

**REPUBLIC OF SOUTH AFRICA**



**IN THE HIGH COURT OF SOUTH AFRICA  
GAUTENG DIVISION, PRETORIA**

**CASE NO: A164/22**

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

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DATE

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MATSHITSE CK

In the matter between:

HWJ COAL (PTY) LTD

(Registration Number: 2013/192858/07)

HWJ WOODCHIPS (PTY) LTD

(Registration Number: 2005/001142/07)

First Appellant

Second Appellant

and

NI-DA TRANSPORT (PTY) LTD

(Registration Number: 1995/010871/07)

Respondent

This judgment was handed down electronically by circulation to the parties' legal representatives by email and by up loading same on the case line.

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## JUDGMENT

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MATSHITSE AJ

### Introduction

[1] The first and second appellants (hereinafter referred to as “the appellants”) are appealing against the costs order granted against them by the District Magistrate sitting at Tshwane Central held at Pretoria. The Magistrate had ordered the appellants to pay costs in the joinder application. The respondent does not oppose this appeal.

### Brief Background

[2] Respondent (plaintiff in the main action) and first appellant (defendant in the main action) are embattled in a legal wrangle, wherein respondent sued first appellant for breach of contract. After the respondent had issued summons against first appellant it discovered that the second appellant together with two other parties were involved in the matter.

[3] The respondent then sought relief in the interlocutory application in the following terms, that:

[3.1] the 2<sup>nd</sup> appellant in this appeal, Jabulex (Pty) Ltd (Registration Number: 2015/ 29500/07 and The Transformation Expert (Pty) Ltd (Registration

number: 2013/225329/09) be joined as the second, third and fourth defendants respectively to the main action in Magistrate District Court; and

[3.2] that the costs of the joinder application be costs in the cause.

[4] The said joinder application was opposed by the appellants where they raised three points *in limine* being the lack of jurisdiction, the lack of authority and the lack of cause of action. In response to the said points *in limine* the respondent filed a replication. Those points were argued before the Magistrate who dismissed them with costs, despite the fact that no costs order was sought by the applicant in the joinder application.

[5] At the end of his judgment, the Magistrate stated that:

*"[17] 'In terms of Rule 33 of the Magistrate Court Rules, the court giving judgment or making any order, including any adjournment or argument, may award such costs as it deems fit. This respective matter is not complicated and it is not untoward for the Respondent (applicants in this appeal) to oppose the application, as this type of application is done daily in our Courts; I am of the view that costs should follow the results and the Applicant (Respondent in this application) must not be out of pocket but the Plaintiff (I believe the court wanted to say the Defendant, considering the terms of the order) must bear the costs".*

[6] Dissatisfied with the decision of the Magistrate, regarding cost, the appellants are now appealing against the said ruling.

[7] The appellants' grounds of appeal against the costs order granted by the Magistrates are as follows:

[7.1] It is settled law that relief not claimed in the Notice of Motion cannot be granted;

[7.2] The Presiding Magistrate relied on rule 33 of the Magistrate Court Rules for authority to award such costs as it deems fit in making an order;

[7.3] Rule 33 of the Magistrate's Court Rules<sup>1</sup> does not override the settled law that relief not prayed in the notice of Motion cannot be granted without the Notice of Motion being amended to include such relief.

#### Issue

[8] The pertinent question for the court in this matter is to establish when an Appeal Court can interfere with the discretion of a Magistrate. This court has to determine whether the Magistrate in the *court a quo* exercised his discretion judicially or whether he misdirected himself in exercising that discretion and committed an irregularity which requires this court to interfere with his decision. In *BST Kombuise (Edms) BPK v Abraham*<sup>2</sup> it was held that:-

*"A court is not entitled, on appeal to interfere with a Magistrates' exercise of his discretion with regard to the awarding of costs if the Magistrate did not misdirect himself and no irregularity occurred."*

[9] The court in the matter of *Gelb v Hawkins*<sup>3</sup> held that in seeking a basic principle to apply, it did not think it necessary or desirable to say more than that the court has a discretion, which is to be exercised judicially and upon the consideration of all the facts of each case which is in essence a matter of fairness to both sides.

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<sup>1</sup> Magistrate Courts Act 32 of 1944.

<sup>2</sup> 1978(4) SA 182(T).

<sup>3</sup> 1960 (3) SA 687(A) at 694A.

[10] The court also needs to make a determination in respect of the issue of whether the Notice of Motion had to be amended for the court to have dealt with the issue of costs. On that issue, counsel for the appellants submitted that the cost order granted by the presiding Magistrate was not prayed for in the respondents' Notice of Motion neither was it prayed for, or substantiated, in the founding affidavit to the joinder application. In fact, it was also not argued for at the hearing of the joinder application.

[11] On this point counsel for appellants referred the court to *Municipal Workers Retirement Fund vs Kopanong Local Municipality*<sup>4</sup> where it was held that:-

*"21. The final orders made on 8 November 2018 were not asked for in the concluding submissions of Mr Burger, but even if it could be said that it was asked for, it could not have been granted in the absence of such relief claimed in the notice of motion. In this regard I align myself with the following dicta in paragraph [7] of the decision of Commissioner of Correctional Services v Ntsetselelo Hlatswako*

*"[7] At the outset it is instructive to note that the first order setting aside the decision of the Disciplinary Board was not prayed for. Accordingly, it was in my view incompetent for the Court a quo to make the order in the absence of an amendment of the notice of motion. This part of the order was unfair both procedurally and materially. It is trite that a litigant can also not be granted that which he/she has not prayed for in the lis." (Footnote omitted)*

[12] The full bench held in *Mgoqi v City of Cape Town & another*<sup>5</sup> that:-

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<sup>4</sup> (A67/2019) [2019] ZAFSHC 159 (10 September 2019) paragraph 21.

<sup>5</sup> 2006 (4) SA 355 (CPD) at paras [10] - [13].

*“the relief sought by applicant’s counsel during his argument could not be considered as the notice of motion did not provide therefore and the applicant failed to move for an appropriate amendment of the notice of motion”.*

[13] It is evident from the record that the respondent never argued or prayed or requested that his Notice of Motion should be amended to the effect that the applicants should be ordered to pay the costs of the (interlocutory) joinder application.

[14] I am of the view that it was procedurally and materially unfair to the appellants for the Magistrate to have granted the respondent a prayer which he did not ask for. As it was held in the case of *The Road Accident Fund v Taylor and other matters*<sup>6</sup>:-

“The third is the principle that the law constrains a court to decide only the issues that the parties have raised for decision. See *Magistrates Commission and Others v Lawrence* [2021] ZASCA 165; 2022 (4) SA 107 SCA para 78-79”.

[15] Furthermore, the Notice of Motion envisaged that a final order, with regard to costs, would be argued and sorted out only at the end of the main trial and only after all the issues have been ventilated. The appeal must succeed based solely on this ground of appeal.

#### Conclusion

[16] The court in *The Road Accident Fund v Taylor and other matters*<sup>7</sup> stated that:-

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<sup>6</sup> (1136-1140/2021) [2023] ZASCA 64 (8 May 2023) at par 31.

<sup>7</sup> (1136-1140/2021) [2023] ZASCA 64 (8 May 2023) at par 33 to 34.

“In the circumstances, the age-old principle of *audi alteram partem* required that the affected persons be afforded reasonable prior notice and opportunity to state their cases. In *De Beer NO v North-Central Local Council and South-Central Local Council and Others (Umhlatuzana Civic Association intervening)* 2002 (1) SA 429 (CC) para 11, the following was said with particular reference to s 34 of the Constitution:

‘This fair hearing right affirms the rule of law which is a founding value of our Constitution. The right to a fair hearing before a court lies at the heart of the rule of law. A fair hearing before a court as a prerequisite to an order being made against anyone is fundamental to a just and credible legal order. Courts in our country are obliged to ensure that the proceedings before them are always fair. Since procedures that would render the hearing unfair are inconsistent with the Constitution courts must interpret legislation and rules of court, where it is reasonably possible to do so, in a way that would render the proceedings fair. It is a crucial aspect of the rule of law that court orders should not be made without affording the other side a reasonable opportunity to state their case. . .’

[17] Deciding the issue of costs without providing the parties with an opportunity to address the court, was unreasonable.

[18] The respondent did not oppose this appeal and also the appellants did not ask for costs in this matter, I am of the view that appellants should pay their own costs of this appeal.

## **ORDER**

In the premises, the following order is granted:

1. The appeal is upheld and paragraph 2 of the order of the court *a quo* is substituted as follows:

“Costs of the joinder application are costs in the cause.”

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C K MATSHITSE  
Acting Judge of the High Court of South Africa  
Gauteng Division, Pretoria

I agree and it is so ordered

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E VAN DER SCHYFF  
Judge of the High Court of South Africa  
Gauteng Division, Pretoria

For the Appellants: Adv TL Jacobs  
Instructed by: Fuchs Roux Inc  
Date of hearing: 30 May 2023  
Date of Judgment: 15 June 2023