



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

(1) NOT REPORTABLE
(2) NOT OF INTEREST TO OTHER JUDGES

CASE NO: 2025-092254

DATE: 14 April 2026

In the matter between:

AFRICAN RAINBOW CAPITAL (PTY) LIMITED

Applicant

and

PULA GROUP LLC

First Respondent

PULA GRAPHITE PARTNERS TANZANIA LIMITED

Second Respondent

AFRICAN RAINBOW MINERALS LIMITED

Third Respondent

DR PATRICE TLHOPANE MOTSEPE

Fourth Respondent

ARCH SUSTAINABLE RESOURCES GPCO LIMITED

Fifth Respondent

BOWLINE PROFESSIONAL SERVICES (PTY) LTD

Sixth Respondent

Neutral Citation: *African Rainbow Capital v Pula Group and Others* (2025-092254) [2026] ZAGPJHC --- (14 April 2026)

Coram: Adams J

Heard: 1 April 2026

Delivered: 14 April 2026 – This judgment was handed down electronically by circulation to the parties' representatives by email, by being uploaded to *CaseLines* and by release to SAFLII. The date and time for hand-down is deemed to be 10:30 on 14 April 2026.

Summary: Civil procedure – application in terms of s 21(1)(c) of the Superior Courts Act 10 of 2013 for declaratory relief against foreign companies – in relation to proceedings in the Tanzania High Court – declaratory orders applied for to the effect that the relief sought in the Tanzanian High Court is fundamentally flawed – and based on an incorrect understanding of South African law, which is the law governing the confidentiality agreement on which action is based –

Edictal citation – Uniform Rule of Court 5 – the main purpose of rule 5 is to regulate institution of legal proceedings against a respondent or a defendant who is outside of South Africa – also regulates service of the initiating process – aimed at giving effective notice of the institution of the proceedings – such purpose achieved – application to set aside edictal citation order refused –

Lis alibi pendens – requirements not complied with – the causes of action in the two sets of proceedings are not the same – and the same relief not sought – plea of *lis pendens* rejected –

Jurisdiction – Court has jurisdiction over applicant's suit if there is a sufficiently close connection between the suit and the geographical area of jurisdiction of the Court – such close connection found *in casu* – terms of the agreement governed by South African law – an order by any Court will ultimately have to be enforced within the jurisdiction of this Court – considerations of convenience also impelling conclusion that Court had jurisdiction –

Declaration of rights - locus standi – applicant in terms of s 21(1)(c) to satisfy Court that it is a person interested in 'existing, future or contingent right or obligation' – nothing more required – once Court so satisfied – applicant having *locus standi* – Court obliged to exercise its discretion whether or not to grant declaratory order – applicant is a defendant in the Tanzanian proceedings – it has a direct and material interest in the proper determination of those proceedings in accordance with the South African law – applicant's *locus standi* established – Court's discretion to grant declaratory relief exercised in favour of the applicant –

Application succeeds – declaratory relief granted in favour of applicant.

ORDER

- (1) It be and is hereby declared that: -
- (a) the confidentiality agreement annexed to 'the plaint' marked 'PULA-2', which is annexed to the founding affidavit marked 'ARC2' ('the confidentiality agreement') was concluded between the first respondent and the third respondent;
 - (b) the second respondent has no contractual rights derived from the confidentiality agreement;
 - (c) the second respondent cannot suffer contractual damages flowing from a breach of the confidentiality agreement;
 - (d) the applicant has no obligations arising from the confidentiality agreement;
 - (e) the applicant cannot be in breach of the confidentiality agreement;
 - (f) the applicant cannot be held liable by the first and/or the second respondent for contractual damages flowing from a breach of the confidentiality agreement;
 - (g) the first and/or the second respondent has made out no cause of action based on breach of contract against the applicant in the plaint annexed to the founding affidavit as 'ARC2' ('the plaint');
 - (h) the relief sought in favour of the first and/or the second respondent against the applicant in prayers (a) to (g) of the plaint, if based on breach of contract, do not arise from the agreement and are not competent orders against the applicant;
 - (i) to the extent that the first respondent is able to prove a breach of the agreement and damages arising from that breach, its contractual remedies are against the third respondent only;

- (j) the first and the second respondents do not have a claim for contractual damages in respect of the surrendered Graphite Prospecting Licence number PL10332; and
 - (k) the first respondent does not have a claim for damages in respect of an asset previously owned by the second respondent.
- (2) The first and the second respondents, jointly and severally, the one paying the other to be absolved, shall pay the applicant's costs of this opposed application for declaratory relief, such costs to include the costs consequent upon the utilisation of Senior Counsel (where so employed), on scale 'C' of the tariff referred to in Uniform Rule of Court 67A(3), read with rule 69.

JUDGMENT

Adams J:

[1]. The applicant (ARC) and the third respondent (ARM) are South African companies, the former being an investment holding company focused on financial services, telecommunications and other diversified investments and the latter carrying on business internationally and in South Africa as a diversified mining and minerals public company. The fourth respondent (Dr Motsepe) has direct and indirect interests in the said companies and he sits on their boards of directors. The fifth respondent (ARCH) is a Guernsey-based entity acting as the General Partner for the ARCH Sustainable Resources Fund, which focuses on investing in mining and natural resource companies that support the green energy transition. The fund is part of ARCH Emerging Markets Partners, which was formed by JCH and Partners LLP and ARC.

[2]. The first respondent (Pula Group) is a company registered in the United States of America and the second respondent (Pula Graphite) is registered in Tanzania and both of these companies also carry on business in the mining

prospecting and mining industry. From time to time I shall refer to the first and the second respondents as the 'Pula respondents'.

[3]. These parties are involved and have since October 2023 been involved in protracted litigation in the United Republic of Tanzania (Tanzania). During October 2023, Pula Group and Pula Graphite – as first and second plaintiffs respectively – caused a summons, together with a 'plaint' (the Tanzanian High Court equivalent of South African High Court particulars of claim), to be issued out of the Commercial Division of the High Court of Tanzania, at Dar-es-Salaam, against ARM, Dr Motsepe, ARC and ARCH – respectively as the first, second, third and fourth defendants. Pula Group and Pula Graphite are claiming, in those proceedings, damages from the defendants on the basis of a confidential agreement concluded in writing at Sandton / Hurlingham, Gauteng, Republic of South Africa, between Pula Group and ARM on 25 October 2019.

[4]. ARC, as the third defendant, is defending those proceedings in the Tanzanian High Court and caused a written statement of defence (the equivalent of a South African plea) to be filed on 27 December 2023. That defended action against ARC is presently proceeding. ARM, as the first defendant, Dr Motsepe, as the second defendant, and ARCH, as the fourth defendant, are not defending those proceedings and Pula Group and Pula Graphite, as first and second plaintiffs respectively, proceeded to apply for default judgment against them. That application for default judgment is presently pending in the High Court of Tanzania.

[5]. The sixth respondent (Bowline) has produced valuation reports, which Pula Group and Pula Graphite have introduced, for example, in their application for default judgment in the Tanzanian proceedings. The Tanzanian plaintiffs rely on that report, amongst others, to quantify their damages claim. Bowline is not opposing this application.

[6]. In this opposed application, ARC applies for declaratory relief against Pula Group and Pula Graphite in relation to the proceedings in the Tanzania High

Court. In sum, ARC applies in terms of s 21(1)(c) of the Superior Courts Act 10 of 2013¹ for declaratory orders to the effect that the relief sought by Pula Group and Pula Graphite against it in the Tanzanian High Court is fundamentally flawed and based on an incorrect understanding by those plaintiffs of South African law, which is the law governing the confidentiality agreement. ARC furthermore contends that, on a proper application of the South African law, this Court can and should determine that Pula Group and Pula Graphite can have no contractual cause of action against ARC arising from a purported breach of the confidentiality agreement in circumstances where it is common cause that neither Pula Graphite nor ARC are parties to that agreement.

[7]. Pula Group and Pula Graphite oppose the application on the following bases: (a) That the Edictal Citation order granted by this court (per Nkoenyane AJ) on 7 August 2025, in terms of which service of the processes in this application was authorised and the court granted ARC leave to institute these motion proceedings by way of edictal citation, ought not to have been granted on an *ex parte* basis and therefore should be set aside; (b) A plea of *lis alibi pendens* is also raised albeit as a ground on which, according to Pula Group and Pula Graphite, the edictal citation order should not have been granted; (c) The Pula respondents also contend that the edictal citation order and the declaratory relief sought by ARC in this application, are disrespectful to the autonomy of the Tanzanian Court seized of the matter and of the sovereignty of nations – the principle of comity; (d) The defence of issue estoppel – based on the withdrawal of an associated matter, Pula Group and Pula Graphite take the point that the ground of jurisdiction relied on by ARC fails to establish jurisdiction; (e) This court

¹ Section 21(1)(c) provides as follows: -

- (1) A Division has jurisdiction over all persons residing or being in, and in relation to all causes arising and all offences triable within, its area of jurisdiction and all other matters of which it may according to law take cognisance, and has the power –
- (a);
- (b);
- (c) in its discretion, and at the instance of any interested person, to enquire into and determine any existing, future or contingent right or obligation, notwithstanding that such person cannot claim any relief consequential upon the determination.

has no jurisdiction to hear this matter; and (f) The applicants have not made out a case for the declaratory orders prayed for.

[8]. The issue to be decided by me is therefore simply whether there is merit in any of the legal defences raised on behalf of Pula Group and Pula Graphite. Furthermore, I am required to decide whether the applicants have made out a case for the declaratory relief sought in this application. Those issues are to be decided against the factual backdrop of the matter and the relevant facts, which are by and large common cause. This is so in view of the fact that Pula Group and Pula Graphite have elected not to deal in any way or to engage with the merits of the ARC's application, which, in my view, amounts to an acceptance of at least the factual assertions subscribed to by ARC.

[9]. The background may be summarised as follows. Pula Groups and Pula Graphite have instituted proceedings in the High Court of Tanzania (Commercial Division) against ARC, ARM, Dr Motsepe and ARCH, claiming declaratory relief and damages in the sum of US\$195 million. The plaint in those proceedings alleges that ARM breached a confidentiality agreement concluded with Pula Group on 25 October 2019, and that ARC – as an alleged 'affiliate' of ARM – is jointly and severally liable, together with all of the other defendants, for those breaches and the resultant damages.

[10]. Clause 13 of the confidentiality agreement provides that its terms shall be governed by the laws of the Republic of South Africa. It is common cause that Pula Graphite is not a party to that agreement, and that ARC is likewise not party to or a signatory of the said agreement. The fundamental question that arises – and which ARC asks this Court to determine – is whether, on a proper application of South African law, ARC can be held contractually liable to either Pula Group or Pula Graphite for breach of an agreement to which it was not a party.

[11]. That brings me to the grounds of opposition raised by Pula Group and Pula Graphite, which I now proceed to deal with individually.

The Setting aside of the Edictal Citation Order of 7 August 2025

[12]. The Pula respondents submit *in limine* that the Order of this Court (per Nkoenyane AJ) of 7 August 2025, which Court Order allowed the applicant to 'institute proceedings' against them by edictal citation, ought not to stand. It was obtained in bad faith by an abuse of the court process, so the contention goes, in that: (a) the application was based on a non-existent affidavit; (b) the said application has the hallmarks of a so-called 'Strategic Lawsuit Against Public Participation (SLAPP)' suit; (c) it has a disregard for the principles of finality in litigation (the defence of *lis alibi pendens*); and (d) it disregards the sovereignty of nations and the dignity of their Courts (the principle of comity).

[13]. Mr Morison SC, Counsel for the Pula respondents, argued that the provisions of Uniform Rule of Court 5, which regulates applications for the issue of Edictal Citation orders, were not complied with. It was also contended on behalf of the Pula respondents that the Court, in issuing the Edictal Citation, was required to exercise a judicial discretion, which it could not do because it was misled and they were not heard. ARC brought the application *ex parte*, so the argument on this point is concluded, because it wanted to avoid opposition to the said application. For these reasons alone, so it is contended, the Edictal Citation order should not have been granted and falls to be set aside.

[14]. I disagree. And I do so for the simple reason that the main purpose of Rule 5 is to govern and to regulate the institution of legal proceedings against a respondent or a defendant who is outside of the Republic of South Africa at the time when such proceedings are commenced. The said rule also regulates service of the initiating process in those proceedings and is aimed at ensuring that a person outside of the country is given effective notice of the institution of the proceedings. This purpose was clearly and indubitably achieved – Pula Group and Pula Graphite after all delivered notice of intention to oppose the application and opposed the said application to finality. There can be no better indication of effective service.

[15]. It may be apposite to cite in full Rule 5, which provides as follows: -

'5 Edictal citation

- (1) Save by leave of the court no process or document whereby proceedings are instituted shall be served outside the Republic.
- (2) Any person desiring to obtain such leave shall make application to the court setting forth concisely the nature and extent of his claim, the grounds upon which it is based and upon which the court has jurisdiction to entertain the claim and also the manner of service which the court is asked to authorize. If such manner be other than personal service, the application shall further set forth the last-known whereabouts of the person to be served and the inquiries made to ascertain his present whereabouts. Upon such application the court may make such order as to the manner of service as to it seems meet and shall further order the time within which notice of intention to defend is to be given or any other step that is to be taken by the person to be served. Where service by publication is ordered, it may be in a form as near as may be in accordance with Form 1 of the First Schedule, approved and signed by the registrar.
- (3) Any person desiring to obtain leave to effect service outside the Republic of any document other than one whereby proceedings are instituted, may either make application for such leave in terms of subrule (2) or request such leave at any hearing at which the court is dealing with the matter, in which latter event no papers need be filed in support of such request, and the court may act upon such information as may be given from the bar or given in such other manner as it may require, and may make such order as to it seems meet.'

[16]. It bears emphasising that the purpose of edictal citation is to provide the means for the institution and prosecution of actions against those in respect of whom the court has jurisdiction but on whom the process of the court cannot be served because they are outside the jurisdiction of the court. *In casu*, that purpose has, in my view, been achieved. I therefore conclude that there is no merit in the first ground of objection raised by the Pula respondents.

[17]. As for the contention that ARC did not in the Edictal Citation application make out a case that the jurisdiction of this Court is engaged, I am of the view that there is no merit in such contention. In its founding affidavit ARC alleges that

none of the defendants in the Tanzanian High Court action are registered or resident in Tanzania. Dr Motsepe, ARM and ARC, so it is averred, are all resident and / or registered in the Republic of South Africa. The agreement was concluded in and is subject to the laws of the Republic of South Africa. ARC therefore draws the conclusion in its founding affidavit that the courts of South Africa are therefore the most suitable, convenient and legally competent to determine the plaintiffs' claims. The foregoing is, in my view, more than adequate compliance with the requirements of rule 5 in relation to jurisdiction.

[18]. In any event, as was held by this court in *Kerbel v Kerbel*², where a litigant applies for leave to sue by way of edictal citation, once it appeared that the court has jurisdiction and the action was not vexatious and was properly brought, the applicant is entitled to the grant of such an order as a matter of course: it is not for the court at such stage *mero motu* to take the equivalent of an exception or defence for the prospective respondent.

[19]. I therefore conclude that the Pula respondents are not entitled to an order setting aside the Edictal Citation order granted by this court on 7 August 2025.

[20]. It is for the foregoing reasons that I also do not accept the Pula respondents' contention that they have the right to have reconsidered the granting of the Edictal Citation order. No purpose would be served by such a reconsideration. The simple point is that, in my view, the court exercised its discretion judiciously when it granted the said order.

[21]. As for the other grounds on which the Pula respondents claim a setting aside of the Edictal Citation Order, such as that the application has the hallmarks of a SLAPP suit, the defence of *lis alibi pendens*, the principle of comity and the contention that this court has no jurisdiction to hear this matter, these are all

² *Kerbel v Kerbel* 1987 (1) SA 562 (W).

defences also raised in this the main application for declaratory relief and I deal with those issues in the paragraphs which follow.

Lis Alibi Pendens

[22]. For their plea of *lis alibi pendens*, the Pula respondents rely on the long-running litigation in the High Court of Tanzania which commenced on 9 October 2023, when they instituted proceedings by way of the ‘plaint’, against ARC, ARM, Dr Motsepe and ARCH.

[23]. As I have already indicated, the action in the Tanzania High Court is based on the confidentiality agreement, which allowed for the exchange of confidential information between Pula Group and ARM. The agreement imposed on both parties the obligation to hold in confidence the exchanged information and to treat it as secret for a period of twenty-four months. Each party agreed not to use the confidential information for any competitive or commercial purpose or in any manner detrimental to the interests of the other. Any failure to comply with that undertaking was actionable by the innocent party as a breach of the confidentiality agreement.

[24]. Importantly, clause 13 of the confidentiality agreement provides as follows: -

‘13 Governing Law

The terms of this agreement shall be governed by the laws of the Republic of South Africa and the grantor shall be entitled to all rights and remedies available for any breach by the recipient under this agreement.’

[25]. It is common cause that the parties to the confidentiality agreement are Pula Group and ARM. There were no other signatories.

[26]. In sum, the cause of action advanced by the Pula respondents is that, in breach of the undertaking embodied in the confidentiality agreement, ARM unlawfully competed with them by indirectly investing in a competitive entity in Tanzania. The plaint asserts that the outcome of those events was that ‘the

plaintiffs suffered and continue to suffer, considerable financial losses, inconveniences and expenses, and are entitled to compensation for the breaches, including consequential losses suffered as a result’.

[27]. Arising from those allegations, the Pula respondents claim that the defendants in the plaint (ARC, ARM, Dr Motsepe and ARCH) are jointly and severally liable to them for the claimed declaratory relief and damages in the sum of US\$195 million. One of the premises for the joint and several liability claimed (as pleaded in the plaint) arises from the definition of ‘Affiliate’ in the definition section of the confidentiality agreement. ARC’s case is that none of the defendants in the Tanzania action is ‘affiliates’ as defined in the agreement.

[28]. The Pula respondents furthermore contend in the Tanzania High Court proceedings that ARM and its affiliates, jointly and severally, acquired confidential information from the Pula Group which enabled them, by means of an investment in an Australian company known as Evolution Holdings, to become ‘part and parcel of the Chilalo Project, which is a competitor of the plaintiffs’. The Chilalo Project is said to be one which directly competes with Pula Graphite in Tanzania.

[29]. It is the acquisition of 40 million shares in Evolution which the Pula respondents say constitute the breach of the confidentiality agreement and which placed them at a severe competitive disadvantage and deprived them of the opportunity to increase investor value in the Pula project.

[30]. In sum, the cause of action of the Pula respondents in the Tanzania High Court action, as set out in their plaint, arise out of the confidentiality agreement with disclosure of technical information, data and documents of a commercial nature and value in respect of graphite materials explored and intended to be mined in Tanzania where both the Chilalo Project and Pula’s Project are situated.

[31]. In other words, the cause of action of the Pula respondents in the Tanzania High Court is squarely based on a breach of the confidentiality agreement. Contra that with ARC’s cause of action in this opposed application which, in sum, is for

declaratory relief based on a contention that it (ARC) is not party to and therefore not bound by the terms and conditions of the confidentiality agreement. The two causes of action are therefore completely distinct and at variance.

[32]. A plea of *lis alibi pendens* is based on the proposition that the dispute (*lis*) between the parties is being litigated elsewhere and therefore it is inappropriate for it to be litigated in the court in which the plea is raised. The policy underpinning it is that there should be a limit to the extent to which the same issue is litigated between the same parties and that it is desirable that there be finality in litigation.

[33]. It is trite that here are three requirements for a successful reliance on a plea of *lis pendens*. They are: (a) that the litigation is between the same parties; (b) that the cause of action is the same; and (c) that the same relief is sought in both. See *Nestlé (South Africa) (Pty) Ltd v Mars Incorporated*³, in which the SCA (per Nugent JA) held as follows at par [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.'

[34]. In this matter, as I have already indicated, it cannot be said with any conviction that the cause of action in the Tanzania High Court (based exclusively on a breach of the confidentiality agreement) is the same as the one *in casu* (based on the contention that the confidentiality agreement is not binding on ARC). Far from it – the one cause of action is the antithesis of the other. Moreover, the relief sought in the two cases is not the same. In the one, the Pula respondents claim contractual damages, whereas in this matter declaratory orders are sought.

[35]. Accordingly, the legal objection by the Pula respondents based on *lis alibi pendens* falls to be rejected.

³ *Nestlé (South Africa) (Pty) Ltd v Mars Incorporated* 2001 (4) SA 542 (SCA).

[36]. Even if I am wrong in my assessment of the applicability of the legal requirements for the invocation of *lis alibi pendens*, the point *in limine* can and should still fail. A court retains a discretion not to uphold a plea of *lis pendens* even if the requirements are satisfied. I am of the view that this case is one such matter in which I should exercise my discretion in favour of not upholding the plea. I do so for the simple reason that, in my judgment, this court, as the court in the best position to apply South African law, which is the law governing the terms and conditions of the confidentiality agreement, is best suited to adjudicate the dispute between the parties. This court should therefore take cognisance of ARC's suit as it has jurisdiction over it.

[37]. The *lis alibi pendens* point *in limine* is dismissed.

[38]. Closely related to the *lis pendens* legal point raised on behalf of the Pula respondents is the contention by them that ARC's application disregards the sovereignty of nations and the dignity of their Courts – the doctrine of comity and the principle that 'one sovereign state should not attempt to regulate the proceedings before the court of a different sovereign state'.

[39]. There is no merit in that contention. In concluding the confidentiality agreement, the parties agreed that the terms of the said agreement would be governed by South African law. This, I interpret, as acquiescence by the parties that a South African court can and should adjudicate any and all disputes between them arising from the said agreement.

[40]. A Court ought not, in my view, to feel diffident about granting declaratory orders in relation to disputes arising from contracts in terms of which the parties subjected themselves to the laws of that Court. Without such an order, an applicant may be deprived of his/her rights to have adjudicated disputes in the appropriate forum.

[41]. When declaratory relief is granted as per the request of ARC in this application, this Court does not direct the foreign court to do something or restrain

from doing anything which it has no power to do. Rather it pronounces on the law, which the parties have elected as the law governing their agreement. In acting in this way, it does not presume to tell a foreign court what it must or must not do.

[42]. This legal point, therefore, is also dismissed, as is the point of issue estoppel for the foregoing reasons.

This Court's alleged Lack of Jurisdiction

[43]. I now turn my attention to an issue central to the dispute between the parties, that being the issue relating to the jurisdiction of this Court to hear ARC's application for declaratory relief against the Pula respondents, who contend that this Court has no jurisdiction in the main application.

[44]. ARC invokes the jurisdiction of this Court on the basis that a South African court should pronounce on South African law. Moreover, so the contention on behalf ARC goes, given the extensive connecting factors to which reference has been made in its affidavits in this application, the main application has 'the most real and substantial connection' with this Court rather than a court in Tanzania.

[45]. Those relevant connecting factors in this application, according to ARC, are the following: - (a) the confidentiality agreement was concluded in Johannesburg; (b) the terms, application and consequences of the said agreement are to be determined in accordance with the South African law; (c) other than Pula Group, Pula Graphite and ARCH, the remaining respondents reside or are within this Court's area of jurisdiction as contemplated in section 21(1) of the Superior Courts Act; (d) the Tanzanian Court has no jurisdiction over ARM, Dr Motsepe, ARCH and Bowline; (e) the breach of the terms of the confidentiality agreement on which the Pula respondents rely for their cause of action – the allegedly improper use of confidential information – will have taken place in South Africa; (f) to the extent that Pula respondents obtain any judgment against ARC or any of ARM, Dr Motsepe, ARCH, that judgment (even though granted in a Tanzanian Court) will require to be executed within this Court's area of jurisdiction; (g) the South African parties to the litigation have a material interest

in its outcome; and (h) any judgment delivered by this Court will have a direct and material outcome on the Tanzanian proceedings.

[46]. In contending that this Court should take cognisance of their suit *in casu*, ARC places reliance on *Bid Industrial Holdings (Pty) Ltd v Strang and Another (Minister of Justice and Constitutional Development, Third Party)*⁴, which concerned the constitutionality of the common-law application for arrest to confirm or found jurisdiction. The Supreme Court of Appeal (SCA) ultimately found that the common-law jurisdictional arrest was unconstitutional.

[47]. The SCA then went on to develop the common law by adopting, where attachment of assets to find or confirm jurisdiction was not possible, of the practice according to which a South African High Court would have jurisdiction if the summons were served on the defendant while in South Africa and there was sufficient connection between the suit and the area of jurisdiction of the court concerned so that disposal of the case by that court was appropriate and convenient. The SCA held further that, in the absence of attachment, the responsibility for achieving effectiveness lay with the parties, and more especially the plaintiff or the applicant.

[48]. *Bid Industrial Holdings* was followed by *Financial Sector Conduct Authority v Financial Services Tribunal and Others*⁵, in which the principles relating to jurisdiction and the related law, as developed by the SCA, were applied, whilst the Court (per Janse van Nieuwenhuizen J) at the same time held that it is in the interest of justice that the law should be developed further in order to, in effect, do away with the requirement that the summons must be served on the defendant when he/she is present in South Africa. The Court then went on to further develop the common law to that effect. In the result, the Court found jurisdiction over a peregrinus on the basis that service of the process was effected by any means (including electronic means), and the connection between the conduct of the

⁴ *Bid Industrial Holdings (Pty) Ltd v Strang and Another (Minister of Justice and Constitutional Development, Third Party)* 2008 (3) SA 355 (SCA).

⁵ *Financial Sector Conduct Authority v Financial Services Tribunal and Others* 2025 (6) Sa 591 (GP).

peregrinus and South Africa was sufficiently close to make it appropriate and convenient for jurisdiction.

[49]. In that regard, the Court commented as follows: -

[55] *The FSCA submits that service of process on a peregrinus while in South Africa makes little, if any, practical sense.* It does little more than hamper and frustrate the effective regulation of financial activity that takes place extra-territorially and digitally.

[56] Personal service has been overtaken by the fast-developing digital world. In introducing rule 4A in the Uniform Rules of Court, the legislature acknowledged the technical advances that have occurred in the digital world, and the rule now allows for the service of all documents, subsequent to the service of a summons or application, by facsimile or electronic mail.

[57] Although rule 4A pertains to procedure and not substantive law, the necessity to develop practices and procedures to meet modern exigencies clearly exists. Modern society lives in a global world where the necessity to be present in person has diminished over time. Courts, for example, hear matters virtually and an employee can reside anywhere in the world if the nature of his/her employment does not demand physical presence.’ (Emphasis added).

[50]. The foregoing approach was also adopted in *Swanepoel v Depuy International Limited*⁶, in which the Western Cape High Court (per Wille J) held that our law has developed to the point where a court must examine whether the forum sought to be employed has a ‘real and substantial’ connection with the action regarding the relevant connecting factors that tie the action to the forum in question. Towards the end of the judgment the Court held as follows: -

[69] Even if I am wrong in my interpretation and analysis of our current jurisprudence on this issue, the peculiar facts of this case dictate that the common law regarding jurisdiction needs to be developed. We live in a technology-driven society, and more global international businesses with no boundaries are being developed.

[70] *Thus, as a matter of pure logic, the common law should be adopted and adapted to modern customs and practices of international trade. In developing the common law, considerations of appropriateness and convenience may sufficiently dilute and erode the*

⁶ *Swanepoel v Depuy International Limited* (20758/2013) [2025] ZAWCHC 9 (21 January 2025).

doctrine of effectiveness as pre-eminent in questions relating to jurisdiction over foreign defendants.

[71] The common law should be developed insofar as monetary claims against the defendant in this case are concerned. The peculiar facts of this case dictate that the common law regarding jurisdiction falls to be expanded and developed to benefit this plaintiff. Thus, the special plea on jurisdiction should fail.' (Emphasis added).

[51]. This means that, as things stand at present, this Court could and should accept jurisdiction over and take cognisance of ARC's suit if there is a sufficiently close connection between the suit and the geographical area of jurisdiction of this Court. About the close connection between the suit and this Court's geographical area of jurisdiction there can, in my view, be no doubt, if regard is had to the consideration referenced in para 45 *supra*. Importantly, according to the confidential agreement, on which the Pula respondents base their claim against ARC, the terms of the agreement are to be governed by South African law. Additionally, any order obtained against ARC will ultimately have to be enforced within the jurisdiction of this Court.

[52]. I accordingly agree with the contentions on behalf of ARC. There is no merit in the Pula respondents' legal objection to the jurisdiction of this Court. Appropriateness and convenience dictate that this Court should hold that its jurisdiction is properly engaged.

[53]. The lack of jurisdiction point *in limine* is therefore dismissed.

The Applicant's Entitlement to Declaratory Orders

[54]. The next question relates to ARC's entitlement and its *locus standi* to seek a declarator in terms of s 21(1)(c) of the Superior Court Act⁷.

[55]. In that regard, it was held by the SCA in *Cordiant Trading CC v Daimler Chrysler Financial Services (Pty) Ltd*⁸, which dealt with the interpretation of the

⁷ Footnote 1 above.

⁸ *Cordiant Trading CC v Daimler Chrysler Financial Services (Pty) Ltd* 2005 (6) SA 205 (SCA).

identically worded s 19(1)(a)(iii) of the old Supreme Court Act 59 of 1959, that the existence of a dispute between the parties is not a prerequisite for the exercise of the power conferred upon the High Court by the subsection. There must, however, so the SCA held be at least interested parties on whom the declaratory order would be binding. The applicant for declaratory relief must satisfy the Court that he/she is a person interested in an 'existing, future or contingent right or obligation' and nothing more is required. See *Shoba v Officer Commanding, Temporary Police Camp, Wagendrif Dam, and Another; Maphanga v Officer Commanding, South African Police Murder and Robbery Unit, Pietermaritzburg, and Others*⁹.

[56]. In *Cordiant Trading*, referring with approval to the *ratio decidendi* in *Durban City Council v Association of Building Societies*¹⁰, the SCA reaffirmed the principle that the question whether or not a declaratory order should be made is to be examined in two stages. First the Court must be satisfied that the applicant is a person interested in an 'existing, future or contingent right or obligation', and then, if satisfied on that point, the Court must decide whether the case is a proper one for the exercise of the discretion conferred on it.

[57]. In applying the foregoing principle *in casu*, regard should be had to the facts in the matter, which, as I have already indicated are by and large common cause or not seriously challenged on behalf of the Pula respondents.

[58]. Importantly, the Pula respondents (plaintiffs in the Tanzanian High Court) have not made out a valid cause of action against ARC – nor, for that matter, against Dr Motsepe or ARCH, all of whom are not party to the confidential agreement. On a proper application of the South African law, there cannot possibly be a dispute that the declaratory orders sought in the notice of motion are factually justified. The simple point is that the Pula respondents' cause of

⁹ *Shoba v Officer Commanding, Temporary Police Camp, Wagendrif Dam, and Another; Maphanga v Officer Commanding, South African Police Murder and Robbery Unit, Pietermaritzburg, and Others* 1995 (4) SA 1 (A) at 14F.

¹⁰ *Durban City Council v Association of Building Societies* 1942 AD 27.

action, which is based on a breach of the confidentiality agreement, is flawed and completely unsustainable.

[59]. There can, in my view, be little doubt about the fact ARC has an interest in an 'existing, future or contingent right or obligation', in that it is a defendant in the Tanzanian proceedings. It has a direct and material interest in the proper determination of those proceedings in accordance with the South African law – as required by the confidentiality agreement. In the absence of the required declaratory relief, ARC will, potentially, be significantly prejudiced in the adjudication of the Tanzania proceedings.

[60]. I am therefore satisfied that ARC has demonstrated a tangible and justifiable advantage in the relief sought, which has a value beyond a mere academic interest. The simple point is this. Without the declaratory relief sought by ARC in this application, it runs the real risk of having granted against it an adverse and prejudicial order, which does not accord with the South African laws applicable to the confidentiality agreement. In that regard, ARC has referred me to the witness statements of the Pula respondents in the Tanzanian proceedings, which, in my view, reveal the shortcomings in the case that the Pula respondents intend to present to the Tanzanian Court. As submitted by ARC, that case is so inimical to the South African law that fairness and justice dictate that this Court exercise its discretion to grant the appropriate declaratory orders.

[61]. I do not accept the submission by the Pula respondents that this matter is of mere academic interest to ARC. The grant of the declaratory orders sought by ARC will be material in the context of the Tanzanian proceedings and will provide ARC with a tangible and justifiable advantage therein. ARC has a direct right in the subject-matter of that litigation. The Pula respondents concede in their plaint that ARC is entitled to have the causes of action advanced against it in Tanzania determined in accordance with the South African law.

[62]. I am of the view that I should exercise my discretion in favour of ARC, which has made out a proper case for the relief that it seeks in terms of section

21(1)(c) of the Superior Courts Act. The case is of significant importance to it (and to the third, fourth and fifth respondents). The declaratory order sought will finally determine a wide range of the legal disputes which will require resolution in the Tanzanian Court. The advantage of this Court granting the declaratory relief is that those matters will be determined by a South African Court rather than a foreign Court which will, by the very nature of things, be required to form a view based on potentially differing legal opinions of what the South African law is and how it is to be applied.

[63]. Moreover, Pula Group and Pula Graphite have not introduced any legitimate basis for this Court refusing to exercise its discretion in ARC's favour.

[64]. For all of these reasons, ARC should be granted the declaratory relief, with costs to follow the suit.

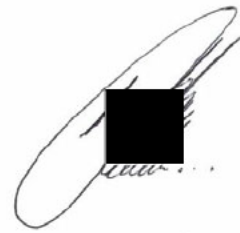
Order

[65]. In the circumstances, the following order is made:

(1) It be and is hereby declared that: -

- (a) the confidentiality agreement annexed to 'the plaint' marked 'PULA-2', which is annexed to the founding affidavit marked 'ARC2' ('the confidentiality agreement') was concluded between the first respondent and the third respondent;
- (b) the second respondent has no contractual rights derived from the confidentiality agreement;
- (c) the second respondent cannot suffer contractual damages flowing from a breach of the confidentiality agreement;
- (d) the applicant has no obligations arising from the confidentiality agreement;
- (e) the applicant cannot be in breach of the confidentiality agreement;

- (f) the applicant cannot be held liable by the first and/or the second respondent for contractual damages flowing from a breach of the confidentiality agreement;
 - (g) the first and/or the second respondent has made out no cause of action based on breach of contract against the applicant in the plaint annexed to the founding affidavit as 'ARC2' ('the plaint');
 - (h) the relief sought in favour of the first and/or the second respondent against the applicant in prayers (a) to (g) of the plaint, if based on breach of contract, do not arise from the agreement and are not competent orders against the applicant;
 - (i) to the extent that the first respondent is able to prove a breach of the agreement and damages arising from that breach, its contractual remedies are against the third respondent only;
 - (j) the first and the second respondents do not have a claim for contractual damages in respect of the surrendered Graphite Prospecting Licence number PL10332; and
 - (k) the first respondent does not have a claim for damages in respect of an asset previously owned by the second respondent.
- (2) The first and the second respondents, jointly and severally, the one paying the other to be absolved, shall pay the applicant's costs of this opposed application for declaratory relief, such costs to include the costs consequent upon the utilisation of Senior Counsel (where so employed), on scale 'C' of the tariff referred to in Uniform Rule of Court 67A(3), read with rule 69.



L R ADAMS
Judge of the High Court
Gauteng Division, Johannesburg

HEARD ON:	1 April 2026
JUDGMENT DATE:	14 April 2026 – Judgment handed down electronically
FOR THE APPLICANT:	A R G Mundell SC
INSTRUCTED BY:	Webber Wentzel, Sandton
FOR THE FIRST and SECOND RESPONDENTS:	L J Morrison SC
INSTRUCTED BY:	Nicqui Galaktiou Incorporated, Illovo, Johannesburg
FOR THE SECOND to SIXTH RESPONDENTS:	No appearance
INSTRUCTED BY:	No appearance