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

Case Number: 2025-199655

(1) REPORTABLE: ~~YES~~ / NO
(2) OF INTEREST TO OTHER JUDGES: YES/~~NO~~
(3) REVISED: YES/NO
11/11/2025

In the matter between:

SERAGE N.O.; TSHEPO MOGATIKEDI

[in his official capacity as the appointed receiver and liquidator in the divorce joint estate between KJ R[...] and N R[]]

Applicant

and

R[...]; N[...]

First respondent

R[...]; K[...] J[...]

Second respondent

JUDGMENT¹

AMM, AJ

1. The applicant is an attorney and the Court appointed receiver and liquidator of the respondents' joint estate (as at the date of their divorce, being 25 August 2022).

¹ This application was allocated and called before me as an urgent application in the Insolvency Motion Court. Whilst this the application is possibly more suited to the Family Motion Court; after engaging with the Senior Judge, I undertook to accommodate the litigants by nevertheless hearing and determining this application. They were happy for me to do so.

2. In his said representative capacity, the applicant has, subject to a usual 30-day type mortgage bond suspensive condition, procured the sale of a residential immovable property owned by the joint estate. The signed or accepted offer to purchase is dated 26 September 2025. The purchaser is one Ms Sodaba.

3. In respect of the mortgage bond suspensive condition, Standard Bank has provided an "Approval in Principal" in respect of the purchaser's home loan application. It did so on 6 October 2025.

4. As its lodestar, the ultimate relief sought in this application - as confirmed on behalf of the applicant during his opening argument - is aimed at the protection, the bringing into operation (via compliance with its suspensive condition), and implementation of a September 2025 signed offer to purchase (also referred in this judgment as the "sale agreement").

5. The applicant claims that the first respondent is frustrating the fulfilment of the mortgage bond suspensive condition with the signed offer to purchase by frustrating access to the immovable property for purposes of it being inspected and valued by Standard Bank.

6. The applicant more specifically alleges the following in paragraph 9.19.3 under the rubric "urgency":

"[T]he purchaser's bond application has been approved in principle. The purchaser's bond application which is to cover the purchase price and generate income or profit to the joint estate is at the risk of being withdrawn if the bank agents or assessors are not allowed into the property to perform valuations."

7. Accordingly, the applicant seeks the following central relief in its notice of motion (Court Online dated 24 October 2025):

- “1. [The usual wording for a prayer for urgency].
 2. An order directing First Respondent to allow the Applicant in the execution of his office as receiver and liquidator and any persons appointed by the Applicant unhindered access to the immovable property described as Portion 113 (Portion of Portion 94) of the Farm B[...] 533, Registration Division J.Q, Province of Gauteng.
 3. An order directing the First Respondent to whenever directed by Applicant to allow entry and access to the immovable property described as Portion 113 (Portion of Portion 94) of the Farm B[...] 533, Registration Division J.Q, Province of Gauteng of the third parties, estate agents, prospective buyers any persons whose services are enlisted by Applicant to render specific professional services to enable the Applicant to execute the mandate of his appointment as receiver and liquidator.
 4. An order directing the First Respondent not to prevent or obstruct the completion of the sale and registration of transfer of the immovable property described as Portion 113 (Portion of Portion 94) of the Farm B[...] 533, Registration Division J.Q, Province of Gauteng to the purchaser Gamase Sodaba on the basis of a sale agreement concluded between Applicant and Ms. Sodaba during 24th September 2025.
 5. In the event that the First Respondent refuses or fails to comply with either order in 2 to 4 above, Applicant be permitted to approach court on the same papers supplemented where necessary for an order to declare Respondent to be in contempt of Court and for her committal to a term of imprisonment for any conduct found to be a contempt of court order.
 6. First Respondent be ordered to pay the costs of this application on Scale A such costs to be debited against Respondent's share in the liquidation and distribution of the net profit in joint estate.”
8. With the aforesaid relief sought in the notice of motion in mind, two preliminary or introductory observations must be made. First, for the reasons set out in this judgment, a determination of the question of the claimed urgency in this application is intrinsically tied up with the merits of the application; as such, determining one, ineluctably results

² The offer to purchase (annexure *TSM2* to the replying affidavit) was accepted (signed) by the applicant on 26 September 2025. Nothing material however turns on this small difference in dates.

in a determination of the other. Second, the relief sought in paragraphs 2 and 3 of the notice of motion is sought within the context of the relief sought in 4 of the notice of motion, and that set out in paragraphs 4 and 5 above, namely the purpose of such relief is to protect the enforcement of the September 2025 signed offer to purchase.

9. The mortgage bond suspensive condition is foreshadowed in clause 1.2, but resides in 10.1, of the signed office to purchase. These clauses read (my emphasis):

“1. PURCHASE PRICE

- 1.2 The *balance of the purchase price* shall be paid in cash on registration of transfer of the property into the name of the Purchaser which amount *shall be secured by a bank guarantee* upon the terms and conditions usually imposed by the financial institution which guarantee shall be delivered *within Thirty (30) Days after acceptance of this offer or fulfilment of the suspensive conditions referred to in clause 10.1.*”

and

“10. SUSPENSIVE CONDITION

- 10.1 *This offer is subject to the suspensive condition that the Purchaser ... is able to raise a loan upon the security of a mortgage bond to be passed over the Property by a bank or other financial institution, for the sum of not less than R4 400 000.00 within 30 days of acceptance of this agreement, (which time may be extended by the Agent at the Agent's sole discretion for a further period not exceeding 15 days).* The parties hereto specifically agree that such extension will be of full force and effect and binding on both the Purchaser and the Seller irrespective of whether such extension is communicated to either the Purchaser or the Seller. The parties specifically agree that *the suspensive condition shall be deemed to be fulfilled on the date that the Purchaser obtains a quotation and/or pre-agreement statement from any financial institution in terms of which such financial institution offers a loan to the Purchaser in an amount of not less than the amount referred to above. ...*”

10. What then is a suspensive condition (also known as a condition precedent)? To this answer this question, in general terms, regard must be had to the following trite features and principles of a suspensive condition, namely:

10.1. A contract that includes a suspensive condition is normally indicated by the contract's use of the words "subject to".³

10.2. A suspensive condition does what its name suggests. It is a contractual condition that suspends the operation of a contract, either wholly or partly, until the happening of an uncertain future event.⁴

10.3. Pending the fulfilment of the suspensive condition, the contract nevertheless remains binding because it is only the operation of the contract that is suspended.

10.4. This means *inter-alia* that, pending the fulfilment of the suspensive condition, neither party can resile from the agreement.⁵ Nevertheless, a party cannot enforce any rights arising from the agreement until the suspensive condition has been fulfilled.⁶

10.5. A suspensive condition usually has an agreed date or time limit for its fulfilment. If the suspensive condition is fulfilled timeously, the contract is brought into operation and is enforceable.

³ *Pangbourne Properties Ltd v Gill & Ramsden* 1996 (1) SA 1182 (A).

⁴ RH Christie, *Digest of the Law of Contract*, page 39 et al.

⁵ *Odendaalsrust Municipality v New Nigel Estate Gold Mining Co Ltd* 1948 (2) SA 656 (O) 665-7; *Ex Parte Universal Insurance Co Ltd* 1949 (3) SA 801 (T) 806. Appropriate damages may also be claimed for breach of the contract during this interim / pending period - see *Frasers Ltd v Nel* 1929 OPD 182; and *Massey-Harris Co (SA) Ltd v Van der Walt* 1932 EDL 115.

⁶ See *inter-alia* *First National Bank of SA Ltd v Lynn* NO 1996 (2) SA 339 (A) and *Mia v Verimark Holdings (Pty) Ltd* [2010] 1 All SA 280 (SCA).

- 10.6. The operative date of the contract is however retrospective, namely with effect from the date of the conclusion of the contract⁷ (i.e. not the date of the fulfilment of the condition) unless the contract provides otherwise.⁸
- 10.7. If the suspensive condition is, in due course, not fulfilled or complied with, the contract is rendered void.⁹ This means that the contract will fall away if the condition is unfulfilled.¹⁰
- 10.8. As such, the date or time limit for the suspensive condition's fulfilment cannot be extended or waived at any time after the date or time for the fulfilment of the suspensive condition has run its course or lapsed.¹¹
- 10.9. Finally, on the question of onus, a litigant that seeks to rely on a contract subject to suspensive condition must plead and prove fulfilment of the suspensive condition.¹²
11. What about a mortgage bond suspensive condition?
- 11.1. A mortgage bond suspensive condition of the type in issue in this application (also commonly referred to as a "mortgage bond condition" or "finance

⁷ *Peri-Urban Areas Health Board v Tomaselli* 1962 (3) SA 346 (A) 351E-352A.

⁸ *G & G Investment and Finance Corp (Pty) Ltd v Kajee* 1962 (2) SA 73 (D) 80D.

⁹ Christie's *The Law of Contract in South Africa*, 8th Edition, page 183. *Administrateur-Generaal vir die gebied Suidwes-Afrika v Hotel Onduri (Edms) Bpk* 1983 (4) SA 794 (SWA); *Southern Era Resources Ltd v Farndell Ltd (in liquidation)* 1993 (1) SA 493 (A) 505A-B; *Command Protection Services (Gauteng) (Pty) Ltd t/a Maxi Security v South African Post Office* 2013 (2) SA 133 (SCA) [10]; *Swart v Starbuck* 2017 (5) SA 370 (CC) [6] [34].

¹⁰ *Basson v Remini* 1992 (2) SA 322 (N) 327C.

¹¹ *Trans-Natal Steenkoolkorporasie Bpk v Lombaard* 1988 (3) SA 625 (A); *De Villiers v BOE Bank Ltd* 2004 (3) SA 1 (SCA) 17; *Abrinah 7804 (Pty) Ltd v Kapa Koni Investments CC* 2018 (3) SA 108 (NCK) [65] – [67].

¹² *Kate's Hope Game Farm (Pty) Limited v Terblanchehoek Game Farm (Pty) Ltd* 1998 (1) SA 235 (SCA), *McHardy v Olifant* 1905 ORC 42 44; *Leo v Loots* 1909 TS 366 370, *Trollip v African Timbers* 1946 AD 1063 1070; *Resisto Dairy (Pty) Ltd v Auto Protection Insurance Co Ltd* 1963 (1) SA 632 (A) 644G.

condition”) is a standard or expected feature in South African offers to purchase immovable property.

- 11.2. Suspensive conditions, especially within the context of immovable property transactions, are required to be clearly defined, timeously met, and met in full (i.e. fulfilled precisely *in forma specifica*¹³). For example, if a signed offer to purchase requires that the buyer must secure mortgage bond finance of R1,000,000.00 within 30-days, an approval of R900,000.00 does not equate to due compliance with the suspensive condition; neither does obtaining approval on day 31 (i.e. after the lapse of the suspensive condition).
- 11.3. In amplification of that already stated regarding the legal principles applicable to suspensive conditions, the court in *Basson v Remini and Another*¹⁴ held that ordinarily a suspensive condition in an immovable property transaction is only fulfilled once the mortgage loan agreement is in place (i.e., the purchaser has accepted the bank’s conditions for the conclusion of the relevant loan agreement and the accompanying mortgage bond security).
- 11.4. The indubitable purpose and underlying intention of the inclusion of a mortgage bond suspensive condition in an offer to purchase protects both the purchaser and the seller in the proposed property transaction.
 - 11.4.1. In the above regards, if the purchaser does not financially qualify for the mortgage loan, the purchaser is able to “walk away” from the property transaction without any financial repercussions or obligations.

¹³ "*In forma specifica*" is a Latin phrase meaning simply that something must be performed in a particular or specified way for it to be considered valid or legally binding.

¹⁴ 1992(2) SA 322 (N).

11.4.2. Similarly, the seller is not indefinitely tied down by the financial inability or uncertainties of the proposed purchaser. A seller is thus able to (re)market the immovable property.

11.5. An equally common feature in South African mortgage bond transactions is what is known as an approval in principle. An approval in principle merely means that the relevant bank or credit providing institution has approved the bond loan amount in principle but the legal and final approval is still subject to the (proposed) finance granter finding value in the immovable property (i.e., appropriate security) within the context of the loan amount requested.

12. The signed offer to purchase in issue in this application, in clear terms, requires that something more than an approval in principle is required in order for the suspensive condition to be fulfilled. In this regard, the signed offer to purchase specifically requires the purchaser “to raise a loan upon the security of a mortgage bond ... within 30-days of acceptance of this agreement (which time may be extended by the Agent at the Agent’s sole discretion for a further period not exceeding 15 days)”.
13. Because the applicant confirmed that the agent had not provided the 15-day discretionary extension, I say nothing further in this regard. As such, because the offer to purchase was “accepted on 26 September 2025, the 30-day suspensive condition period expired at the latest on Monday, 27 October 2025 (26 October 2025, being a Sunday).
14. For the avoidance of any doubt, the signed offer to purchase sets the threshold, or minimum requirement, for the raising of a mortgage bond loan, and as such the deemed fulfilment of the suspensive condition to include and take place “on the date that the Purchaser obtains a quotation and/or pre-agreement statement from any financial institution.”

15. As such, as a minimum for purposes of fulfilling the suspensive condition, the purchaser was required to (i) provide a quotation and/or pre-agreement statement from any financial institution and (ii) do so by, the very latest, Monday, 27 October 2025. As already indicated, the failure to tirelessly for the suspensive condition results in the voiding of the signed offer to purchase.

16. As already indicated, the fulfilment of a suspensive condition after the time limit imposed does not give rise to a binding sale agreement.¹⁵ The question therefore now to be answered is whether the purchaser timeously fulfilled the suspensive condition in the signed offer to purchase? Otherwise stated, did the purchaser, on or before Monday, 27 October 2025, obtain “a quotation and/or pre-agreement statement from any financial institution”?

17. In paragraph 9.14 of the founding affidavit, the applicant asserts the following is:

“The purchaser has been granted an approval of a bond guarantee in the sum of [R]4.4 million”.

18. The aforesaid statement is however factually incorrect. This is for a panoply of reasons including (i) if it were correct, there would have been no need for the bringing of this application, (ii) the allegation is also at odds with that stated in paragraph 9.19.3 of the founding affidavit, and (iii) as demonstrated below, all that has happened in respect of the fulfilment of the suspensive condition is Standard Bank providing the purchaser with an “Approval in Principal”. It did so on 6 October 2025.

19. For the reasons that follow, the relied upon Standard Bank “Approval in Principal” is not the “quotation and/or pre-agreement statement” required by clause 10.1 of the signed

¹⁵ *Dirk Fourie Trust v Gerber* 1986 (1) SA 763 (A).

offer to purchase. The “Approval in Principal” expressly informs, provides and states (as the case may be):

- 19.1. that her “Standard Bank loan application has been approved in principle ... subject to the following conditions: ...”;
- 19.2. lists, at its page 2, the following “Special Condition”: “FAVORABLE PROPERTY ASSESSMENT” - this is described, in turn, as “[a] satisfactory valuation of the property that is being purchased”;
- 19.3. also lists, at page 2, the following “Additional Requirements”: “In order for your application to be finalised, please fax requested documents to [...] or provide them to your Origination Channel, as indicated above”; and
- 19.4. the following in the second last paragraph on the same page 2 (my italics):

“... If you meet the conditions above to our satisfaction, *we will send you a quotation and pre-agreement statement to consider.* This pre-agreement quotation statement will set out the detailed terms and conditions applicable to the loan.

This approval in principle is valid for five business days.”

- 20. All things considered, in its own express terms, the Standard Bank “Approval in Principal” (i) records that it is not a “quotation and/or pre-agreement statement”, and (ii) requires that the “Special Condition” and “Additional requirements” must first be complied with before a “quotation and/or pre-agreement statement” is provided, and then on or before Monday, 13 October 2025 (providing for the “five business days” validity period of the “Approval in Principal”).

21. With the above in mind, it is common cause, especially within the context of the platform upon which this application is pursued and the urgent relief sought, that the “Special Condition” in the Standard Bank “Approval in Principal” has not been fulfilled. The first respondent’s alleged frustration of the valuation process stands at the true heart of this application, and its claimed urgency. It also cannot be seriously disputed that the “five business days” expired on Monday, 13 October 2025.

22. When presented with the above facts, counsel for the applicant sought to argue that because Standard Bank provided an “Approval in Principal” timeously (i.e., within the 30-day suspensive condition period):
 - 22.1. the running of the 30-day suspensive condition period ran, or commenced to run afresh, on the date upon which Standard Bank furnished the Approval in Principal; and

 - 22.2. that the recommencement of the running of this re-instated 30-day period was due to “run out” shortly - in approximately 10 days’ time; with the result that there was a pressing need for the granting of the urgent relief sought by the applicant.

23. Given the applicant’s submissions, an interpretation of the offer to purchase is required (with a particular focus on the mortgage bond condition). The now trite “modern” South African approach to the interpretation of legal documents requires an “integrated” or “unitary” process or investigation that requires considerations of text, context and purpose.¹⁶

¹⁶ See inter-alia *Betterbridge (Pty) Ltd v Masilo and Other NNO* 2015 (2) SA 396 (GNP), as affirmed by the SCA in inter-alia *Tshwane City v Blair Atholl Homeowners Association* 2019 (3) SA 398 (SCA), and *Capitec Bank Holdings Ltd v Coral Lagoon Inv 194 (Pty) Ltd* 2022 (1) 100 (SCA), *University of Johannesburg v Auckland Park Theological Seminary and Another* 2021 (6) SA 1 (CC). See also *Natal Joint Municipal Pension Fund v Endumeni Municipality*

24. Otherwise stated, the language used in the document, understood within the context in which it is used, and having regard to the purpose of the document, must be considered in an integrated or unitary fashion¹⁷ - the process being objective and not subjective¹⁸; so that an interpretation is arrived at that is coherent, salient and businesslike.¹⁹
25. With the aforesaid “integrated” or “unitary” interpretation process in mind, I am unable to find any support for the applicant’s interpretation of the mortgage bond suspensive condition; be it alone, or within the context of the signed offer to purchase as a whole. The interpretation proposed by the applicant is incoherent, obtrusive, and unbusinesslike. It creates the potential for a never-ending loop of the re-running, or re-setting, of the 30-day suspensive condition clock. This proposed interpretation results in a contractual and interpretive aberration; at direct odds inter-alia with (i) the offer to purchase’s, and the suspensive condition’s, express wording, (ii) the context for the suspensive conditions inclusion in the offer to purchase, and (iii) the aforesaid purpose of the suspensive condition and also its 30-day limit (intended contractual certainty).
26. All things considered, because it is common cause that the “Agent” did not provide the possible 15-day discretionary extension (the applicant’s counsel submitted that she was not required to for the reasons listed in paragraph 22 above), the sale agreement has undoubtably lapsed. It moreover does not matter that it had lapsed shortly after the

2012 (4) SA 593 (SCA) par 18; *Bothma-Batho Transport (Edms) Bpk v S Bothma & Seun Transport (Edms) Bpk* 2014 (2) SA 494 (SCA).

¹⁷ See inter-alia *University of Johannesburg v Auckland Park Theological Seminary* 2021 (6) SA 1 (CC) and *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) para 18.

¹⁸ *Iveco South Africa (Pty) Ltd v Centurion Bus Manufacturers (Pty) Ltd* 2020 JDR 0911 (SCA) para 6.

¹⁹ See inter-alia *Capitec Bank Holdings Limited and Another v Coral Lagoon Investments 194 (Pty) Ltd and Others* 2022 (1) SA 100 (SCA) para 25, with reference to *Endumeni*; *Bothma-Batho Transport (Edms) Bpk v S Bothma & Seun Transport (Edms) Bpk* 2014 (2) SA 494 (SCA) para 12; *City of Tshwane Metropolitan Municipality v Blair Atholl Homeowners Association* 2019 (3) SA 398 (SCA) paras 59-61; *Swart en 'n Ander v Cape Fabrix (Pty) Ltd* 1979 (1) SA 195 (A) at 202C-D; *Coopers & Lybrand and Others v Bryant* 1995 (3) SA 761 (A) at 767H-768E; *KPMG Chartered Accountants (SA) v Securefin Ltd and Another* 2009 (4) SA 399 (SCA) at 409I-410B.

bringing of the application. At the time when this application was argued before me, there was no longer a binding and extant signed offer to purchase requiring judicial protection.

27. Equally importantly, the Standard Bank “Approval in Principal” (i) would have lapsed when the applicant demanded that the Bank’s valuers be given access to the property “commencing on 15 October 2025” (see demand dated 13 October 2025), and (ii) had already lapsed when this application. As such, Standard Bank’s “Approval in Principal” also does not warrant, even indirect, judicial protection.
28. In the above circumstances, the applicant thus fails to establish:
 - 28.1. the circumstances, within the prescripts of uniform rule 6(12)(b), that render his application urgent, nor why the applicant would not be afforded substantial redress at a hearing in due course; and
 - 28.2. that, on a balance of probabilities, the applicant has a clear right,²⁰ let alone a *prima facie* right,²¹ within the context of the established requirements for interdictory relief.
29. As already indicated, considerations of the lack of merit in the application (on the basis of clear right / *prima facie* right considerations as just mentioned) are, to all intents and purposes, also dispositive of those relevant to the lack of urgency in the application. If the signed offer to purchase has lapsed, there is no merit in the application and, vice versa, there is likewise no urgency in the application.

²⁰ *Nenaber v Stuckey* 1946 AD 1049, and see *People of His Way Ministry v Mokuke and Others* (2023/032252) [2024] ZAGPPHC 1198 (22 November 2024) para 10.

²¹ *Steel and Engineering Industries Federation v National Union of Medical workers of South Africa* (2) 1993 (4) SA 196 (T) 199G.

30. Furthermore, because the signed offer to purchase has lapsed, the established interdict requirement that the applicant is suffering an act of interference²² that requires judicial protection simply cannot be not satisfied.
31. In addition to the above, the founding affidavit fails to make out a case that, absent the grant the relief sought, there is no other satisfactory remedy available to the applicant in respect of and against the first respondent.²³
- 31.1. At its high watermark, counsel for the applicant argued that no other satisfactory remedy requirement was satisfied because the first respondent required loan finance for purposes of a prior offer to purchase the property and as such an inference is to be drawn regarding her financial position.
- 31.2. The founding affidavit however presents no established or proven facts²⁴ of the first respondent's inability to satisfy a damages claim that the applicant may possibly proffer against her.²⁵ The inference is thus insufficient to discharge the required evidentiary, at least, burden resting on the applicant. As such, this requirement for the grant of the interdictory relief sought is not met.
32. As already indicated, and as per paragraphs 4, 5 and 8 above, the need for the relief sought in paragraphs 2 and 3 of the notice of motion is not self-standing or discrete from, but in fact tied to, the relief sought in paragraph 4 of the notice of motion. As the applicant is not entitled to an order in terms of paragraph 4 of the notice of motion, the relief sought in paragraphs 2 and 3 must suffer the same fate. I would nevertheless

²² Setlogelo v Setlogelo 1914 AD 221 227.

²³ *Celleiers v Lehfeldt* 1921 AD 509 and See *Exxaro Coal Mpumalanga (Pty) Ltd v TDS Projects Construction and Newrak Mining JV (Pty) Ltd and Other* 2022 JDR 1463 (SCA) para 14.

²⁴ *Skilya Property Investments (Pty) Ltd v Lloyds of London* 2002 (3) SA 765 (T) 781A-B and 781B-D, *S v Mtsweni* 1985 (1) SA 590 (A) and *Caswell v Powell Duffryn Associated Collieries Ltd* [1939] 3 All ER 722 (HL) 733E-F.

²⁵ *Mandela v Falati* 1995 (1) SA 251 (W) 260D-E.

encourage the parties to have regard to the cautionary word provided in paragraph 43 below of this judgment.

33. That said, as a matter of caution, I also traverse the question of the non-joinder of (i) the third-party purchaser of the immovable property and (ii) Standard Bank in this application.
34. In every case, a necessary or essential party is a party whose rights may be affected by the outcome of a proceeding. It is thus trite that all parties who have a direct and substantial (legal) interest in an application and the relief sought must be cited and joined as necessary parties to the application.
35. The test for (non-) joinder is thus that of a “direct and substantial interest”; being a legal interest in the subject matter of the litigation which may be affected prejudicially by the judgment of the Court. The nature of the legal interest is dependent on the circumstances of each case²⁶ but it is required to be something more than a substantial financial or commercial interest.²⁷ Accordingly, a Court is required to be cautious in ensuring that all relevant parties are before it when it is asked to make a finding and/or order that may impact upon such parties’ rights.²⁸
36. In fact, so fundamental are considerations of non-joinder to the rule of law, a Court can *mero motu* raise the issue of joinder; even if (i) the non-joinder is not raised by the litigating parties, (ii) it arises for the first time on appeal.²⁹

²⁶ *Cohen v Jacobs supra* at 438.

²⁷ See also *Aquatour v Sacks and others* 1989 (1) SA 56 (A) at 62G; *Brauer v Cape Liquor Licensing Board* 1953 (3) SA 752 (C) at 761H and *Vandenhende v Minister of Agriculture, Planning and Tourism, Western Cape and Others* 2000 (4) SA 681 (C).

²⁸ See *Amalgamated Engineering Union v Minister of Labour* 1949 (3) SA 637 (A) at 649 and *Klep Valves (Pty) Ltd vs Saunders Valve Company Limited* 1987 (2) SA 1 (A) at 39I-40A.

²⁹ *Rosebank Mall (Pty) Ltd vs Cradock Heights (Pty) Ltd* 2004 (2) SA 353 (W) at para 11.

37. Because the applicant seeks in this application to protect and enforce a lapsed sale agreement, and so too a lapsed “approval in principle” of a mortgage bond, I am of the view that both the purchaser and Standard Bank have a legal interest in the relief sought by the applicant, particularly if the relief sought is to be granted.
38. Moreover, the need for joinder of the purchaser and Standard Bank is amplified because, it was submitted from the Bar for the applicant, that the purchaser wished to still pursue the purchase of the immovable property. This may well be so, but there was nothing in the papers filed of record before me that endorses or confirmed this to be the case. The purchaser was not before me to confirm this was the case, and without Standard Bank’s participation, I am unable to determine if the purchaser’s claimed wishes are even relevant, given that they are ultimately dependent upon Standard Bank’s position.
39. My findings on the non-joinder of the purchaser and Standard Bank, being essential and interested parties in this application, raises the following question: What then is to happen with this application?
40. In *Bensen v Joelson*,³⁰ the Court - echoing the concerns of Fagan AJA in *Amalgamated Engineering Union*³¹ - was reluctant to continue in the absence of necessary parties who should have been joined. On the other side of the spectrum, in *Absa Bank Ltd v Naude*,³² the application *a quo* was dismissed, via the appeal, because of the non-joinder of interested parties.

³⁰ *Bensen and Others v Joelson and Others* 1985 (3) 566 (C) at 569F-H.

³¹ *Amalgamated Engineering Union* supra at 661.

³² *Absa Bank Ltd v Naude N.O. and Others* 2016 (6) SA 540 (SCA).

41. While our Courts have often ordered a stay³³ of proceedings pending the non-joinder of necessary parties³⁴ (especially if the non-joinder is not fatal to the proceeding³⁵), I believe that such an order, in the prevailing circumstances, would serve no ultimate purpose and be a *brutum fulmen*.³⁶ The staying of this application to facilitate the belated joinder of the purchaser and Standard Bank could not, and would not, resurrect the lapsed signed offer to purchase.
42. All things considered, leaving questions of non-joinder aside for a moment, the administration and interests of justice would not be served if I were to merely strike the application off the urgent roll because of a lack of urgency. This is because the application is also, to all intents and purposes (and at the same time and for the same reasons for it not being urgent), “dead on arrival” in respect of its merits given the lapsed signed offer to purchase and the absence of a recognisable right requiring judicial protection. It would be a waste of scarce judicial resources if an opposed motion court would subsequently be required to determine the merits of this application (when I am suitably placed to do so; notwithstanding this being a purported urgent, but not actually urgent, application.) Accordingly, I have elected to determine, and dismiss, this application on, and because of, its (lack of) merits.
43. Before dealing with the question of costs, I must provide a cautionary word. As I read the court order of appointing and empowering the applicant as the appointed receiver and liquidator of the respondents’ joint estate, the applicant is clothed with a judicially endorsed discretion and mandate to realise any assets of the joint estate (including the property in issue). At the risk of stating the obvious, provided the applicant acts lawfully

³³ The proceedings are temporarily halted or stopped so that the applicant can have an opportunity to join the missing / non-joined necessary party.

³⁴ For example, see *Peacock v Marley* 1934 AD 1, where this approach has been available for almost a hundred years.

³⁵ *Conrad v Key West Body Corporate* 2022 JDR 2005 (GP) para 29.

³⁶ Latin phrase meaning “senseless thunderbolt” or “empty threat”. It refers to something that appears powerful or threatening but is ultimately senseless, fruitless, ineffective or worthless.

and in terms of the relevant court order, it does not behove either of the respondents to frustrate or handicap him in the exercise of his discretion and the fulfilment of his mandate. If, for example, the first respondent believes that the applicant is not doing so, or that he has not given “due consideration” to her wishes (see paragraph 6.2 of such court order), she would be well advised to pursue her remedies.

44. Finally, the ordinary rule in civil litigation in South Africa is that costs are in the discretion of the relevant judicial officer and, that subject thereto, the usual costs order is that costs follows the result of the litigation.³⁷ I do not find that there is any basis for a punitive costs order, nor to depart from the unusual costs order. A party and party costs order suffices. Because the application is obviously important to the parties, scale B shall apply.

45. In the result, I grant the following orders:

1. The application is dismissed.
2. The applicant is ordered to pay the costs of this application (scale B to apply).

AMM AJ
JUDGE OF THE HIGH COURT
JOHANNESBURG

HEARD & ARGUED: 6th NOVEMBER 2025

JUDGMENT ELECTRONICALLY DELIVERED: - This judgment was handed down electronically by circulation to the parties’ legal representatives by email. It will also be uploaded onto CaseLines.

The date and time for the handing-down of this judgment is deemed to be:
10h00 on 11th NOVEMBER 2025.

³⁷ *Ferreira v Levin; Vryenhoek v Powel* 1996 (2) SA 621 (CC) at 624.

For the applicant:

Mr T Mhlanga (Advocate)
Instructed by TM Serage Inc.

For the first respondent:

Ms ZD Maluleke (Advocate)
Instructed by Mabote Gwede & Associates

