ltd* [1953 \(1\) SA 241 \(W\)](#) at 243E.
- [25](#) *New Zealand Insurance Co Ltd v Stone* [1963 \(3\) SA 63 \(C\)](#) at 68H–69A. See also *International Tobacco Company of SA Ltd v United Tobacco Companies (South) Ltd* [1953 \(1\) SA 241 \(W\)](#); *Licences and General Insurance Co Ltd v Van Zyl* [1961 \(3\) SA 105 \(D\)](#) at 108E; *London & Lancashire Insurance Co Ltd v Dennis NO* [1962 \(4\) SA 640 \(D\)](#) at 643D–F.
- [26](#) *Minister of Agriculture v Estate Randeree* [1979 \(1\) SA 145 \(A\)](#) at 160F.
- [27](#) *Minister of Agriculture v Estate Randeree* [1979 \(1\) SA 145 \(A\)](#) at 160D–G.
- [28](#) [1991 \(3\) SA 644 \(W\)](#) at 653I–654A, 654F.
- [29](#) *Nel v Silicon Smelters (Edms) Bpk* [1981 \(4\) SA 792 \(A\)](#) at 801G.
- [30](#) *C v R* (unreported, GJ case no A5002/2022 dated 15 December 2022 — a decision of the full court) at paragraphs [20]–[27].