

Case No: 23076/2022

In the matter between:

MTHOMBENI MAQHAWE

Applicant

and

SITHOLE & ASSOCIATES INC ATTORNEYS

First Respondent

SITHOLE EDWARD

Second Respondent

Heard on : 02 June 2026

Decided on : 03 July 2026

Coram: Tebeile AJ

JUDGMENT

TEBEILE AJ:

Introduction

- [1] This is a special interlocutory application brought by the applicant, Mr Maqhawe Mthombeni, against the respondents, Sithole & Associates Inc Attorneys and Mr Edward Sithole. The applicant seeks an order compelling the respondents to sign a pre-trial minute of a pre-trial conference held on 5 April 2024.
- [2] The application is brought in terms of paragraph 27 of the Consolidated Practice Directive 1 of 2024 (“Directive”), as amended on 12 June 2024.
- [3] The relief sought is twofold. First, the applicant requests that the respondents be ordered to sign the pre-trial minute dated 9 April 2024 within three days of service of this Court’s order. Second, should the respondents fail to comply with such an order, the applicant seeks leave to approach this Court on the same papers, supplemented where necessary, for an order to strike out their defence in the main action.
- [4] The respondents oppose this application. Their primary contention is that the pre-trial minute does not accurately reflect the consensus reached during the pre-trial conference and that they cannot be compelled to sign a document that contains a disputed proposition on a material issue. The respondents further argue that the applicant’s approach constitutes a misuse of the Special Interlocutory Court (“SIC”) process and that the issue in dispute should properly be ventilated at trial.

Factual background

- [5] The applicant, a practicing advocate, instituted action against the respondents on 29 June 2022, claiming an amount of R570 500.00 for professional services rendered at the instance and request of the respondents. The claim is based on 16 invoices issued for work performed in various matters between 2019 and 2021. The applicant pleads that his fees constitute a disbursement in the business and practice of the respondents, and that he is entitled to look to them for payment.

- [6] The respondents filed a plea on 25 October 2022. In their plea, the respondents admitted certain paragraphs but raised a special plea of prescription and defended the merits on the basis that payment of the applicant's fees was conditional upon the successful finalisation of matters and the taxation of bills of costs. Critically, at paragraph 24 of the plea, the respondents admitted the following: "[t]he contents of this paragraph are admitted" – this being a reference to paragraph 26 of the amended particulars of claim, which states that the applicant's fees constitute a disbursement in the business and practice of the respondents, and that the applicant is entitled to look to them for payment.
- [7] The pleadings closed, and discovery was completed by both parties. On 5 April 2024, a pre-trial conference was held via Microsoft Teams. The applicant's erstwhile attorney, Mr Thobane Magubane, and the respondents' representative, Ms Nontokozo Mndebele, attended the pre-trial conference. The applicant also joined the pre-trial conference, albeit about five minutes late, to provide instructions.
- [8] Prior to the pre-trial conference, Mr Magubane prepared a pre-trial agenda, which was erroneously labelled as "Pre-Trial Minutes". The agenda contained sections for common cause issues, issues in dispute, and the standard Rule 37(6)(a-k) questions. At the conclusion of the pre-trial conference, it was agreed that Mr Magubane would finalise the minutes, sign them, and send them to the respondents' attorney for signature.
- [9] Mr Magubane prepared the final pre-trial minute and sent it to Ms Mndebele on 6 April 2024. However, Ms Mndebele took issue with a particular paragraph listed under common cause issues. This paragraph, which appeared as paragraph 2.7 in the final minute, read: "[t]hat the Plaintiff's fees constitute a disbursement in the business and practice of the Defendants and the obligation to pay him rests with them." Ms Mndebele crossed out the paragraph with a red pen, refused to sign the minute, and requested that the paragraph be removed from the list of common cause issues.

- [10] The applicant, through his legal representatives, took the position that the respondents could not unilaterally resile from an agreement reached at the pre-trial conference. The applicant also pointed out that the proposition in question was admitted in the respondents' plea at paragraph 24 and therefore constituted a common cause issue.
- [11] The respondents, on the other hand, argued that no consensus had been reached on this issue during the pre-trial conference. They contended that Ms Mndebele had expressly disputed the proposition and had indicated that she would not sign the minute unless it was removed from the list of common cause issues. The respondents further explained that the admission in the plea was the result of an administrative and drafting error, and they filed a notice of intention to amend the plea on 19 February 2026 to correct the error. The applicant objected to the proposed amendment on 23 February 2026.
- [12] On 28 May 2024, the applicant launched the present application to compel the Respondents to sign the pre-trial minute. The applicant's replying affidavit in this application was served three days out of time, on 10 July 2024. The respondents filed a Rule 30 notice of an irregular step on the same day, taking issue with the late filing. The applicant subsequently brought a condonation application, which was granted by S van Nieuwenhuizen AJ on 29 January 2026, with costs reserved. The Court granted condonation for the late filing of the replying affidavit. The present application to compel then proceeded to a hearing before me on 02 June 2026.

The issues

- [13] The following issues arise for determination in this application:

- 13.1. Whether the respondents can be compelled to sign the pre-trial minute in terms of paragraph 27 of the Directive, read with Rule 37 of the Uniform Rules of Court.

- 13.2. Whether the issue in dispute (whether the applicant's fees constitute a disbursement payable by the respondents) is properly a common cause issue or a disputed issue that must be referred for trial.
- 13.3. Whether the respondents' notice of intention to amend the plea has any bearing on the application to compel.
- 13.4. Whether the applicant is entitled to the costs of the condonation application, which were reserved by S Van Nieuwenhuizen AJ.
- 13.5. Whether the applicant is entitled to a punitive costs order on an attorney-and-client scale.

[14] However, for convenience, I will not deal separately with each issue for determination. In my approach, I will jointly deal with all the issues for determination as it appears in this judgment.

The legal principles

[15] The purpose of a pre-trial conference is regulated by Rule 37. The rule is designed to narrow the issues in dispute, obtain admissions where possible, promote settlement, and curtail the duration of trials. Rule 37(4) requires that the parties attempt to reach agreement on all matters that can be agreed upon, including the issues that are in dispute and those that are common cause.

[16] The SIC was established by the Directive to address procedural delinquency, including a failure to sign a pre-trial minute promptly. Paragraph 27.13.4 of the Directive specifically identifies a failure to sign a Rule 37 minute as a type of delinquency that the SIC shall deal with.

[17] However, the SIC is not intended to be used to compel substantive admissions on disputed issues. Paragraph 27 of the Directive is concerned with procedural

compliance, not with determining the merits of a dispute. As the respondents correctly argued, a pre-trial minute merely records agreements reached during the pre-trial conference. It cannot be used to create an admission where none exists.

[18] The leading authority on this issue is *Fila-Matix*¹ wherein the Supreme Court of Appeal held that to allow a party, without special circumstances, to resile from an agreement deliberately reached at a pre-trial conference would negate the object of Rule 37, which is to limit issues and curtail the scope of litigation.² The court emphasised that agreements reached by the parties at pre-trial conference are binding on the parties, and a party cannot unilaterally withdraw from such an agreement.³

[19] However, the *Fila-Matix* principle applies only where the parties have deliberately reached an agreement during the pre-trial conference. It does not apply where there is no consensus on a particular issue during the pre-trial conference. A party cannot be compelled to agree to a proposition that it disputes, and the proper course where there is no agreement is to record the issue as being in dispute and refer it for trial.

[20] In *SA Breweries (Pty) Ltd v Louw*⁴ it was held:

“The relationship between the pleadings and the pretrial conference minute has been the subject of several judicial pronouncements. In short, a minute of this sort is an agreement from which one cannot unilaterally resile. Also, a pleading binds the pleader, subject only to the allowing of an amendment, either by agreement with the adversary, or with the leave of the court. The case pleaded cannot be changed or expanded by the terms of a minute; if it does, it is necessary that that change go hand in hand with a necessary amendment. The chief objective of the pretrial conference is to agree on limiting the issues that go to trial. Properly applied, a typical minute – cum

¹ *Fila-Matix (Pty) Ltd v Freudenberg and Others* 1998 (1) SA 606 (SCA).

² See also *Price NO v Allied-JBS Building Society* 1980 (3) SA 874 (A) 882D-H).

³ See also (*Edms*) *Bpk v Santam Verseteringsmaatstappy Bpk* 1985 (1) SA 399 (A) 415B-D; *Chemfos Ltd v Plaasfosfaat (Pty) Ltd* 1985 (3) SA 106 (A) 114I-115B).

⁴ (2018) 39 ILJ 189 (LAC).

– agreement will shrink the scope of the issues to be advanced by the litigants. This means, axiomatically, that a litigant cannot fall back on the broader terms of the pleadings to evade the narrowing effect of the terms of a minute. A minute, quite properly, may contradict the pleadings, by, for example, the giving of an admission which replaces an earlier denial. When, such as in the typical retrenchment case, there are a potential plethora of facts, issues and sub-issues, by the time the pretrial conference is convened, counsel for the respective litigants have to make choices about the ground upon which they want to contest the case. There is no room for any sleight of hand, or clever nuanced or contorted interpretations of the terms of the minute or of the pleadings to sneak back in what has been excluded by the terms of a minute. The trimmed down issues alone may be legitimately advanced. Necessarily, therefore, the strategic choices made in a pretrial conference need to be carefully thought through, seriously made, and scrupulously adhered to. It is not open to a court to undo the laces of the straitjacket into which the litigants have confined themselves.”⁵ (My emphasis and underlining)

Application of the legal principles and analysis of this case

[21] The central question in this application is whether the respondents can be compelled to sign a pre-trial minute that contains a proposition that they dispute. I find that they cannot. A party cannot be compelled to sign a pre-trial minute that does not accurately reflect the consensus reached at the pre-trial conference. This is so because a pre-trial minute is a record of agreement between the parties, and not a document that can be unilaterally imposed by one party on another.

[22] The respondents have consistently maintained that no agreement was reached on paragraph 2.7 of the pre-trial minute. Ms Mndebele crossed out the paragraph with a red pen, refused to sign the minute, and requested that the paragraph be removed from the list of common cause issues. This demonstrates that there was no consensus on this issue. The applicant cannot rely on *Fila-Matix* because there

⁵ Id at para 8.

was no agreement to resile from. Instead, the respondents have consistently objected to the inclusion of this proposition in the common cause section.

[23] Furthermore, the issue in dispute is a material one. The question of whether the applicant's fees constitute a disbursement payable immediately by the respondents, or whether payment was conditional upon the successful finalisation of matters and the taxation of bills of costs, lies at the heart of the dispute between the parties. This is not a neutral factual issue but a legal conclusion that goes to the core of the claim. It is precisely the kind of issue that must be ventilated at trial, not determined in an interlocutory application.

[24] Most importantly, the respondents' alleged mistaken admission must be read in context with some of the paragraphs of the respondents' plea wherein the respondents pleaded as follows:

“5.3.1. The 1st Defendant would brief the Plaintiff from time to time in respect of matters to which the 1st Defendant has entered into contingency fee agreements with its clients;

5.3.2. The 1st Defendant will only settle the invoices of the Plaintiff upon successful ("a cost order granted in the favour of the 1st Defendant's clients") finalisation of each matter;

5.3.3. Once the 1st Defendant has received a cost order, it would tax the bill;

5.3.4. Once the bill was taxed, and the opposition has settled the costs, the 1st Defendant would then settle the Plaintiff's invoice as taxed by the taxing master;

5.3.5. In the event that the court rules in favour of the opposition ("unsuccessful claims") then the Plaintiff shall have no claim against the Defendants.”

[25] From the reading of paragraphs 5.3.1 to 5.3.5 of the respondents' plea, it cannot be concluded that the respondents are disingenuous in their refusal to sign the minutes of the pre-trial conference.

[26] I find that the applicant's reliance on the fact that the issue is admitted in the plea to be misplaced. The applicant argues that because the proposition was admitted in paragraph 24 of the plea, it is now a common cause issue that the respondents

cannot dispute. I disagree. The admission in the plea is only a formal admission. It can be withdrawn or amended, as the respondents have indicated they intend to do and they have already filed notice to amend their plea. The proper forum for challenging the respondents' attempt to amend the plea is when the application for leave to amend is heard. It is not appropriate to use this interlocutory application to effectively determine the merits of the dispute, particularly when the respondents have filed a notice of intention to amend their plea and the applicant has objected to it.

[27] The respondents' notice of intention to amend the plea, dated 19 February 2026, is relevant. The respondents seek to substitute paragraph 24 of their plea with a denial of the proposition that the applicant's fees constitute a disbursement. The applicant has objected to the proposed amendment. However, the amendment process is separate from this application. The respondents are entitled to seek to amend their pleadings, and the merits of that amendment will be considered in the appropriate forum. The mere fact that an amendment has been proposed does not render the present application to compel moot. However, it reinforces the respondents' position that the issue is genuinely in dispute.

[28] I am also persuaded by the respondents' submission that compelling them to sign the pre-trial minute would effectively determine the merits of the dispute without a trial. This would prejudice the respondents' ability to present their defence and would be contrary to the principles of fairness and justice. The purpose of Rule 37 is to narrow issues, not to determine them. Only a trial is meant to determine the issues. Where there is no agreement on a material issue, the proper course is to record the issue in the pre-trial minutes as being in dispute and refer it for trial. No party should be compelled to agree to anything during the Rule 37 proceedings.

[29] The applicant also contended that the respondents' answering affidavit was deficient because it did not respond to all the paragraphs of the founding affidavit. The applicant argued that the unanswered paragraphs should therefore be deemed admitted. I find this argument to be without merit. The central issue in this

application is narrow and procedural: whether the respondents can be compelled to sign the pre-trial minute where they dispute common cause issues. The respondents' answering affidavit squarely addresses this issue by explaining that there was no agreement on paragraph 2.7 and that the proposition in question is disputed. The fact that the answering affidavit does not respond to every narrative paragraph of the founding affidavit is not fatal to the respondents' case. What matters is that the Respondents have raised a bona fide dispute on the issue in question.

[30] Furthermore, the applicant's reliance on the doctrine that an allegation that is neither admitted nor denied is deemed to be admitted is misplaced. That doctrine applies to pleadings, not to affidavits in motion proceedings. In motion proceedings, the court considers the affidavits holistically. The unanswered portions of the founding affidavit do not automatically establish the facts alleged.

[31] The applicant further argued that the respondents' conduct was obstructive and that the only way to progress the matter was to compel them to sign the minute. I do not agree. The respondents have not refused to participate in the pre-trial process. They have simply refused to sign a document that they say does not accurately reflect the agreement reached. This is not obstruction; it is a legitimate exercise of their rights. The Directive provides for other mechanisms to address disputes, such as judicial case management. The applicant was not without a remedy.

[32] The applicant also argued that he would suffer prejudice if the application is dismissed because he will be unable to apply for a trial date without a signed pre-trial minute. I do not find this argument compelling.

[33] The applicant is not precluded from applying for a trial date. If the parties cannot agree on a pre-trial minute, the issue can be resolved by the trial court. The registrar may still allocate a trial date, albeit with the dispute noted. Moreover, the applicant can seek judicial case management to resolve the impasse.

Conclusion

[34] In conclusion, I find that the applicant has failed to make out a case for the relief sought. The respondents cannot be compelled to sign a pre-trial minute that contains a proposition that they genuinely dispute.

[35] The issue in dispute (whether the applicant's fees constitute a disbursement) is a material issue that must be ventilated at trial. The respondents' refusal to sign the minute is not obstructive but is a legitimate exercise of their rights. The application to compel is therefore dismissed.

Costs

[36] The central dispute that gave rise to this application was paragraph 2.7 of the pre-trial minutes, which stated: "[t]hat the Plaintiff's fees constitute a disbursement in the business and practice of the Defendants and the obligation to pay him rests with them." The respondents' attorney unilaterally deleted this paragraph, refusing to sign the minutes.

[37] The applicant contended that this issue was common cause. He further pointed out that the very same legal proposition was admitted by the respondents in paragraph 24 of their plea. The respondents submitted that this admission was a mistake, an "administrative and drafting error," and that they intended to amend their plea. At the time of hearing of this application, they had indeed filed a notice of intention to amend their plea.

[38] The question before me now is the appropriate costs order. In assessing the respondents' conduct, I must consider the context. The admission in their plea was indeed a mistake. The respondents' decision to first deny the admission existed and then later to characterize it as a mistake was, objectively, caused the applicant to launch this application. It was this very conduct that necessitated the applicant's

application to compel. Nevertheless, the respondents' decision to oppose the application was not entirely without foundation. They presented a coherent argument that the issue was disputed. Their "mistaken admission" argument was not so far-fetched as to be deemed vexatious or malicious. It was a legal argument rooted in their own view of their case. They were attempting to correct what they perceived as an error, and they followed the proper procedure by filing a notice to amend their plea. This lends some credence to their claim of a good-faith mistake.

[39] Furthermore, the respondents' conduct was not characterized by the kind of gross delinquency or abuse of process that typically attracts punitive costs. Their opposition was based on a legal point concerning the use of pre-trial minutes to record admissions on disputed issues. This, in my view, distinguishes this case from situations where a party acts with deliberate disregard for the rules or seeks to frustrate the litigation process.

[40] Although the applicant was unsuccessful and the respondents are generally entitled to their costs, this Court retains a broad discretion. In the present case, the applicant's application was necessitated by the respondents' mistake and the respondents succeeded in opposing the application. I find no vexatious conduct on each party, and therefore the Court may depart from the usual costs order.

[41] In the exercise of my discretion, I find that the just and equitable order is that each party should bear its own costs for this application. The respondents' refusal to sign the minutes was the direct cause of the litigation, but their conduct was not so reprehensible as to warrant a punitive costs sanction.

[42] Furthermore, the applicant seeks the costs of the condonation application, which were reserved by S Van Nieuwenhuizen AJ. As for the costs of the condonation application, I am of the view that similarly each party must pay their own costs having considered that although the applicant was successful, he was a party seeking indulgence from the court. Of significance, it is also that the condonation application is intertwined to this application wherein I found that each party must pay their own costs and that application was necessary because the applicant filed

his replying affidavit three days out of time. The respondents opposed the condonation application. While the condonation was granted, I am not persuaded that the respondents should bear the costs of that application. The applicant's delay was relatively short. In the circumstances, the appropriate order is that each party must pay their own costs in the condonation application.

Order

[43] In the premises, I make the following order:

1. The application to compel the respondents to sign the pre-trial minutes is dismissed.
2. Each party must pay its own costs of the application to compel the signing of pre-trial minutes.
3. Each party must pay its own costs for the condonation application for late filing of the replying affidavit, and which costs were reserved by S. van Nieuwenhuizen AJ on 29 January 2026.



SHADRACK TEBEILE

Acting Judge of the High Court of South Africa

Gauteng Local Division, Johannesburg

For the Applicant: Adv M Mthombeni

For the Respondents: Ms N Mndebele instructed by Edward Sithole Inc
& Associates