




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

(1) REPORTABLE: YES/NO
(2) OF INTEREST TO OTHERS JUDGES: YES/NO
(3) REVISED
05 MAY 2021 DATE
 SIGNATURE

**Case No: 72514/2018**

In the matter between:

**MWRK ACCOUNTANTS & CONSULTANTS (PTY) LTD**

**APPLICANT**

and

**HLB INTERNATIONAL SA (PTY) LTD**

**FIRST RESPONDENT**

**PAR EXCELLENCE FINANCE & LEASING (PTY) LTD SECOND RESPONDENT**

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**JUDGMENT: LEAVE TO APPEAL**

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**DAVIES AJ:**

[1] On concluding the hearing of this application for leave to appeal, which was conducted on Microsoft Teams in terms of the prevailing practice directives, this court

granted an *ex tempore* judgment and order granting leave to appeal to the Supreme Court of Appeal. I have subsequently on 1 April 2021 been requested to furnish written reasons for that judgment, and I apologise for my delay in doing so.

[2] The parties and their business relationships with one another are as set out in paragraphs 2 to 4 of the judgment dated 15 November 2019.

[3] For the purposes hereof, I emphasise that at the time of the merger between MWRK Accountants and Certified Master Auditors Pty) Ltd ("CMA"), the parties envisaged that CMA would lease the immovable property under consideration, that had already been purchased. Clause 6 of the relevant shareholders agreement records that HLB purchased the relevant immovable property Erf 3726, Benoni, and that payment of the purchase price is divided *pro rata* according to the shareholding. Thereafter clause 8 records that the immovable property will be rented exclusively to CMA for an initial period of nine years, renewable for an additional nine years at the election of CMA, and on the basis that CMA would pay all operating costs. The aforesaid terms are replicated in the agreement of lease entered into between HLB International (South Africa) Inc. and CMA on 31 May 2017. Clause 25 records that the validity of the lease shall not be affected by the transfer of the premises from the lessor, embodying the common law "*huur gaat voor koop*" principle.

[4] The terms pertaining to the rental amount and the duration of the lease are contractual rights inuring to the commercial benefit of CMA, and as such constitute an asset or at least part of the goodwill of CMA]. [The first and second respondent's seek leave to appeal the judgment of this Honourable Court, *inter alia* on the grounds that

CMA had not been joined as a respondent in the application, as appears from paragraph 6.2 of the first respondent's application for leave to appeal].<sup>1</sup> Objectively viewed, the sweetheart arrangements obviously have commercial value to CMA. The fact of the matter is that CMA has contractual rights, albeit it in the context of the commercial arrangements between the parties.

[5] The judgment of this Honourable Court, as clarified, makes it clear that the relief granted was intended to assist the applicant in withdrawing its capital on equitable terms. The mechanism ordered in the form of a sale through estate agents was aimed at achieving a fair market-related price for this investment, which necessarily entails ending the existence of the lease agreement which diminishes the value of the immovable property, and which would in all probability be renewed after nine years. It was therefore necessary to clarify the orders to make specific provision for the envisaged sale to be free of any lease.

[6] The judgment and the orders of this Honourable Court therefore directly impact on the contractual rights and the commercial interests of CMA, which are of course intertwined with the interests of the parties, and those of Reynolds and Maritz.

[7] Where a third party has (or may have) a direct and substantial interest in any order that the court might make in proceedings to which it has not been joined, or if such an order cannot be sustained or carried into effect without prejudicing the third

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<sup>1</sup> *Caterham Car Sales & Coachworks Ltd v Birkin Cars (Pty) Ltd* 1998 (3) SA 938 (SCA).



party, then he is a necessary party and should be joined in the proceedings unless the court is satisfied that the third party has waived its right to be joined.<sup>2</sup>

[8] Where a party is or may be a necessary party in the sense alluded to above, the court should not deal with the issues without a joinder being effected, and no question of discretion or convenience arises.<sup>3</sup>

[9] The interest of CMA is not nearly a financial interest, or a contingent and indirect commercial interest in the litigation. By virtue of its contractual rights, it has a direct legal interest.<sup>4</sup>

[10] The case is therefore distinguishable from that where for instance a sub-tenant, who has no legal interest in the contract between the landlord and the tenant, and therefore need not be joined.<sup>5</sup>

[11] In his heads of argument dated 12 January 2021, Bergentuin SC, it is argued that: *"Maritz is the controlling mind (and ultimate beneficiary in terms of various agreements) of all profits arising from the property of first respondent . He, and CMA had full knowledge of applicant's applications, and could have intervened, but decided not to do so. Eventually the question whether CMA will be entitled to any compensation*

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<sup>2</sup> ***Amalgamated Engineering Union v Minister of Labour*** 1949 (3) SA 637 (A); ***Henri Viljoen (Pty) Ltd v Awerbuch Brothers*** 1953 (2) SA 151 (O) at 165-171; ***Toekies Butchery (Edms) Bpk en Andere v Stassen*** 1974 (4) SA 771 (T).

<sup>3</sup> ***Licenses and General Insurance Co. Ltd v Van Zyl and Others*** 1961 (3) SA 105 (D) at 110.

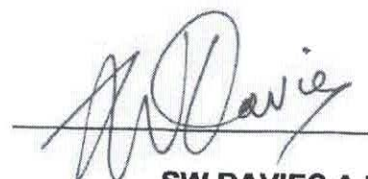
<sup>4</sup> ***Abrahamse and Others v Cape Town City Council*** 1954 (2) SA 178 (C); ***Toekies Butchery*** (*supra*).

<sup>5</sup> ***Sheshe v Vereeniging Municipality*** 1951 (3) SA 661 (A) at 667A; ***Henri Viljoen*** (*supra*) at 167; ***United Watch and Diamond Co. (Pty) Ltd and Others v Disa Hotels Ltd and Another*** 1972 (4) SA 409 (C) at 417.

*has never been an issue before the Honourable Court*". Even accepting the truth of this proposition, it is nonetheless irrelevant the Maritz or CMA knew of the proceedings. As I understand the position, the interested third party such as CMA must either be joined or must receive "*judicial notice*" emanating from the court which is formally served on the third party. Informal notice will not suffice.<sup>6</sup>

[12] Moreover, while it is true that the application for clarification was indeed served upon CMA, by this time the proverbial horse had bolted. A final order had been granted in the absence of a directly interested third party, and belated intervention on the part of CMA or its successor in title would not change the fact that an order prejudicial to its contractual rights had been granted in its absence, and without its input. It was not open to this Honourable Court in the Rule 42 clarification proceedings, to amend the order to cater for a rule *nisi* as ought to have occurred initially, and as would have satisfied the requirement of judicial notice.

[13] In the premises, and for the above reasons, I ordered that the first respondent should be afforded leave to appeal to the Supreme Court of Appeal, with costs to be costs in the cause.



SW DAVIES AJ

ACTING JUDGE OF THE HIGH COURT

GAUTENG DIVISION, PRETORIA

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<sup>6</sup> *Toekies Butchery (supra)* at 774H; *Smith v Conelect* 1987 (3) SA 689 (W) at 694.

Appearances:

For the applicant:	Adv JG Bergentuin SC
(Respondent in the leave to appeal.)	
Instructed by:	Griesel & Breytenbach Attorneys
For the first respondent:	Adv HF Oosthuizen SC
Instructed by:	Carel Van Der Merwe Attorneys
Date of hearing:	21 January 2021
Date of <i>ex tempore</i> judgment:	21 January 2021
Date of written reasons:	5 May 2021