IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

Reportable

Case no: 5087/2023

In the matter between:

BOITUMELO LEKALAKALA **PLAINTIFF**

and

KRAMER WEIHMANN INC **DEFENDANT**

and

PETRUS JOHANNES JOUBERT **THIRD PARTY**

Neutral citation: *Lekalakala v Kramer Weihmann Inc and PJ Joubert* (5087/2023) [2025] ZAFSHC 187 (20 June 2025)

Coram: Greyling-Coetzer AJ

Heard: 20 March 2025

Delivered: 20 June 2025

Judgment by: Greyling-Coetzer AJ

Civil procedure – Third party – Special pleas – Lis pendens – Non-joinder – Whether the Defendant's failure to issue third party notices against all potentially liable co-directors constitutes a material non-joinder – Consideration of the applicability of section 34(7)(c) of the Legal Practice Act.

ORDER

1. The third party's special plea of non-joinder is dismissed.

2. The third party's special plea of *lis pendens* is upheld.

3. The action under case number 5087/2023 are stayed pending the final determination of the action under case number 3645/2022.

4. The costs of the stated case are to be paid as follows:

   4.1 the third party to pay the cost of the plaintiff; and

   4.2 the defendant and third party are to pay their own cost.

5. The cost in respect of the hearing of 28 January 2025 are cost in the cause.

JUDGMENT

GREYLING-COETZER AJ

[1] This stated case arises in the context of a tri-party proceeding involving a plaintiff, a defendant and a third party. The court is called upon to determine the merits of two special pleas advanced by the third party. Central to the determination is whether, in seeking indemnification from a third party who is alleged to be one of several directors *ex lege* jointly and severally liable for the debts of the defendant, the defendant is required to join all such directors to the proceedings.

[2] The plaintiff claims repayment from the defendant of an amount of R175 000.00 paid to the defendant as purchase price in respect of an immovable property transaction which did not materialise.

[3] The defendant issued third party proceedings against a former shareholder and director. The defendant seeks an indemnification, alternatively a conditional

order against the third party, directing the third party to pay the defendant any amount the court orders the defendant to pay to the plaintiff.

[4] In addition to pleading over, the third party raised several special pleas against both the plaintiff and the defendant.

[5] On 28 January 2025 Nemavhidi AJ, and by agreement between the parties, ordered that the third party's special pleas of *lis pendens* and non-joinder be adjudicated by way of a stated case as contemplated in Uniform Rule 33(1).

Relevant common cause facts per the stated case

[6] At all times relevant and material to the plaintiff's action and the third-party proceedings, the defendant was a commercial juristic entity conducting a legal practice as contemplated by and/or subject to s34(7)(c) of the Legal Practice Act, 28 of 2014 ('the LPA'). The defendant initially and/or previously conducted a legal practice contemplated by s23 of the now repealed Attorneys Act, 53 of 1979 ('the Attorneys Act').

[7] The defendant conducted a legal practice as a personal liability company as contemplated in the Companies Act 71 of 2008 ('the 2008 Companies Act').

[8] At the time when the plaintiff deposited the amount of R175 000.00 with the defendant, the defendant had several shareholders as directors, including the third party. The remaining shareholders, as directors, as the case may be, of the defendant are not cited or joined by the plaintiff or defendant as parties in these proceedings ('the non-joined parties').

[9] Prior to the current action and on/or about 29 July 2022, the defendant instituted action proceedings in this court under case number 3645/2022 against the third party ('the first action'). In the first action the defendant *in casu* is the plaintiff and the third party *in casu* is the first defendant.

[10] In the first action the defendant claims from the third party an amount of R14 652 787.28, and in support and computation of the defendant's claim, the defendant relies on annexure "POC1" which lists the AJS file number, the seller's names, the purchaser's names, the date of the first irregular transaction, the date of the last irregular transaction, the total trust deficit and the amount already paid by the defendant.

[11] Included in the claim of the defendant in the first action, is the amount claimed by the plaintiff in this action for which the defendant now seeks indemnity from the third party.

[12] The first action is still pending in this court and has not been adjudicated and/or finalised.

[13] The parties placed the following relevant documents before court in the stated case: (i) the defendant's amended particulars of claim and annexure "POC1" as filed under case number 3645/2022; (ii) the plaintiff's particulars of claim; (iii) the defendant's plea; (iv) the third party notice and statement of claim against the third party; (v) the third party's special plea and plea over and (vi) the signed Rule 37 minutes.

[14] The issues to be decided as defined by the parties are: (i) whether the plaintiff and/or the defendant were required to institute an action and/or third-party proceedings against the non-joined parties; (ii) whether the third party's special plea relating to non-joinder constitutes a material non-joinder of parties to this action; (iii) whether the third party's special plea of *lis pendens* is successful to the effect that the plaintiff's claim, alternatively the defendant's third party claim, should be dismissed alternatively stayed pending finalisation of the first action.

The parties' contentions per the stated case

[15] The plaintiff submits that the third party's special plea of non-joinder is not a competent defence in the present proceedings, as no relief is sought by the plaintiff against the third party in this action. Furthermore, the plaintiff contends that while the third party's special plea of *lis pendens* may be applicable as a defence in the separate proceedings between the third party and the defendant, it is not a proper plea in the current matter between the plaintiff and the defendant, given that the plaintiff asserts no claim against the third party herein.

[16] The defendant submits, in relation to the special plea of non-joinder, that it was within the plaintiff's discretion to join or not to join the parties who were not cited in the present action. The defendant further avers that there was no obligation upon it to institute third-party proceedings against any party other than the third party.

[17] In respect of the special plea of *lis pendens*, the defendant submits that it will abide by the decision of the court. However, it maintains that the third party is not entitled to seek the dismissal of the defendant's third-party claim on the basis of the pending prior action under case number 3645/2022. At most, the defendant contends, these proceedings may be stayed.

[18] The third party contends, in relation to the special plea of non-joinder, that in terms of s34(7)(c) of the LPA should the court find (i) that the defendant is liable in respect of the alleged debt and/or (ii) that the third party is liable in respect of the alleged third-party debt, then the parties who have not been joined are likewise jointly and severally liable with the defendant and the third party. Such joint and several liability, the third party submits, arises automatically and *ex lege*.

[19] It is contended further that, consequent to the above, the non-joined parties have a direct and substantial interest in the subject matter(s) of the plaintiff's action and/or the third-party proceedings, which interest would be prejudicially affected should this court grant an order in their absence.

[20] With regard to the plea of *lis pendens*, the third party contends that there is currently pending litigation namely, the first action and the present action which involves: (i) the same parties; (ii) the same cause of action in that both require the determination of certain common facts and/or points of law; (iii) the same subject matter and (iv) a claim for overlapping or similar relief.

[21] At the hearing the third party abandoned the relief initially sought against the plaintiff, while maintaining its view that the special pleas of *lis pendens* and non-joinder could competently be raised against the plaintiff. As a result the question of whether the third party was entitled to raise such special pleas against the plaintiff no longer arises for determination, and I accordingly refrain from making any finding in that regard.

Discussion

[22] The first two issues for determination namely, (i) whether it was incumbent upon the plaintiff and/or the defendant to institute proceedings, either by way of action or third-party notice, against the non-joined parties; and (ii) the third party's resultant special plea of non-joinder is interrelated and will accordingly be addressed together.

[23] In *Judicial Service Commission and Another v Cape Bar Council and Another*[1], the court held that: '[12] It has now become settled in law that the joinder of a party is only required as a matter of necessity – as opposed to a matter of convenience – if that party has a direct and substantial interest which may be effected prejudicially by the judgement of the Court in the proceedings concerned (see Bowring N.O v Vrededorp Properties CC 2007 (5) SA 239 (SCA), para [21].The mere fact that the party may have an interest in the outcome of the litigation does not warrant a joinder plea. The right of a party to validly raise the objection that other parties should have been joined to the proceedings, has thus been held to be a limited one.'

[24] The test whether there has been non-joinder is whether a party has a direct and substantial interest in the subject matter of the litigation which may prejudice the party that has not been joined.[2] In *Gordon v Department of Health, Kwazulu-Natal*[3] it was held that if an order or judgment cannot be sustained without necessarily prejudicing the interest of third parties that had not been joined, then those third parties have a legal interest in the matter and must be joined.

[25] The third party relies on s34(7)(c) of the LPA as the basis for his contention that the non-joined parties are necessary parties who ought to have been joined to the proceedings. The relevant subsection of s34 provides:

'(7) A commercial juristic entity may be established to conduct a legal practice provided that, in terms of its founding documents...

(a)...

(b)...

(c) all present and past shareholders, partners or members, as the case may be, are liable jointly and severally together with the commercial juristic entity for –

(i) the debts and liabilities of the commercial juristic entity as are or were contracted during their period of office; and

(ii) in respect of any theft committed during their period of office.' (own underlining)

[26] The repealed Attorneys Act has a similar provision per s23(1)(a) which provided that a private company may conduct a practice if such company is

1 *2013 (1) SA 170 (SCA)*

2 *Absa Bank Limited v Naude N.O. and Others (20264/2014) [2015] ZASCA 97; 2016 (6) SA 540 (SCA) (1 June 2015)*

3 *2008 (6) SA 522; [2008] ZASCA 99 (SCA) at par 9*

incorporated and registered as a private company under the Companies Act, 1973, with share capital, and its memorandum of association provides that all present and past directors of the company shall be liable jointly and severally with the company for the debts and liabilities of the company contracted during the periods of office.

[27] The defendant is a personal liability company. Section 19(3) of the 2008 Companies Act, provides that: 'If a company is a personal liability company the directors and past directors are jointly and severally liable, together with the company, for any debts and liabilities of the company as are or were contracted during their respective periods of office.'

[28] Section 53(b) of the Companies Act 61 of 1973 ('the 1973 Companies Act') likewise provided that: 'The memorandum of a company may, in addition to the requirements of s 52 . . .in the case of a private company, provide that the directors and past directors shall be liable jointly and severally, together with the company, for such debts and liabilities of the company as are or were contracted during their periods of office, in which case the said directors and past directors shall be so liable.'

[29] In *Sonnenberg McLoughlin Inc v Spiro*[4] the court, dealing with s53(b) of the 1973 Companies Act, held that where a private company includes in its memorandum of association a provision that the directors and past directors shall be liable jointly and severally together with the company for debts and liabilities of the company that were contracted during their periods of office, the effect was two-fold: (a) creditors would be able to hold the directors liable *singuli et in solidum* for company debts and liabilities, and (b) if a director had paid any of the company debts, he would have a right of recourse against his fellow directors for their proportionate share.[5]

[30] The court in its reasoning dealt with the history of s 53(b) of the 1973 Companies Act and referred to *Fundstrust (Pty) Ltd (in Liquidation) v Van Deventer*[6] where the history of s53(b) was traced. It held further that: 'The section had a predecessor in s 6A of the Companies Act of 1926 - the latter section was inserted into the 1926 Act by the Companies Amendment Act 62 of 1968. The section provided as follows:

'The directors and former directors of a private company limited by shares shall be liable jointly and severally, together with the company, for such debts and liabilities of the company

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4 *2004 (1) SA 90 (C)*
5 *Sonnenberg McLoughlin Inc v Spiro 2004 (1) SA 90 (C) at 97D/F*
6 *1997 (1) SA 710 (A)*

as w ere contracted during their period of office, if the memorandum of association of the company contains a provision to that effect.'

The insertion of s 6A proceeded from a recommendation of the Commission of Enquiry into the Companies Act (usually referred to as the Van Wyk de Vries Commission) that provision be made 'for a private company with the concurrent joint and several liability of the directors for the debts and liabilities of the company'. The intention was not to impose upon directors a liability equal to the common-law liability of partners, but rather *'to impose on them [directors] an entirely new statutory liability and to provide creditors with an entirely new remedy not hitherto available to them which would enable them to hold the directors liable singuli et in solidum for company debts and liabilities before the company's liquidation'.*[7]

A similar intention clearly underlies s 53(b) of the present Companies Act which 'is intended primarily for the case of certain types of private company, ie incorporated associations of professional persons (see eg s 23 of the Attorneys Act 53 of 1979)'. (Henochsberg on the Companies Act 5th ed vol 1 at 106.)

Section 53(b) is an empowering section…'[8]

[31] The court in *Sonnenberg supra* further found that s53(b) does not provide a right of recourse to a company against its directors where the company has paid its debts.[9] In *Molose NO and Others v Nonxuba and a Similar Matter*[10] the court held that s19(3) of the 2008 Companies Act provides in similar terms for personal liability of directors as its predecessor s53(b) of the 1973 Companies Act.

[32] The Supreme Court of Appeal in *Maritz and Another v Maritz & Pieterse Inc (In Liquidation)*[11] cited *Sonnenberg McLoughlin supra* with approval. The court in *Maritz supra* was concerned with the rights of liquidators of a professional company to rely on the statutory liability per s23(1)(a) of the Attorneys Act of joint and several co-debtors as ground for claiming from those directors claim amounts proved by creditors in the liquidation of the company. The court further remarked that it was not necessary to decide whether Erasmus J was correct in finding that s53(b) of the 1973 Companies Act does not provide a right of recourse to a company against its directors where the company has paid its debts, as no such averment was made by the

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7 *Fundstrust (Pty) Ltd (in Liquidation) v Van Deventer 1997 (1) SA 710 (A) at 731G*
8 *Sonnenberg McLoughlin Inc v Spiro 2004 (1) SA 90 (C) at 96H to 97D*
9 *Sonnenberg McLoughlin Inc v Spiro 2004 (1) SA 90 (C) at 97D/F*
10 *2024 (3) SA 145 (ECEL)*
11 *2006 (3) SA 481 (SCA)*

liquidators. Their case was simply reliant on a direct right flowing from s23(1)(a) of the Attorneys Act. To interpret s23(1)(a) as such would bring about consequences directly opposed to the legislative intention.[12]

[33] Having regard to the similar worded s53(b) of the 1973 Companies Act, s19(3) of the 2008 Companies Act, s23(1) of the Attorneys Act and s34(7)(c) of the LPA, and employing parity of reasoning, the effect s34(7)(c) is similar and thus two-fold, as in relation to s53(b), (a) creditors would be able to hold the directors liable *singuli et in solidum* for company debts and liabilities and (b) if a director had paid any of the company debts, he would have a right of recourse against his fellow directors for their proportionate share, yet it does not provide recourse to a company against its directors where the company has paid its debts.

[34] In addition to what has been stated above, a plaintiff is entitled to choose whom to cite as a defendant, even in circumstances where multiple debtors or co-debtors may exist. If the liability is joint and several, the plaintiff may either join all the debtors or choose a specific one.[13] I see no reason why the same principle should not apply, on an equal footing, to the defendant in the third-party proceedings

[35] In *Molose NO supra*, the court criticised the applicant for pursuing a claim against the directors rather than the firm of attorneys, be it for the reason that the firm would have been in a better position to satisfy the claim than the individual directors.

[36] Although the non-joined parties may be *ex lege* personally liable, the judgment or order against the defendant will not be enforceable against them without more. The non-joined parties are not at risk of suffering prejudice.

[37] It remains open to the third party to seek joinder or a claim for indemnification within the framework of the third-party proceedings.

[38] For these reasons, I find that the non-joined parties do not possess a direct and substantial interest in the subject matter of either the plaintiff's action or the third-party proceedings, such that their rights would be prejudicially affected by the outcome.

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12 *Maritz and Another v Maritz & Pieterse Inc (In Liquidation) 2006 (3) SA 481 (SCA) par [13] and [14]*

13 *Parekh v Shah Jehan Cinemas 1982 (3) SA 618 (D) 623*

[39] In respect of the special plea of *lis pendens*. It is trite that here are three requirements for a successful reliance on a plea of lis pendens. They are: (1) that the litigation is between the same parties; (2) that the cause of action is the same; and (3) that the same relief is sought in both. In *Nestlé (South Africa) (Pty) Ltd v Mars Incorporated*[14], it was held as follows: - '[17] There is room for the application of that principle only where the same dispute, between the same parties, is sought to be placed before the same tribunal (or two tribunals with equal competence to end the dispute authoritatively). In the absence of any of those elements there is no potential for a duplication of actions.'

[40] Should the requirements of a plea of lis pendens be satisfied, it will not automatically serve as a bar to hear the second matter. The court retains a discretion whether or not to stay the proceedings or to hear the matter, depending on what is just and equitable to do in the circumstances, including considerations of balance of convenience.[15] Once the requirements have been established, a factual presumption arises that the current application is prima facie vexatious. It is then for the applicant to satisfy the court that, despite the element being present, the balance of convenience and equity requires the application to proceed. As the court retains an overriding discretion to order the second proceeding to continue, notwithstanding the establishment of the requirements, it also retains the discretion to order a stay, even if all the elements are not present.[16]

[41] A plea of lis pendens, shares similar features to the defense of res judicata, because the underlying consideration is to ensure finality in litigation. Therefore once a suit has been instituted, it should be finalised before another can be instituted by the same parties, relating to the same cause of action.[17] The underlying principle of a plea of lis alibi pendens is that the dispute between the parties is already pending before another court, rendering it inappropriate for the same dispute to be adjudicated in the court where the plea is raised. This serves to prevent a situation in which multiple courts may be called upon to determine the same issue, potentially resulting in conflicting judgments.

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14 *Nestle South Africa (Pty) Ltd v Mars Inc 2001 (4) SA 542 (SCA) par [17]*

15 *Ferreira v Minister of Safety and Security and Another 2015 ZANCHC 14 at par [8]*

16 *Ceazer Stone S-Yam Ltd v The World of Marble and Granite 2000 CC and Others 2013 (6) SA 499 (SCA)*

17 *Nestle South Africa (Pty) Ltd v Mars Inc 2001 (4) SA 542 (SCA)*

[42] Although the special plea of lis pendens as raised by the third party is not opposed in the true sense the defendant intimated that it will abode by the court decision, therefore the merits of the special plea still warrants consideration and determination. Before doing so it is fitting to restate the general considerations applicable to third-party proceedings. In terms of Uniform Rule 13(5) 'The third party shall, after service upon him of a third party notice, be a party to the action…'.(own underline)

[43] The third party does not become a defendant *vis-à-vis* the plaintiff, as there is no *lis* between the plaintiff and the third party.[18]

[44] Uniform Rule 13(6) provides: 'The third party may plead or except to the third party notice as if he were a defendant to the action. He may also, by filing a plea or other proper pleading contest the liability of the party issuing the notice on any ground notwithstanding that such ground has not been raised in the action by such latter party…'

[45] The defendant herein is the plaintiff in the first action and the third party herein is one of the defendants in the first action.

[46] In the first action it is inter alia alleged by the defendant that: (i) the third party breached his duties as a legal practitioner and conveyancer, including without being exhaustive, receiving deposits in connection with conveyancing transactions and acquiescing in unauthorised and unlawful payments of trust monies; (ii) the third party failed to comply with the principles of the common law and the standard of the common law regarding the management, control and use of trust monies; (iii) the third party failed to comply with the fiduciary duties and/or duty to exercise reasonable care, skill and diligence; (iv) the third party failed to conduct the necessary due diligence on files before authorising payments; and (v) the third party received deposits in connection with conveyancing transactions but failing to make any investment. The defendant places reliance on inter alia s76 and 77 of the 2008, Companies Act.

[47] In the first action the defendant claims payment of the amount of R14 652 787.28, which amount includes at item 67 of "POC1" to the first action the amount of R175 000,00 herein claimed by the plaintiff.

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18 *Shield Insurance Co Ltd v Zervoudakis 1967 (4) SA 735 (E) at 739B; Swart v Scottish Union & National Insurance Co Ltd 1971 (1) SA 384 (W) at 395H; Geduld Lands Ltd v Uys 1980 (3) SA 335 (T) at 340G–341C*

[48] In the third party claim it is *inter alia* alleged that the express, alternatively tacit, further alternatively implied terms of the agreement between the plaintiff and third party were: (i) that the third party would hold the deposit of the plaintiff in the defendant's trust account on behalf of the plaintiff pending the transfer of the property;(ii) that the third party would exercise the highest possible degree of good faith towards the plaintiff in doing so, and (iii) that the third party was expected to exercise the degree of skill and diligence that may be expected or required from a senior conveyancing attorney while representing the defendant in the performance of the above-mentioned mandate.

[49] It is further alleged that the third party failed to act with the degree of skill and diligence required of a conveyancing attorney and perform in his mandate, and more specifically: (i) by failing to ensure that no unauthorised payments are made by his secretary/personal assistant under his direct control as head of the conveyancing department and appointed conveyancing attorney; (ii) by failing to properly inspect the applicable file and digest statement in order to control payments made from said file; and (iii) by failing to ensure that the deposits be paid in an interest-bearing account pending further instructions.

[50] The defendant seeks the third party to be held personally liable in terms of s77(3)(B) read with s424 of the 1973 Companies Act, and in terms of a contravention of s76 to s79 of the 2008 Companies Act.

[51] The defendant seeks an order declaring the third party personally liable in terms of s424 of 1973 Companies Act, alternatively repayment of any amount the court orders the defendant to be liable for, which per the plaintiff's claim is the amount of R175 000.00.

[52] The requirement of a plea of lis pendens has been established. This brings one to the consideration of whether, notwithstanding the satisfaction of the requirements for *lis alibi pendens*, considerations of fairness and convenience nonetheless justify allowing the liquidation application to proceed. In *Van As v Appolos and Andere*[19] the court held that exercising its discretion to order the second proceeding to proceed, the consideration of fairness and convenience is fundamentally important. In *Kerbel v Kerbel*[20] it was held that once the requirements

[19] *1993 (1) SA 606 (C)*
[20] *1987 (1) SA 562 (W)*

for a plea of lis pendens are established, the court should be inclined to uphold it, because it is undesirable for there to be litigation in two courts over the same issue.

[53] Having found that the requirements have been established it would have befallen the defendant to satisfy this court that, despite the element being present, the balance of convenience and equity requires the application to proceed. For the reasons that the defendant abides by the court decision not such facts has been placed before court.

[54] Notwithstanding aforesaid, the circumstances of this matter is somewhat novel in that, although the special pleas is not raised against the action of the plaintiff, the unavoidable consequence, from a practical perspective, is that in upholding the special plea of lis pendens in the third party proceedings, it will stay the plaintiff's action. This is so because there is only a single action before the court, namely the action instituted by the Plaintiff.

[55] In *MCC Contracts (Pty) Ltd v Coertzen and Others*[21] the Supreme Court of Appeal dealing with a joinder in terms of Rule 13 of the Uniform Rules of Court, it stated that 'the rule was designed to avoid a multiplicity of actions and to consolidate, in specific circumstances, a multiplicity of issues between a number of litigants, all in a single action'.[22] The court further held that 'whether or not a *lis* does arise between the plaintiff and the third party (and conceivably one could, if regard be had to subrules 7 and 8) and even if a separation of issues occurs pursuant to subrule 9, the rule provides for only one action, and that action is necessarily the one begun by the plaintiff. All this is plain from the first line of subrule (1) in which the action referred to cannot be any other action than that instituted by the plaintiff, and the fact that the references to the action or action in the latter subrules are clearly to the action referred to in subrule (1).'[23]

[56] Having regard to the practical implications, the underlying principles applicable to the plea of *lis pendens*, the balance of convenience, and the need to fairly balance the rights of all three parties, I remain of the view that it is just and equitable, in the circumstances, to stay the current action pending the final determination of the first action.

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21 *1998 (4) SA 1046 (SCA)*
22 *At 1049J – 1050B*
23 *At 1050B/C*

Cost of hearing of 28 January 2025

[57] Per the order of Nemavhidi AJ, the cost of the postponement stood over for later adjudication. As such the parties were invited to address the court in this respect.

[58] For this purpose, the parties compiled a bundle of correspondences which was submitted by agreement for this court to consider in adjudicating this issue.

[59] From the submissions by the parties and aforesaid bundle it appears that the trial was enrolled for one day and for the purpose of adjudicating the special pleas only. Leading up to the hearing the parties conducted a pre-trial meeting on 7 August 2024. The draft pre-trial minute was circulated, and various comments ensued thereupon during the month of August 2024.

[60] In the signed pretrial minute of 24 August 2024, the parties agreed that the special pleas of non-joinder and *lis pendens* should be adjudicated upon first. It was further recorded that the third party himself may be called as a witness and reserves his right whereas the plaintiff and defendant did not envisage calling any witnesses also reserving their respective rights.

[61] A week before the trial was to commence on 28 January 2025, the plaintiff's attorneys of record directed correspondence to the remaining parties, seeking clarity in respect of the manner in which the third party intends to present his case. Specific clarity was sought as to whether the third party intends to lead oral evidence. Various written and telephonic exchanges then took place on the issue and in order to establish a suitable date and time for the respective counsel to engage one another. It appears, due to the parties' counsel's various schedules, that such an engagement never took place.

[62] On 27 January 2025, the third party's attorneys of record suggested that a stated case be prepared and that the matter be postponed to the opposed motion roll. In response the plaintiff's attorneys indicated that the proposal and request for a postponement were belated and that the plaintiff does not agree thereto. On the day of the hearing all parties were ready proceed, and the third party again proposed that the special please be determined by stated case.

[63] At the hearing the parties agreed that a stated case should be prepared. The matter initially stood down for two hours with the intention to prepare the stated case,

but the defendant was of the view that said time was not sufficient to fully prepare same. By agreement the matter was postponed for the preparation of the state case, and filing of heads of argument. The costs of the postponement as reserved

[64] It bears mention that although the parties agreed as far back as August 2024 that the special pleas would be adjudicated upon separately, there was no suggestion at that stage of a stated case and as to how the special pleas would be dealt with. All parties reserved their rights in terms of paragraph 14 of the signed pre-trial minute to call witnesses.

[65] In summation, the parties' respective arguments in relation to the costs of the postponement were as follows.

[66] The plaintiff contended that the third party was *dominus litis* and should have actively ensure the effective hearing of the special please. Further that the suggestion of a stated case should have been made timeously. The plaintiff sought the cost to be borne by the third party on scale B.

[67] On behalf of the defendant it was submitted that the proposal of a stated case was only made on 27 January 2025, and as in the case of the plaintiff, the defendant was of the view that clear guidance ought to have been provided earlier as to how the special pleas would be presented to court. The defendant sought the third party to pay the cost.

[68] On behalf of the third party it was contended that he ought not to be held liable for the cost, as the parties actively engage pursuant to the correspondence on 20 January 2025 and attempted to ensure that the parties' counsel meet to clarify the way forward. When the engagement between counsel did not materialise, the third party suggest that a stated case be prepared, which suggestion was acceptable to all the parties and which method the parties agreed to adopt.

[69] It was further contended that as all the parties were ready to proceed on the 28th of January 2025, the matter could have proceeded but for the agreement to prepare a stated case. Up until the agreement in respect of the stated case, the position was governed by the signed pre-trial minute, which made it clear that all the parties reserved their right to adduce oral evidence and that the third party himself could be a witness. The third party sought that each party pay their own cost.

[70] The circumstances relevant to this issue of costs do not reveal that any particular party can be regarded as the sole cause of the necessity for the matter to be postponed. As much as the suggestion that a stated case be utilised was made by the third party, which consequentially led to the postponement, it remained open to the other parties to insist on proceeding on the day set down for hearing, in which event the postponement would not have ensued, and no cost would have been incurred. However, the plaintiff, and later the defendant, considered the proposal and agreed thereto. In agreeing to present the special pleas on a stated case the defendant and plaintiff had to formed the view that it was the most suitable manner to cause the adjudication of the special pleas. To give effect to the agreement the matter had to be postponed.

[71] A belated proposal to curtail, alternatively attend to the issues in an expedient manner as envisaged in Rule 33(1), in itself does justify a cost order against the third party. For as far as the argument was made that said proposal should have been forthcoming at an earlier stage, it would have been more apposite yet it was accepted by the defendant and plaintiff. In the absence of their acceptance the matter could have proceed and the parties would have been guided by that agreed to in the pre-trial minute, being that there may be a possibility that the third party would testify.

[72] The correspondence exchanged during January 2025 demonstrates that all parties appear to have attempted to ensure that counsel meet, but same could plainly not happen. For these reason, it would be appropriate that the wasted cost of the postponement be cost in the cause.

Costs of stated case

[73] The general rule in civil litigation is that the successful party should be awarded costs in its favour, unless there is just cause to depart therefrom.[24]

[74] In light of the partial success of the third party and taking into consideration that the third party did not persist with the special pleas *vis-à-vis* the plaintiff, it would be just in the circumstances that the third party pays the cost of the plaintiff, and the defendant and third party each pay their own costs.

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24 *Motala v Master, North Gauteng High Court [2019] ZASCA 60; 2019 (6) SA 68 (SCA) at 102G–104C*

[75] Given the complexity of the matter and the nature of the arguments presented, I am of the view that it would be appropriate that counsel's fees be taxed at scale B.

[76] Consequently, the following order is made:

1. The third party's special plea of non-joinder is dismissed.

2. The third party's special plea of *lis pendens* is upheld.

3. The action under case number 5087/2023 are stayed pending the final determination of the action under case number 3645/2022.

4. The costs of the stated case are to be paid as follows:

   4.1 the third party to pay the cost of the plaintiff; and

   4.2 the defendant and third party are to pay their own cost.

5. The cost in respect of the hearing of 28 January 2025 are cost in the cause.

[redacted]

D. GREYLING-COETZER

Acting Judge of the High Court

Appearances:

For the plaintiff:	JS Rautenbach
Instructed by:	Symmington de Kock Attorneys
For the defendant:	EG Lubbe
Instructed by:	Kramer Weihmann Inc

For the third party:	GC Steenkamp
Instructed by:	Peyper Attorneys