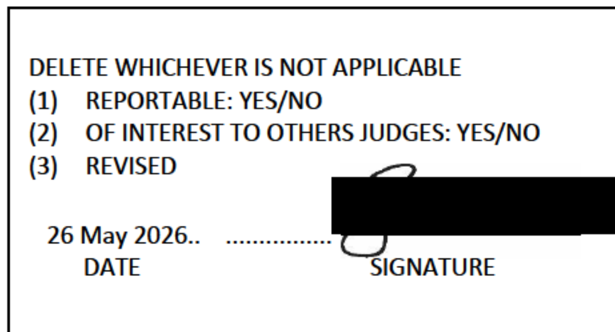
IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

Case No: 2025-237917
26 May 2026



DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: YES/NO
(2) OF INTEREST TO OTHERS JUDGES: YES/NO
(3) REVISED

26 May 2026.. ....
DATE SIGNATURE

In the matter between:

EPHRAIM SEPHEKA	**FIRST APPLICANT**
KHULEKILE SEPHEKA	**SECOND APPLICANT**

and

THE PRETORIA NORTH REGIONAL COURT MAGISTRATE (ELIZABETH DENGE)	**FIRST RESPONDENT**
INEZ FERREIRA	**SECOND RESPONDENT**
IF PROPERTY SOLUTIONS (PTY) LTD	**THIRD RESPONDENT**

This order is made an Order of Court by the Judge whose name is reflected herein, duly stamped by the Registrar of the Court and is submitted electronically to the Parties/their legal representatives by e-mail. This Order is further uploaded to the electronic file of this matter on Case Lines by the Judge or his/her secretary. The date of this Order is deemed to be 26 May 2026.

JUDGMENT

DU PLESSIS, AJ

INTRODUCTION

1.

1.1. This is an application brought in terms of section 22 of the Superior Courts Act 10 of 2013, read with section 6(2)(a)(iii) of the Promotion of Administrative Justice Act 3 of 2000 ("PAJA"), to review and set aside the costs order granted by the First Respondent, sitting as the Regional Magistrate for the Regional Division of Gauteng, held at Pretoria North, on 7 November 2025 in case number GP/PTANORTH/RC/910/2025.

1.2. The Applicants pertinently do not seek to review the substantive outcome of the proceedings in the court a quo, namely the discharge of the rule nisi on the basis that the Regional Court lacked jurisdiction in terms of section 46(2)(c) of the Magistrates' Courts Act 32 of 1944. They accept that finding. What they place before this Court is a narrow but pointed complaint: that the costs order made against them, jointly and severally, is the product of bias and gross irregularity, and that the First Respondent erred in refusing to entertain their post-judgment submissions on costs.

1.3. The First Respondent has filed a Notice to Abide. The Second and Third Respondents oppose the application and seek its dismissal with costs.

1.4. For the reasons that follow, the application succeeds in part.

FACTUAL BACKGROUND AND THE PROCEEDINGS *A QUO*

2.

2.1. The background, insofar as it is necessary for the disposal of the issues now before me, is largely common cause.

2.2. On 4 August 2025 the Second Applicant concluded an agreement of sale in respect of a subdivided portion of the immovable property known as Erf 703 Lady Selborne Extension 1, Suiderberg, Gauteng. The Third Respondent had been mandated to attend to the subdivision of that property. A dispute arose between the Applicants and the Third Respondent concerning the timing of the final payment of professional fees. The Third Respondent refused to lodge the subdivision application with the City of Tshwane until full payment had been made; the Applicants contended that, on a proper

construction of the parties' arrangement, the balance was payable only upon successful completion of the subdivision and from the proceeds of the sale.

2.3. On 13 October 2025, on an ex parte and urgent basis, the Applicants obtained from the First Respondent a rule nisi in terms of which, inter alia, the Third Respondent was directed to submit the subdivision application to the City of Tshwane immediately, and which order operated with immediate effect pending the return day of 28 November 2025.

2.4. The Third Respondent anticipated the return day. The anticipated proceedings served before the First Respondent on 31 October 2025. Judgment was reserved and delivered electronically on 7 November 2025.

2.5. In her judgment, the First Respondent dealt seriatim with the points in limine raised on either side. She dismissed the Applicants' sole point in limine (directed at the propriety of the Third Respondent's anticipation of the rule) with costs. She thereafter dismissed each of the four points in limine raised by the Third Respondent, doing so without making any costs order in respect of any of them.

2.6. Having so dealt with the points in limine, the First Respondent mero motu raised the question of the Regional Court's jurisdiction. She concluded that, because what the Applicants in truth sought was specific performance unaccompanied by an alternative claim for damages, the Court was deprived of jurisdiction by section 46(2)(c) of the Magistrates' Courts Act. On that basis she discharged the rule nisi and ordered the Applicants, jointly and severally, to pay the costs of the application.

2.7. By e-mail dated 10 November 2025, the Second Applicant addressed written submissions to the First Respondent concerning the costs order, asking her to reconsider it. The Third Respondent's attorneys, by letter dated 12 November 2025, responded objecting to the Applicants' communication on the basis that the First Respondent had become functus officio. The First Respondent did not entertain the Applicants' submissions; the present application followed.

THE RELIEF SOUGHT

3.

The Applicants seek an order reviewing and setting aside the costs order of 7 November 2025 and substituting it with an order that each party bears its own

costs. They seek further that the Second and Third Respondents pay the costs of this application.

THE POINTS IN LIMINE RAISED BY THE SECOND AND THIRD RESPONDENTS

4.

Misjoinder and non-joinder

4.1. The Second and Third Respondents contend that the application is fatally defective by reason of (a) the non-joinder of Labuschagne Attorneys, Real Estate Services and Mr Tebogo Solomon Motsiri, who were respondents in the court *a quo*, and (b) the misjoinder of the Second Respondent, Ms Ferreira, in her personal capacity, in circumstances where the litigation *a quo* was conducted against the Third Respondent as a juristic person.

4.2. The settled test for joinder is whether the party concerned has a direct and substantial interest in the subject-matter of the litigation, in the sense of a legal interest in the right which is the subject of the litigation, which may be prejudicially affected by the judgment of the court (Amalgamated Engineering Union v Minister of Labour 1949 (3) SA 637 (A) at 657-9).

4.3. The subject-matter of the present review is, on a proper reading of the founding papers, confined to the costs order made in favour of the Third Respondent and against the Applicants. The other respondents in the court a quo did not appear before the First Respondent on the anticipated return day, took no part in the argument, and were not the beneficiaries of any costs order. Whatever interest they may have had in the underlying contractual dispute, they have no direct and substantial interest in the question whether the costs order in favour of the Third Respondent should be reviewed and set aside. Their non-joinder is therefore not fatal.

4.4. As for the citation of Ms Ferreira: she is the sole director and deponent on behalf of the Third Respondent. She is cited in this Court in that representative capacity. Whilst the better practice would have been to cite the Third Respondent alone, and to identify Ms Ferreira simply as the deponent, the inclusion of her name in the heading does not, on the papers as they stand, expose her to personal liability and does not vitiate the proceedings. Any prejudice she may apprehend can be addressed by an appropriate ancillary order.

4.5. The point in *limine* of misjoinder and non-joinder is accordingly

dismissed.

Appeal disguised as review

4.6. The Second and Third Respondents contend, with reference to Snyders and Others v De Jager 2016 (5) SA 218 (SCA) and the line of authority deriving from Johannesburg Consolidated Investment Co v Johannesburg Town Council 1903 TS 111, that the application is in truth an appeal on the question of costs, masquerading as a review.

4.7. The distinction between appeal and review is well known. An appeal is directed at the correctness of the decision; a review is directed at the manner in which the decision was arrived at, including the question whether the decision-maker was actuated by bias or committed a gross irregularity. Costs orders, being discretionary, will not lightly be interfered with on either appeal or review, and a court of review will not substitute its own discretion for that of the magistrate merely because it might have decided the matter differently.

4.8. Section 22(1) of the Superior Courts Act, however, expressly provides that the proceedings of any Magistrates' Court may be brought under review on the grounds, amongst others, of bias on the part of the presiding officer (s 22(1)(a)), and gross irregularity in the proceedings (s 22(1)(c)). Where, as here, an applicant alleges that the costs order is itself the product of bias or gross irregularity, the complaint sounds in review and not in appeal. The fact that the relief sought is the setting aside of a costs order does not, without more, convert the proceeding into an appeal.

4.9. Whether the Applicants have made out the grounds of review they assert is a different question, to which I turn presently. The point in limine that the application is an appeal disguised as a review is, however, not well founded and falls to be dismissed.

Failure to file the Rule 53 record

4.10. In their heads of argument the Second and Third Respondents place reliance on the absence of a Rule 53 record, citing Democratic Alliance v Acting National Director of Public Prosecutions 2012 (3) SA 486 (SCA). The complaint was not pertinently raised as a discrete point in limine in the answering affidavit and was advanced only in argument. In any event, the entirety of what occurred before the First Respondent is reflected in the reasoned written judgment of 7 November 2025, which forms an annexure to the founding affidavit, together with the correspondence subsequent to that judgment. The First Respondent has elected to abide and has not

been called upon to supplement the record. The Applicants' grounds of review are confined to what appears ex facie the judgment and the post-judgment correspondence. In those narrow circumstances, the absence of a formal Rule 53 record is not fatal.

THE MERITS OF THE REVIEW

5.

The first ground: differential treatment in respect of costs on the points in limine

5.1. The Applicants' principal complaint is this: their single point in limine was dismissed with costs, whereas each of the Third Respondent's four points in limine was dismissed without any costs order. They contend that, no rational basis having been provided for the differential treatment, the only inference reasonably available is that the First Respondent was biased against them, alternatively that she failed to exercise her discretion judicially.

5.2. The award of costs is pre-eminently a matter for the discretion of the presiding officer, to be exercised judicially upon a consideration of all the relevant facts and circumstances. The settled grounds upon which a court of review will interfere with a discretionary costs order are those identified in Naylor v Jansen 2007 (1) SA 16 (SCA) para 10: a failure to exercise the discretion judicially, the application of a wrong principle, the taking into account of an irrelevant consideration, or the failure to take into account a relevant one.

5.3. The test for a reasonable apprehension of bias, as set out in President of the Republic of South Africa v South African Rugby Football Union 1999 (4) SA 147 (CC) paras 38-48, requires objective facts which would give rise, in the mind of a reasonable, objective and informed person, to a reasonable apprehension that the presiding officer would not bring an impartial mind to bear on the adjudication of the case. The threshold is a high one. Mere displeasure with an outcome, or with adverse findings, does not suffice.

5.4. I have read and re-read the judgment of the First Respondent. In paragraph [12] of that judgment, dealing with the Applicants' point in limine, the First Respondent expressly explained her decision on costs in the following terms: punitive costs were not warranted, but "*the relevant parties' arguments hinged around the interpretation of the Rules*". The clear inference is that she considered the point misconceived to a degree warranting an adverse costs order, albeit not a punitive one. She thus furnished a reason, even if a brief one.

5.5. When one turns to her treatment of the Third Respondent's four points in *limine*, no equivalent reasoning is to be found. Each point was dismissed on its merits, but no consideration is recorded of why those dismissals should not also attract a costs order. The judgment is silent. The judgment does not, for example, suggest that the Third Respondent's points in *limine* were better grounded than the Applicants' point, or that there was some other feature distinguishing the two sets of points for purposes of costs.

5.6. Differential treatment, without more, does not establish bias. It is open to a presiding officer to award costs against a party who has unsuccessfully taken a procedural point, and to refrain from doing so in respect of another party whose own unsuccessful points were nevertheless thought to be reasonably advanced. What the law requires, however, is that the discretion be exercised judicially, and that, where reasons are called for, they be furnished. That is particularly so where the differential treatment is on its face stark: one party penalised in costs for a single dismissed point, the other party not so penalised for four dismissed points.

5.7. Counsel for the Second and Third Respondents met this complaint head-on in argument. He submitted that, the rule nisi having been discharged with costs against the Applicants, it is of no moment that the First Respondent dismissed the Third Respondent’s four points in limine without dealing separately with the costs of each: the Applicants were in any event liable for the costs of the application as the unsuccessful party, and the practical effect is therefore the same. There is a measure of force in the submission, but it does not, in my view, answer the Applicants’ true complaint. The Applicants’ grievance is not that the Third Respondent ought to have been ordered to pay the costs of its own dismissed points. It is that the First Respondent singled out their single dismissed point for a discrete adverse costs order – an order additional to, and independent of, the costs that followed the result – while passing over four materially indistinguishable dismissed points of the Third Respondent in silence. The vice complained of lies not in the ultimate incidence of the costs of the application, but in the unequal manner in which the discretion was exercised on the points in limine. That a litigant is liable for the costs of an application it has lost does not relieve the presiding officer of the obligation to exercise, judicially and even-handedly, any separate discretion she elects to exercise as to the costs of interlocutory points along the way. The submission accordingly goes to the consequences of the irregularity rather than to its existence, and, for the reasons set out below, it is the cumulative effect of that irregularity together with the further

considerations canvassed hereunder that proves decisive.

5.8. Whether what is here demonstrated is bias, in the strict sense, or rather a failure to apply the mind to the question of costs on the Third Respondent's points in limine, is in my view less important than the underlying conclusion. The judgment, read as a whole, does not disclose the exercise of a judicial discretion in respect of the costs treatment of the Third Respondent's points in limine. The First Respondent has, by her election to abide, declined the opportunity to explain. Section 5(3) of PAJA permits this Court, where reasons are not forthcoming, to draw the inference that the decision was taken without good reason.

5.9. I am satisfied that the Applicants have, on this limited ground, made out a case for review. The discretion was not, in respect of the costs treatment of the Third Respondent's points in *limine*, judicially exercised. To that extent the proceedings are tainted by gross irregularity in the sense contemplated by section 22(1)(c) of the Superior Courts Act.

<u>The second ground: the *functus officio* question and the post-judgment correspondence</u>

5.10. The Applicants' second ground of review is that the First Respondent, having delivered her judgment on 7 November 2025, declined to entertain their written submissions of 10 November 2025 on the costs order, yet received and (so the Applicants contend) acted upon the contrary submissions made by the Third Respondent's attorneys on 12 November 2025. The Applicants say that this constitutes a gross irregularity, the more so because their submissions were said to fall within a recognised exception to the *functus officio* rule.

5.11. It is trite that a judicial officer is, save in narrowly defined circumstances, *functus officio* upon the handing down of a final order. The exceptions identified in F<u>irestone South Africa (Pty) Ltd v Genticuro AG</u> 1977 (4) SA 298 (A) at 306F-307A are well known: the correction of clerical or arithmetical errors, the clarification of patent ambiguities, and the supplementation of accessory or consequential matters inadvertently omitted. To these may be added the limited power to vary an order as to costs in the circumstances contemplated by the rules and recognised in the case law (see also <u>West Rand Estates Ltd v New Zealand Insurance Co Ltd</u> 1926 AD 173 at 184).

5.12. The Applicants' written submissions of 10 November 2025 did not, on any reasonable reading, fall within any of those exceptions. They

constituted, in substance, an attempt to persuade the First Respondent to reconsider the merits of her costs order and to substitute a different one. The proper remedy for such a complaint lies in appeal or review, not in informal correspondence.

5.13. To that extent, the First Respondent was entitled, indeed obliged, to decline to entertain those submissions. Her conduct in that regard was not irregular.

5.14. The Applicants' related complaint, however, that she nevertheless received and was influenced by the Third Respondent's attorneys' letter of 12 November 2025, requires separate consideration. There is nothing in the record before me to suggest that the First Respondent acted upon that letter, or that it had any bearing upon her judgment, which had already been delivered. The letter was, on its face, defensive and reactive: it was directed at the Applicants' correspondence and asked the court to note its contents and to decline to entertain post-judgment submissions. No further order was made by the First Respondent. The functus officio principle was, on the record, observed.

5.15. I am accordingly not persuaded that the handling of the post-judgment correspondence, taken in isolation, constitutes a reviewable irregularity.

The third ground: the "*successful party*" complaint and the court correcting itself

5.16. The Applicants further submit, with some force, that the Third Respondent cannot fairly be described as the "successful party" in the proceedings before the First Respondent. Each of the Third Respondent's points in limine was dismissed. The discharge of the rule nisi was occasioned not by any argument advanced on the Third Respondent's behalf, but by the First Respondent's own ex officio identification of the jurisdictional defect. In substance, so the Applicants contend, the court was correcting its own earlier decision to issue the rule, and the Applicants should not be visited with the costs of that course.

5.17. There is real substance in this complaint. The general rule that costs follow the result is not inflexible; it must always yield to the dictates of fairness in the particular case. Where the dispositive issue is one taken by the court itself, and where neither of the contending parties has materially assisted the court in arriving at the conclusion that disposed of the matter, the ordinary rule may be displaced. The same applies where the court is, in effect, correcting an earlier decision of its own.

5.18. I do not, however, find it necessary to decide whether this

consideration alone would have warranted interference. It suffices for present purposes to observe that, taken together with the irregularity already identified in relation to the costs treatment of the points in limine, the cumulative effect is such that the costs order as a whole cannot be allowed to stand.

APPROPRIATE REMEDY

6.

6.1. Having concluded that the costs order is reviewable, the question arises whether to remit the matter to the First Respondent for reconsideration, or to substitute this Court's own order. The First Respondent has elected to abide; she has had the opportunity to furnish reasons and has chosen not to do so. The matter has been fully ventilated before me on the papers. Remittal would serve no useful purpose and would only occasion further delay and expense. I shall, in the exercise of the discretion conferred by section 8(1)(c)(ii) of PAJA, substitute the order.

6.2. Considering all the circumstances - the dismissal of all four of the Third Respondent's points in limine, the limited assistance afforded to the court a quo by the parties on the dispositive question of jurisdiction, the fact that the court was in substance correcting its own earlier order, and the absence of any reasoned exercise of discretion as to costs on the Third Respondent's points in limine - I am satisfied that the appropriate order is one in which each party bears its own costs of the proceedings in the court *a quo*.

COSTS OF THIS APPLICATION

7.

The Applicants have substantially succeeded. The Second and Third Respondents opposed the application throughout, and in doing so advanced a number of points in *limine* which I have rejected. There is, however, no basis for any punitive costs order. The Applicants seek costs against the Second and Third Respondents. In my view the proper order is that the Third Respondent, being the substantive opposing party and the beneficiary of the costs order set aside, should bear the costs of this application, on the ordinary scale. No costs order is appropriate against the Second Respondent in her personal capacity, who was, as I have indicated, improperly so cited.

ORDER

8.

In the result, I make the following order:

8.1. The application succeeds in part.

8.2. The costs order granted by the First Respondent on 7 November 2025 in case number GP/PTANORTH/RC/910/2025 is reviewed and set aside, and is substituted with the following order:

"Each party shall bear its own costs."

8.3. The citation of the Second Respondent, Ms Inez Ferreira, in her personal capacity is set aside. The proceedings shall be deemed to have been instituted against the Third Respondent only, the Second Respondent having acted in her representative capacity as the deponent for the Third Respondent.

8.4. The Third Respondent shall pay the costs of this application on the party-and-party scale.

ACTING JUDGE DU PLESSIS

GAUTENG DIVISION, PRETORIA

APPEARANCES

For the Applicants:

Adv E Sepheka

Instructed by:

Mahlakoane Attorneys, Pretoria

For the 2nd & 3rd Respondents:

Adv R A Britz

Instructed by:

BFJ Van Zyl Attorneys, Pretoria

For the 1st Respondent:

No appearance (Notice to Abide filed)

Date heard:	25 May 2026
Date of judgment:	_______ 2026