

SOUTH AFRICA / JUDGMENT

Pule and Another v Minister of Police (1575/2023) [2025] ZANWHC 104 (20 June 2025) [2025] ZANWHC 104

COURT

North West High Court, Mafikeng

BEFORE

T C Mokhare

CASE / FILE NUMBER

1575/2023

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IN

THE HIGH COURT OF SOUTH AFRICA

NORTH WEST DIVISION –

MAHIKENG

Case No: 1575/2023

Reportable: YES / NO

Circulate to Judges: YES

/ NO

Circulate to Magistrates:

YES / NO

Circulate to Regional

Magistrates: YES / NO

In the matter between:

BOYBOY OUPA

PULE

1ST APPLICANT/PLAINTIFF

JOHN DINGAAN MADODA

2ND APPLICANT/PLAINTIFF

and

MINISTER OF POLICE

RESPONDENT/DEFENDANT

Delivered: This judgment is handed down electronically by circulation to the parties through their legal representatives' email addresses.
The date for the hand-down is deemed to be on 20 JUNE 2025

ORDER

1.
The application is dismissed.
2.
The applicants shall pay the respondent's costs of the joinder application, jointly and severally the one paying the other to be absolved, on party and party basis on Scale B.
3.
The costs shall include the costs of counsel.

JUDGMENT

MOKHARE AJ

1. The applicants are the Plaintiffs in a delictual action instituted by them on 06 July 2023 against the Minister of Police ("the Minister") as defendant, in this Court for malicious prosecution. The Minister is defending the action and has delivered a special plea of non-joinder of the National Director of Public Prosecution ("NDPP"). In reaction to the special plea, the applicants have brought a joinder application in which they seek an order that the NDPP be joined as defendant in the action. The applicants omitted to cite the NDPP in the joinder application despite seeking an order against it. The effect of this omission is that not only was there a non-joinder of the NDPP in the action, but also a non-citation of the NDPP to the joinder application. Thus, the joinder application on its own is fatally defective.
2. In essence, this Court is asked to join a party which is not cited in the application for joinder, though the relief sought is to join the NDPP to the proceeding pending in this Court.
3. The brief history of the matter is as follows. The applicants as Plaintiffs, have instituted a civil claim against the Minister in his official capacity. The summons was issued on 06 July 2023. The applicants cause of action as pleaded is one of malicious prosecution. Delictual damages are sought in the sum of three million rand in respect of each of the applicants.
4. On 8 November 2023, the Minister delivered a special plea of non-joinder of the NDPP. The applicants delivered a reply to the special plea on 05 February 2024. In the reply aforesaid, the applicants intimated that they were not barred from joining the NDPP as it was their rights to do so. However, the applicants reacted to the special plea of non-joinder by bringing an application for joinder of the NDPP.
5. The application for joinder was delivered on 23 February 2024, citing only the Minister as respondent. The NDPP was not cited. The joinder application was opposed by the Minister.

6. The relief sought in the notice of motion is as follows:
 1. “The national director of public prosecution be joined as the 2nd defendant in the main action under case number 1575/2023.
 2. That all pleadings filed of record be served upon the party joined in terms of prayer 1 within 10 days of the date of this order.
 3. That the costs of this application be reserved
 4. Further and /or alternative relief.”
7. The Minister opposed the application contending that a party sought to be joined was not cited as respondent in the joinder application. The application was merely served on the NDPP on 14 March 2024. The NDPP did not file opposing papers nor was she represented in court when the application was argued.
8. Counsel for the applicants and the Minister made oral submissions buttressed by their written submissions in court. The applicants’ argument through counsel was that the NDPP was served with the application despite her non-citation as co-respondent. Counsel submitted that this Court has a discretion to join as party to proceedings, if it is of the view that a party has substantial interest in the matter.
9. Counsel for the Minister refuted the applicants’ counsel’s

submissions

and submitted that this Court is in no position to make an order against the NDPP when the NDPP was not cited.

10. The legal principles of joinder are trite. Direct and substantial interest in the subject matter before court are the operative words. If direct and substantial interest is established, a joinder of a party is necessary. The other question is whether such party is likely to be affected by the outcome. If so, joinder must take place as a matter of necessity. Otherwise, prejudice is manifest in such situation if a joinder did not occur and judgment adverse to that party has been issued. In *Transvaal Agricultural Union v Minister of Agriculture and Land Affairs*,^[1] the Supreme Court of Appeal (“SCA”) adopted the following test:

“In Van Winsen, Cilliers and Loots Herbstein & Van Winsen’s The Civil Practice of the Supreme Court of South Africa 4th ed at 172 the learned authors supply a useful summary of the approach of the Court in the Amalgamated Engineering case in determining, by way of two tests, whether a third party has a direct and substantial interest in the outcome of litigation. Concerning the two tests, the learned authors state as follows:

‘The first was to consider whether the third party would have locus standi to claim relief concerning the same subject-matter. The second was to examine whether a situation could arise in which, because the third party had not been joined, any order the Court might make would not be res judicata against him, entitling him to approach the Courts again concerning the same subject-matter and possibly obtain an order irreconcilable with the order made in the first instance’.”

11. It is common cause between the parties that the NDPP has a direct and substantial interest in the matter. This being the case, it follows that the non-citation of the NDPP to the joinder application was fatal to the application itself. The applicants did not even seek a postponement in order to cure this procedural defect so that the NDPP may be cited. The non-joinder or non-citation of a party that an adverse order is sought against, is not a matter of form but substance. It goes to the heart of everyone’s right to defend themselves including access to courts. The argument of the applicants that this was a matter of form over substance falls to be rejected.
12. The question of whether all necessary parties have been joined does not depend on the subject matter of the suit, but rather on how, and to what extent the court's order may affect the interests of third parties. The test is whether a party has a direct and substantial interest in the subject matter of the action, meaning a legal interest, that may be prejudiced by the court's judgment. When considering joinder, the relief sought against a party plays a central role.
13. In *Lottostar (Pty) Ltd and others v Ithuba Holdings (Pty) Ltd and Others*[2] the Court in dealing with joinder held in par 13 that:

“As Fagan AJA pointed out in Amalgamated Engineering Union v Minister of Labour 1949 (3) SA 637 (A) at 656:

‘The question of joinder should surely not depend on the nature of the subject-matter of the suit ..., but ... on the manner in which, and the extent to which, the Court’s order may affect the interests of third parties’.

14. The rule is that any person is a necessary party and should be joined if such a person has a direct and substantial interest in any order the court might make or if such an order cannot be sustained or carried out into effect without prejudicing that party. The relief sought in the particulars of claim is against the NDPP and cannot be given effect to without prejudicing the NDPP. As such, it follows that as conceded by the applicants’ counsel, the NDPP has a direct and substantial interest in the outcome of the action and ought to have been joined as respondent in the joinder application.
15. In *Road Accident Fund and Others v Hlatshwayo and Others*[3] the SCA in par 29 in dealing with the non joinder of the Board stated that:

*“[29] In dealing with the issue of personal costs against the CEO and the Board, it is perhaps convenient to start with the order against the Board. The order of the full court was assailed on the basis that there was a material non-joinder of the Board. It is trite that joinder of a party is required where such a party may have direct and substantial interest in the subject matter of the action. In *Snyders and Others v De Jager and Others* [2016] ZACC 54 2017 (5) BCLR 606 CC the Constitutional Court held as follows:*

‘A person has a direct and substantial interest in an order that is sought in proceedings if the order would directly affect such

person’s rights or interest. In that case the person should be joined in the proceedings. If the person is not joined in

circumstances in which his or her rights or interests will be prejudicially affected by the ultimate judgment that may result from

the proceedings, then that will mean that a judgment affecting that person’s rights or interests has been given without affording

that person an opportunity to be heard. That goes against one of the most fundamental principles of our legal system. That is that, as a general rule, no court may make an order against anyone without giving that person the opportunity to be heard.”

16. In *Matjhabeng Local Municipality v Eskom Holdings Limited and Others*[4] the Constitutional Court in par 92 and 93 stated that:

“The law on joinder is well settled. No court can make findings adverse to any person’s interests, without that person first being a party to the proceedings before it. The purpose of this requirement is to ensure that the person in question knows of the complaint so that they can enlist counsel, gather evidence in support of their position, and prepare themselves adequately in the knowledge that there are personal consequences – including a penalty of committal – for their non-compliance. All of these entitlements are fundamental to ensuring that potential contemnors’ rights to freedom and security of the person are, in the end, not arbitrarily deprived.

‘The principles which are fundamental to judicial adjudication, in a constitutional order, were reaffirmed by this Court in its recent

decision in *Lushaba*, where the Court, per Jafta J, endorsed principles stated by Ackermann J in *De Lange*:

“[F]air procedure is designed to prevent arbitrariness in the outcome of the decision. The time-honoured principles that . . . the

other side should be heard [*audi alterem partem*], aim toward eliminating the proscribed arbitrariness in a way that gives

content to the rule of law. . . . Everyone has the right to state his or her own case, not because his or her version is right, and must be accepted, but because in evaluating the cogency of any argument, the arbiter, still a fallible human being, must be informed about the points of view of

both parties in order to stand any real chance of coming up with an objectively justifiable conclusion that is anything more than chance. Absent these central and core notions, any procedure that touches in an enduring and far-reaching manner on a vital human interest, like personal freedom, tugs at the strings of what I feel is just, and points in the direction of a violation.”

17. In *Matjhabeng Local Municipality v Eskom Holdings Limited* [5] the apex court stated at 33D-E:

“At common law courts have an inherent power to order joinder of parties where it is necessary to do so even where there is no substantive

application for joinder. A court could, mero motu, raise a question of joinder to safeguard the interest of a necessary party and decline to hear a matter until joinder has been effected. This is consistent with the Constitution.”

18. In this case, the issue of this Court mero motu joining a party does not arise because there is an application for joinder which is opposed. The application for joinder has failed to cite a party against whom an order is sought. The application itself is fatal, and an order of joinder cannot be granted on a defective application.
19. What remains is the issue of costs. I see no reason why the general rule that costs should follow the event, should not be applied in the present matter.

Order

20. Accordingly, the following order is made:

1. The application is dismissed.
2. The applicants shall pay the respondent’s costs of the joinder application, jointly and severally, the one paying the other to be absolved, on party and party basis on Scale B.
3. The costs shall include the costs of counsel.

T C MOKHARE

ACTING JUDGE

NORTH WEST DIVISION

APPEARANCES

DATE OF HEARING

: 29 MAY 2025

DATE OF JUDGMENT

: 20 JUNE 2025

COUNSEL FOR APPLICANT : ADV B RILEY

Instructed by

: Van Velden-Duffey Inc

COUNSEL FOR RESPONDENTS : ADV M E MMOLAWA

Instructed by

: State Attorney, Mahikeng

[1] 2005 (4) SA 212 (SCA) at para 66

[2] (Case No 624/22 And 630/22) [2023] ZASCA 119 (5 September 2023)

[3] (724/2023; 724B/2023) [2025] ZASCA 17; [2025] 2 All SA 333 (SCA) (5 March 2025)

[4] 2018

(1) SA 1 (CC)

[5] 2018

(1) SA 1 (CC)

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