



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

CASE NO: A2023-117185

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED: NO
2 FEB 2026	
DATE	SIGNATURE

In the matter between:

TURBO DIRECT SA (PTY) LIMITED

Appellant/Defendant

and

**R & P TRUCK PARTS (PTY)
LIMITED**

Respondent/Plaintiff

JUDGMENT

DAMBUZA – GCAWU AJ:

Introduction

- [1] This is an appeal against the judgment and order delivered by the Kempton Park Magistrates' Court on 14 September 2023. The Magistrate found in favour of the respondent (plaintiff in the trial) and ordered that the appellant (defendant in the trial) to pay the sum of R29,051.00, together with interest and costs. The appellant is appealing the whole judgment. The appeal is with the Magistrate's leave.
- [2] Having considered the notice of appeal, the appellant's practice note, the heads of argument filed by both parties, and the record, and having heard counsel for the parties, I am of the view that the appeal must fail. My reasons follow.

Background

- [3] The respondent instituted action against the appellant for payment of R29,051.00, being the amount, it paid to the appellant for a turbo charger on the 24 October 2019. It was the respondent's case that the turbo charger was never delivered despite payment. The respondent's claim, as pleaded in its amended particulars of claim, was based on an alleged agreement to cancel the aforementioned sale agreement made on the 10th of December 2019, via WhatsApp communication, when the appellant agreed to refund the purchase price.
- [4] The appellant defended the action, pleading, *inter alia*, that the turbo charger was a special-order item to which its standard terms and conditions applied, and that those terms precluded any refund. The appellant also denied that its employee, Dinesh, had the authority to conclude a cancellation agreement to refund the purchase price.
- [5] At the trial, the respondent called one witness, Mr Van Der Merwe. During cross-examination, Mr Van Der Merwe testified that the respondent's cause of action was not the pleaded cancellation agreement, but that the respondent had paid for the turbo charger and never received it.
- [6] The appellant's sole witness, Mr Kambouris, testified that the turbo charger was a special-order item, that the appellant's terms and conditions which precluded a

refund for such items, applied, and that the appellant always had been ready to tender delivery and the turbo charger remains available for delivery to the respondent.

[7] The Magistrate accepted the evidence of the respondent and found in its favour, holding that the respondent had paid for the turbo charger, it was never delivered, and that the respondent was entitled to a refund. The Magistrate rejected the appellant's version that the turbo charger had been tendered as such tender was not established and found that the appellant had failed to prove that its terms and conditions were brought to the respondent's attention.

Grounds of Appeal

[8] The appellant raises numerous grounds of appeal, which may be summarised as follows:

[8.1] The Magistrate misdirected himself in finding that the respondent had proved its case and finding for the respondent on a cause of action of non-delivery as it was not pleaded;

[8.2] The Magistrate erred in failing to find that the respondent had abandoned its pleaded case, in not granting absolution from the instance and in rejecting the appellant's version regarding tender of the turbo charger and the applicability of its terms and conditions.

[9] The appellant contended that the respondents are bound by their pleadings. The appellant further contended that Dinesh, who was the defendant's representative had no authority to offer refund and or cancel the agreement. It also asserted that it was the respondent who unilaterally cancelled the sale agreement. As a result of such cancellation, the respondent could not rely on the cancelled agreement. The appellant also attacked the credibility of the respondent's witness and contended that he lied under oath.

[10] The respondent refuted such contention and submitted that the evidence adduced proved its cause of action. The respondent contended that when the summons

was issued, the turbo charger had not been delivered. It further contended that it was only when it demanded refund of the purchase price that it was informed that the turbo charger would be delivered in January 2020. Until then, the respondent was not aware of such a date.

[11] The respondent submitted that the appellant failed to call Dinesh as a witness. Only he could establish whether he had no authority to cancel a sale agreement and offer a refund of the purchase price. Finally, it was the submission of the respondent that it established a *prima facie* case at the close of its case.

Evaluation

[12] The central issue in this appeal is whether the magistrate was entitled to find in favour of the respondent on the basis of non-delivery, when the respondent's pleaded case was based on a cancellation agreement.

[13] Ordinarily, a party is bound to its case as pleaded. However, our courts have consistently held that technical objections to pleadings should not be allowed to prevail where they do not cause prejudice or mislead the other party. *In **Four Wheel Drive v Ratten NO¹***, the Supreme Court of Appeal emphasised that the primary purpose of pleadings is to define the issues between the parties and ensure a fair trial. However, there is an exception to this general principle. The Court may also rule on an issue that is not pleaded if it is fully ventilated by the parties in evidence.²

[14] In the present matter, the respondent's amended particulars of claim set out the background to the dispute, including the fact that the respondent had paid for the turbo charger and that it was never delivered. The appellant was fully aware of the case it had to meet, as evidenced by its plea and the conduct of the trial. The appellant was not taken by surprise, and no prejudice was suffered as a result of

¹ 2019 (3) SA 451 SCA.

² Also see *South British Insurance Co Ltd v Unicorn Shipping Lines (PTY) LTD* 1976 (1) SA 708 (A).
716A-E; *Minister of Safety and Security v Slabbert* 2009 JDR 1218 (SCA) 2009 JDR 1218 para 12.

the respondent's witness testifying that the essence of the claim was non-delivery.

[15] Moreover, the respondent's claim, whether framed as one for breach of contract due to non-delivery or as one based on a cancellation agreement, arises from the same set of facts: that the respondent paid for a turbo charger which was never delivered. The appellant's defence that the turbo charger was a special-order item, that its terms and conditions applied, and that it was ready to be delivered – was fully ventilated at the trial.

[16] The Magistrate was entitled to consider the evidence as a whole and to make a finding based on the substance of the dispute. The appellant's contention that the respondent "abandoned" its pleaded case is without merit. The respondent's witness simply clarified the basis of the claim, which remained one for repayment of money paid for a product not received.

[17] With regard to the appellant's challenge to the Magistrate's credibility findings, it is well established that a court of appeal will not lightly interfere with the trial court's findings on credibility unless it is satisfied it misdirected itself.³ The Magistrate had the benefit of observing the witnesses and was best placed to assess their veracity. The Magistrate found Mr Van Der Merwe to be a credible witness and rejected Mr Kambouris's evidence regarding tender of the turbo charger and the applicability of the terms and conditions. There is no basis for this court to interfere with those findings.

[18] The appellant's complaint that the Magistrate failed to consider its terms and conditions is also without substance. The Magistrate expressly found that there was no proof that the terms and conditions were brought to the respondent's attention. This finding was open to the Magistrate on the evidence.

[19] Finally, the Magistrate correctly refused absolution from the instance. At the close of the respondent's case, there was sufficient evidence to establish a *prima facie* case. The appellant elected to adduce evidence, and the matter was ultimately

³ See *Trincon Construction (Pty) (Ltd) vs Industrial Development Corporation and Another* (CCT198/14) {2015} ZACC 22,2015(5) SA paragraph 85.

decided on the totality of the evidence. In *Van's Auctioneers Gauteng CC and Theron N.O and Others*,⁴ Jansen Van Nieuwenhuizen J stated as follows:

“[the] plaintiff must make out a *prima facie* case – in the sense that there is evidence relating to all elements of claim to survive absolution”. It is trite law that absolution should be granted sparingly same was further emphasized in the case *supra*.

Conclusion

[20] For the reasons set out above, I am satisfied that the Magistrate's judgment and order was correct and that there is no basis for this court to interfere with her findings.

[21] The appeal is accordingly dismissed with costs.

DAMBUZA - GCAWU AJ

ACTING JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION, JOHANNESBURG

I agree and it is so ordered.



L.T. MODIBA J

JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

⁴ (34810/2019) [2025] ZAG PPHC 794 (30 July 2025).

DATE OF HEARING: 20 November 2025

DATE OF JUDGMENT: 2 February 2026

APPEARANCES

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