IN THE HIGH COURT OF SOUTH AFRICA

KWA-ZULU NATAL DIVISION, PIETERMARITZBURG

CASE NO: **14006/16P**

In the application between:

GALAXY BINGO PAVILION (PTY) LTD	**FIRST APPLICANT**
GALAXY BINGO MIDLANDS (PTY) LTD	**SECOND APPLICANT**
GALAXY BINGO GATEWAY (PTY) LTD	**THIRD APPLICANT**
GALAXY BINGO KWAZULU-NATAL (PTY) LTD	**FOURTH APPLICANT**
GALAXY BINGO AMANZIMTOTI (PTY) LTD	**FIFTH APPLICANT**
GALAXY BINGO SOUTH COAST (PTY) LTD	**SIXTH APPLICANT**
GALAXY BINGO EMPANGENI (PTY) LTD	**SEVENTH APPLICANT**
And	
PEERMONT GLOBAL KZN (PTY) LTD	**FIRST RESPONDENT**
AND FOURTEEN OTHERS	**SECOND TO FIFTEENTH RESPONDENTS**

In re:

The matter between:

PEERMONT GLOBAL (KZN) (PTY) LTD	**APPLICANT**
And	
CHAIRPERSON, KWAZULU-NATAL GAMING AND BETTING BOARD	**FIRST RESPONDENT**
AND TWENTY OTHERS	**SECOND TO TWENTY-FIRST RESPONDENTS**

Coram: Koen J
Heard: 16 March 2018
Delivered: 17 April 2018

O R D E R

The application is dismissed with costs, to include the costs of two counsel where so employed.

J U D G M E N T

Koen J

Introduction

[1] In this application[1] the applicants seek the following relief:

'1 Staying the review application brought by Peermont Global (Pty) Ltd under this case number until the finalisation of the application brought by Afrisun (Pty) Ltd t/a Sibaya Casino & Entertainment Kingdom in case number 1366/2015, and in the event of a ruling that those proceedings may continue, the final determination of the review proceedings under case number 1366/2015.

2 Directing that the costs of this application be paid by any and all Respondents that oppose this application, jointly and severally, alternatively that the costs of this application be costs in the cause of the review application under this case number;

3 Granting the Applicants further and/or alternative relief.'[2]

[1] At times hereinafter referred to as 'the stay application'.
[2] Paragraphs 1 to 3 of the notice of application.

Relevant Background Facts

[2] The factual chronology relevant to this application includes the following:

[3] On 16 January 2015 the second respondent, the KwaZulu-Natal Gaming and Betting Board ('the Board'),[3] took a decision regarding the grant of amended bingo licences to various bingo operators.[4] That decision, hereinafter referred to as 'the impugned decision', subsequently turned out to be controversial.

[4] On 30 January 2015 the Premier of KwaZulu-Natal ('the Premier') and the Member of the Executive Council of Finance for KwaZulu-Natal ('the MEC') brought an application under case number 1366/15 ('the MEC's review') to review the impugned decision, seeking an order that it be set aside and be declared null and void. The applicants in the present application (collectively referred to hereinafter as 'the Galaxy parties') are amongst the respondents in the MEC's review.[5] The first respondent, Peermont Global KZN (Pty) Ltd ('Peermont'), the fourteenth respondent, 'Afrisun KZN (Pty) Limited' ('Afrisun') and the fifteenth respondent in this application, 'the Peoples Forum Against Electronic Bingo Terminals' ('the Forum') were not cited as parties to the MEC's review.

[5] On 3 and 4 February 2015 Afrisun and the Forum applied for leave to intervene as co-applicants in the MEC's review. In its Notice of Motion dated 3 February 2015 in, what will hereinafter be referred to as 'the Afrisun review', Afrisun also contemplated a review of the impugned decision in the relief it claimed, the relevant parts whereof included the following:

'1. …

2. That (Afrisun) is granted leave to intervene as the Third Applicant in the (MEC's review).

---

[3] The names of the various parties shall be used in this judgment rather than referring to them with the usual nomenclature of 'applicant' or 'respondent' to avoid confusion arising from their contrasting citations in the various litigation between them. The Board is in fact cited with reference to its chairperson.

[4] The further details of the decision are irrelevant to this application.

[5] The respondents in that review are the Board, nine members of the Board, Galaxy, eight companies in the Gold Rush group (who are also respondents in the present application), the fourth Respondent ('Poppy Ice (Pty) Ltd), and Bingo Royale.

3. Granting the relief sought by the (Premier and MEC) in paragraphs 1, 2.1, 2.2, 2.4, 3 and 4 of the Notice of Motion to the (MEC's review).
4. That (Afrisun) (as the Third Applicant in the (MEC's review) is granted leave to file a supplementary affidavit and/or amended notice of motion in respect of the relief that it seeks, in the (MEC's review), in accordance with rule 53(4) of the Uniform Rules of Court, once the (Board) files the record called for by the Premier and MEC in the Notice of Motion in the (MEC's review).'

[6] On 5 February 2015 an order,[6] seemingly sought with the consent of the parties to the MEC's review, Afrisun and the Forum, was granted paragraph 6 of that order recording that:
'Afrisun[7] (Pty) Ltd t/a Sibaya Casino and Entertainment Kingdom and the Peoples Forum against Bingo Terminals are hereby granted leave to intervene[8] without prejudice to any party to raise any arguments in this respect (Case No's 1472/2015 and 1366/2015).'[9]

[7] On 19 February 2015 Peermont launched an application seeking leave to intervene in the MEC's review as a party, as it too wishes to review the impugned decision. The relief claimed in its Notice of Motion was as follows:
'1. Condoning the applicant's non-compliance with the time periods provided for in Rule 6 of the Uniform Rules of Court;
2. Granting the applicant leave to intervene as the fifth applicant in the main application issued under case number 1366/15, and in those proceedings, granting the applicant an order in the following terms:
2.1 Exempting the applicant from the requirement that it exhaust internal remedies;
2.2 Reviewing, setting aside and declaring invalid the first respondent's decision of 16 January 2015, recorded as Resolution BD0115.11 on pp 50-54 of the court papers;
2.3 Granting costs, jointly and severally, against all the respondents that oppose the relief sought in 2.1 and 2.2 above;

---

[6] Per Vahed J.
[7] Although the designation of 'KZN' was omitted from the name in the court order, the reference appears to be to Afrisun as described in this judgment. No other similar entity has featured in the litigation.
[8] In the founding affidavit the deponent shuns any notion that they have been admitted as applicants in the MEC/s review, even 'provisionally' (whatever that may mean) although they were referred to in some documents in the MEC's review as third and fourth applicants.
[9] Whatever the exact import of that order may be, and whether it actually permitted Afrisun and the Forum as parties to the MEC's review even if only for expediency, it did not include Peermont.

3. Directing that the affidavit filed in support of this application will serve as the applicant's founding affidavit in the main application;
4. Ordering that any respondent that opposes this intervention application shall pay the costs thereof and, in the event that there is no opposition, that costs be costs in the cause;
5. Granting such further and/or alternative relief as the court may deem just.'

Peermont's founding affidavit in its intervention application setting out the basis on which it claimed to be entitled to intervene for the aforesaid relief, was stated to also 'double as its founding affidavit for its own review in the event that it was admitted'. That application to intervene remains pending. To date no court order has been granted giving leave to Peermont to intervene.

[8] On 28 April 2015 an order was granted[10] in the MEC's review, the relevant parts provide that

'1 The –
1.1 Intervention applications of the [Forum[11]] and [Peermont[12]] and the objections to the [Afrisun[13]] intervention in case number 1366/2015; and
1.2 …
1.3 The joinder application launched by [Afrisun] in case number 1366/2015;
1.4 …
are postponed for hearing to a date to be arranged by the Registrar.'

[9] On 18 November 2016 a notice of withdrawal of the MEC's review was filed on behalf of the Premier and the MEC. The notice recorded an agreement regarding costs in respect of some of the respondents to that application, but not in respect of others, which would inter alia include Peermont in respect of its pending application to intervene, and Afrisun. The notice of withdrawal prompted an objection from Afrisun. Afrisun disputed the validity of such withdrawal in correspondence. When that did not elicit a satisfactory response its correspondence was followed by a rule 30(2)(b) notice on 29 November 2016

---

[10] Per Lopes J.
[11] Described as the Fourth applicant.
[12] Described as the 'Fifth Applicant' although it had not been granted leave to intervene?
[13] Described as the Third Applicant.

affording the Premier and MEC 'an opportunity of removing the cause of complaint.'

[10] On 8 December 2016 Peermont brought a review ('the Peermont review') for relief, in some respects similar to that in the MEC's review and the Afrisun review insofar as they also attack the validity of the impugned decision, citing inter alia the Galaxy parties as respondents[14] under the present case number (14006/16P), seeking an order:

'1. Condoning [Peermont's] non-compliance with the time periods provided for in section 7(1) of Promotion of Administrative Justice Act 3 of 2000 and, to the extent necessary, exempting [Peermont] from the requirement that it exhaust internal remedies;

2. Reviewing, setting aside and declaring invalid the second respondent's [the MEC's] decision of 16 January 2015, recorded in resolution BD0115.11 (as appears in annexure DLP28 to the founding affidavit) ("the impugned decision");

3. Granting costs, jointly and severally, against all the respondents that oppose any of the relief sought in prayers 1 and 2 above; and

4. Granting such further and/or alternative relief as the Court may deem just.'

[11] The motivation for bringing the Peermont review is explained as follows in the founding affidavit filed in support of that review:

'There is a dispute between the attorneys acting for the Premier and a number of the other respondents, on the one hand, and Afrisun, on the other, as to whether the purported withdrawal was competent, and whether it brought an end to the MEC's review, and with it the participation of those parties who had either already been granted leave to intervene (on a provisional basis), or whose applications for leave to intervene (on a provisional basis), or whose applications for leave to intervene were still to be heard (like Peermont), I elaborate on this dispute below. It is this purported withdrawal of the MEC's review, and the dispute about the effect this had on the reviews sought by the intervening parties to be

[14] The First to Seventh Applicants herein (collectively referred to as 'Galaxy') have been cited as respondents in both applications. In some instances they may have been misnamed. Nothing however turns on this for the purpose of this judgment as the corporate entities, even if misnamed; appear to be accepted by the Applicants as duly joined.

joined to such review by way of their intervention as applicants, that has necessitated this application, as explained further below'.[15]

[12] When the MEC's notice of withdrawal of her review was not 'removed' in accordance with Afrisun's notice in terms of rule 30(2)(b), Afrisun filed an interlocutory application ('the Afrisun application') claiming the following relief:[16]

'1. It is declared that the transfer of the administration of the KwaZulu-Natal Gaming & Betting Act, 8 of 2010, to the Premier of KwaZulu-Natal is unconstitutional and invalid, due to the non-compliance with section 137 of the Constitution of the Republic of South Africa, 1996;

2. The transfer of the administration of the Kwa Zulu-Natal Gaming & Betting Act, 8 of 2010, to the Premier of KwaZulu-Natal, is accordingly set aside;

3. That the decision of the Premier of KwaZulu-Natal, and concurred in by the MEC for Finance, KwaZulu-Natal, to withdraw the main application instituted by them dated 30 January 2015, in terms of the notice of withdrawal referred to in paragraph 5 hereof, is reviewed and set aside;

4. It is declared that such decision is unlawful and invalid;

5. That the notice of withdrawal filed on behalf of the Premier of KwaZulu-Natal and the MEC for Finance, KwaZulu-Natal, stamped by the Registrar on 18 November 2016 and served on 21 November 2016, be set aside.

6. That the notice in terms of Uniform Rule 15(2) dated 30 November 2016, in terms of which notice was given of the substitution of the Premier of the Province of KwaZulu-Natal as second applicant in place of the MEC for Finance, KwaZulu-Natal, delivered on 2 December 2016, be set aside;

7. Alternatively to paragraphs 1 to 6 hereof, and in the event that the above relief is refused and/or it is found that the application was validly withdrawn, then an order be granted declaring that:

7.1 the proceedings have not terminated;

7.2 the applicant is entitled to proceed with its review application as an intervening applicant;

---

[15] The reasoning behind the bringing of Peermont's review application was repeated *verbatim* in paragraph 10 of Peermont's founding affidavit in this application.

[16] The relief in paragraphs 3, 4, 5 and 7 of the Notice of Motion is particularly apposite to this application.

7.3 The applicant is entitled to obtain dates to set down the hearing of the issues referred to in paragraph 1 of the Court Order granted by the Honourable Mr Justice Lopes in the main application, dated 28 April 2015;
8. That the first and second applicants (in the main application) viz. the Premier of the Province of the KwaZulu-Natal and the MEC for Finance, KwaZulu-Natal, and any other party who opposes this application pay the costs of this application jointly and severally, the one paying the other to be absolved, such costs to include those consequent upon the employment of two counsel;
9. Costs of suit; and
10. Granting such further and/or alternative relief as the court may deem fit.'

Peermont's attitude to that Afrisun application has been stated to be that 'Peermont will abide the outcome.'

[13] Peermont's attitude to the above developments is described as follows by the deponent to the founding affidavit on behalf of the Galaxy parties in the present application:

> '26 As mentioned, Peermont's review application was brought before Afrisun applied to Court to set aside the Premier's and MEC's notice of withdrawal, alternatively to obtain an order declaring that the proceedings in case number 1366/15 had not terminated. That application was however anticipated in Peermont's founding affidavit, with Mr Petzer *inter alia* stating the following at paragraph 47 thereof:
>
> "Peermont assumes that the Rule 30 Notice filed by Afrisun will spawn an application in the MEC's review, with the MEC and Premier adopting the attitude that the proceedings have been withdrawn. Peermont will abide the outcome of any such application, and any decision, in the MEC's review, on the dispute about the status of the reviews sought by the various intervening parties to be advanced through their intervention."
>
> 27. Mr Petzer then also added the following in paragraphs 48 and 49 of Peermont's founding affidavit [bold emphasis added]:
>
> "48. **I am advised and respectfully submit that the position is as follows: either Peermont's review grounds fall to be considered and determined in the pending application in which Peermont sought leave to intervene in order to raise those grounds (the MEC's review), or they are to be considered in an**

independent review application. In substance, it makes no difference. … **Whether Peermont's review is ultimately determined as this independent review or as an appendage to the shell of the MEC's review should make no difference at all in substance.**

"49. Once the Premier and MEC purported to withdraw the MEC's review and adopted the attitude that such act by itself brought an end to Peermont's own review that it was seeking to prosecute by way of intervention, it was obviously prudent and appropriate for Peermont to launch this application that could serve as its 'secession' from the MEC's review **depending on the outcome of the dispute between Afrisun and the MEC and Premier.**"

28. Peermont's review application was thus brought in order for Peermont to protect its position in the event that the MEC's review did not go ahead, and that the issues raised in Peermont's review application could accordingly not be ventilated under case number 1366/15, as Peermont initially envisaged.' (my emphasis)

The Contentions of the Galaxy Parties

[14] The Galaxy parties contend that the Peermont review falls to be stayed in terms of the principle of *lis alibi pendens*. The issue is whether that submission is well-founded.[17]

[15] They submit that

'In the light of the facts set out above, there is:

(i) pending litigation (namely, the MEC's review, including the review application brought by Peermont under that case number,[18]

(ii) between the same parties (namely Peermont, the Board, Galaxy, Goldrush, Poppy Ice and Bingo Royale),

(iii) based on the same cause of action (namely, an administration review of the impugned decision based on the review grounds repeated in paragraph 6 of Peermont's founding affidavit), and

---

[17] Reference is also made in the founding affidavit filed by the Galaxy parties to points of view expressed in correspondence between the attorneys of the Galaxy parties and Peermont. I do not deal with those as they are expressions of opinion and do not influence my decision on the legal position.

[18] Case number 1366/15.

(iv) in respect of the same subject matter.'[19]

[16] As regards the submission of the Galaxy parties quoted in paragraph 15(i) above, referring to 'the review application brought by Peermont under that case number'; being case number 1366/15, there is as yet no review by Peermont[20] under that 'case number'. What there is at present is an application by Peermont for leave to intervene in order that it may thereafter, once leave is granted, pursue a review. But there is as yet no review pending at the instance of Peermont under that case number. The notice of motion in the present stay application also does not refer to the Peermont application under case no 1366/15, but to the 'application brought by Afrisun (Pty) Ltd t/a Sibaya Casino & Entertainment Kingdom in case number 1366/2015' which is either the Afrisun review in which Afrisun as an applicant in case number 1366/15 seeks leave to intervene to review the impugned decision, alternatively it has already been granted such leave (depending on an interpretation of the court order granted on 5 February 2015), 'in the event of a ruling that those proceedings may continue, the final determination of the review proceedings under case number 1366/2015' which refers either to the MEC's review or the Afrisun review.

[17] This has unfortunately caused confusion. In what follows I shall endeavour to consider the legal position *viz-a-viz* the MEC's review, the Afrisun review, and the 'review' by Peermont under case number 1366/2015.

[18] They contend that it does not appear to be disputed that the review applications[21] concern the same parties, the same cause of action (namely, an

---

[19] Para 29 of the founding affidavit.
[20] In certain papers Peermont has been referred to as the 'Fifth Applicant', but no order to that effect has been granted.
[21] They in fact refer to the review by Peermont, but as indicated above the application by Peermont for leave to intervene in the MEC's review to thereafter allow it to pursue a review, if leave is granted to Peermont to intervene in case number 1366/2015, and then the Peermont review under case number case number 14006/16P.

administrative review of a decision of the Board) and the same subject matter (the review grounds being largely similar).[22]

Peermont's Contentions

[19] As regards Peermont's contentions:

(a) Its main ground of opposition to the stay application is directed at the first requirement for a defence of *lis alibi pendens* – namely, that there be pending litigation with those characteristics between the same parties.[23]

(b) Peermont's answering affidavit further also contains a contention that the Galaxy parties have waived their right to contend that the first review is still pending.[24] However, as pointed out in reply, the waiver argument[25] would not be sustainable either factually or legally, as the threshold for a successful waiver argument would not be met. I agree with those sentiments. I shall accordingly not consider the waiver argument further in this judgment, particularly also as the application falls to be dismissed for other reasons.

(c) Finally, Peermont has argued that even if *lis alibi pendens* finds application, this court should, in the exercise of its discretion, in any event refuse to stay the Peermont review.

The Relevant Legal Principles

[20] The legal basis for the application is *lis alibi pendens*,[26] specifically that the Peermont review should be stayed as the *lis* which it raises is one already pending. The same *lis* already pending can only be that in the MEC review, or possibly the

---

[22] As regards the requirements of a defence of *lis alibi pendens*, see e.g. *Williams v Shub* 1976 (4) SA 567 (C) at 570C; *Belmont House (Pty) Ltd v Gore and another NNO* 2011 (6) SA 173 (WCC) para 9; *Socratous v Grindstone Investments 134 (Pty) Ltd* 2011 (6) SA 325 (SCA) para 13.

[23] Record at 142-145, paras 23 – 31.

[24] See e.g. *Road Accident Fund v Mothupi* 2000 (4) SA 38 (SCA) para 19 (the *onus* of proving waiver rests on the party alleging it and clear proof is required of an intention to do so; moreover, where waiver is to be inferred from conduct, that conduct must be unequivocal, i.e. consistent with no other hypothesis than an intention to waive) and *Alfred McAlpine & Son v Transvaal Provincial Administration* 1977 (4) SA 310 (T) at 324C–D (in considering whether the onus of establishing waiver by conduct has been discharged, a court will take cognisance of the fact that persons do not as a rule lightly abandon their rights); as well as *Le Roux v Odendaal and others* 1954 (4) SA 432 (N) at 441D–E, where the Court endorsed the statement in *Kannemeyer v Gloriosa* 1953 (1) SA 580 (W) at 585H – 586A that 'the Court must take into account the unlikelihood, the strong improbability, that a man will lightly waive a right conferred upon him by law'.

[25] Which was pursued fairly faintly and tentatively.

[26] As a defense, the exception *litis pendentis*.

Afrisun review, depending on the view one takes of the effect of the order granted on 5 February 2015, or possibly the review by Peermont foreshadowed in its application to intervene.[27] The deponent to the founding affidavit articulates the objective of the application as obtaining a stay of the Peermont review 'at least until the fate of the impugned decision under …the MEC's review …and thus, too, the status of the pending application by Peermont to intervene in that matter and itself review the impugned decision – has been determined'. He continues that 'in terms of the principle of *lis alibi pendens*, the [Peermont] review falls to be stayed pending a decision as to whether the MEC's review will proceed, and, if it does, the final determination of that review'. I shall in this judgment proceed on the basis that the latter is what is sought to be achieved.

[21] The requirements for the dilatory defence of *lis alibi pendens* briefly stated are:

(a) a similar suit between the same parties;

(b) concerning the same thing and founded on the same cause of action.[28]

The defence is 'based on the proposition that the dispute (*lis*) between the parties is being litigated elsewhere' and that it is therefore 'inappropriate for it to be litigated in the court in which the plea is raised.'[29]

---

[27] In its heads of argument Peermont view the essence of the application as an application, brought by the Galaxy parties, an unrelated third party, that the Afrisun review might, at some uncertain future date, revive the MEC review which Peermont considers as withdrawn, which if that was to happen, would give rise to the same substance and issues as the MEC's application. Peermont point to Galaxy in its affidavit not alleging that the MEC's review remains live and extant, but only that the Afrisun review 'could potentially' revive those proceedings. Peermont draws attention to a conflicting position being adopted in the Heads of argument of Galaxy where they argue that the Afrisun review is 'an interlocutory application' in the MEC's review and that, if it succeeds 'either all the proceedings in the [MEC's review] will remain alive or Afrisun will be permitted to persist with its own review' and that in either event, the essence of the Peermont review will be determined. In my view the application is one for the Peermont to be stayed, pending a decision as to whether the MEC's review will proceed, and, if it does, the final determination of that review.

[28] Voet 44.2.7; *Westphal v Schlemmer* 1925 SWA 127. H Daniels *Becks Theory & Principles of Pleading in Civil Actions* 6 ed (2002) at 157.

[29] *Caesarstone Sdot-Yam Ltd v The World of Marble and Granite 2000 CC and others* [2013] 4 All SA 509 (SCA) para 2.

The Requirements of a 'Similar Suite between the Same Parties'

Peermont's standing in the MEC's application

[22] Peermont has not been granted leave to intervene in the MEC's application. It is accordingly not a party to any suit in that application. Whatever conclusion is reached in that application, absent the prior joinder of Peermont as a party thereto, will not be res judicata against Peermont. That is fatal to the present application as the requirement of a suit between the same parties is not satisfied.

[23] The Galaxy parties have submitted the interpretation in the preceding paragraph would be unduly technical and frustrate the underlying purpose to a plea of *lis alibi pendens*, namely to avoid a multiplicity of legal proceedings with the attendant costs being incurred running in parallel prior to a definitive judgment being given in one. Mr Pillemer SC (with him Mr Farlam SC) submitted that the mere application by Peermont to intervene in the MEC's application to review the impugned decision (even prior to any order that it actually be granted leave to intervene), constitutes the pending proceedings which should result in the Peermont review being stayed.

[24] I am not persuaded that this is so. Peermont is not a party to a review under the case number in which the MEC's review is being pursued. It will only be a party to a review of the impugned decision under that case number once it is granted leave to intervene. If Peermont is refused leave to intervene in the MEC's application for whatever reason (either on the merits of its the intervention application, or because the MEC's review has been withdrawn legitimately and it therefore is no more) then the Peermont review would have been stayed '…until the finalisation of the application brought by Afrisun (Pty) Ltd t/a Sibaya Casino & Entertainment Kingdom in case number 1366/2015' which itself contemplates a possible review at Afrisun's instance in the alternative, without Peermont being able to participate therein and advance its own arguments (albeit that any decision reached on the Afrisun review will in the absence of Peermont being granted leave to intervene not be res judicata against it). If the review contemplated to be pursued by Afrisun in those circumstances was to fail, then similar proceedings would have to be pursued afresh by Peermont to determine its prospects of

success in achieving the result Afrisun was desirous of but unable to achieve, with attendant delays and costs. A similar result would follow '… in the event of a ruling that those proceedings may continue' and the Peermont review be stayed until '…the final determination of the review proceedings under case number 1366/2015.'

[25] It might be argued that it is unlikely that Peermont will not be granted leave to intervene in the MEC's review (which will depend on whether those proceedings will indeed continue, an issue to which I shall return below), or at least that Peermont will be granted leave to intervene and will thus become a party to the litigation pursued under that case number in which Afrisun seeks leave to intervene (which has apparently been permitted on a without prejudice contingent basis) and hence the Afrisun review, if the latter is included in the part of the order referring to 'those proceedings … proceeding'. I cannot however express a view on the likelihood or probability of the MEC's review not proceeding, in the absence of hearing all the parties to that issue, notably the MEC and the Premier who have not been cited by the Galaxy parties as parties to the present stay application.

[26] The defence of *lis alibi pendens* is a technical defence but the effect thereof is to interfere with a litigant's right to have his dispute heard expeditiously by a competent court. An interpretation which will promote that right rather than impede it in any way, should be favoured.

[27] Peermont is not a party to the MEC's review. The fact that it has an application to intervene which is pending in the MEC's review does not make it a party to a similar suit between the parties in the Peermont review. Until leave to intervene is granted by a court, the proposed intervenor is not 'clothed with the same rights as the other parties'[30] and is not a party to the application in which it seeks to intervene.[31]

---

[30] *Garment Workers' Union v Minister of Labour and others* 1945 WLD 181 at 184 – 185.
[31] See also *Firstrand Bank Ltd v Wallace Pienaar Properties CC (Absa Bank Ltd intervening)* 2002 (2) SA 758 (W) at 760I - 761H.

[28] The present stay application accordingly falls to be dismissed.

[29] In the light of my aforesaid conclusion it is unnecessary for me to consider the other arguments raised in detail. I accordingly refrain from doing so, save to comment briefly on certain aspects thereof.

The effect of the withdrawal of the MEC's review by the Premier and MEC

[30] Apart from disputing that there is pending litigation to which it is or has been allowed as a party, Peermont maintains that there is no pending litigation for a review certainly at the MEC's instance, because it contends that the overarching proceedings within which its launched proceedings to intervene to pursue a review once admitted as a party to the MEC's review, had been withdrawn by the Premier and the MEC. It argues that, even though the withdrawal of the application within which a review to be pursued by it once leave to intervene is granted is contested, and is the subject of an interlocutory application in which it is contended that the withdrawal was an irregular step, the withdrawal decision by the Premier and MEC is one which must be regarded as extant and binding unless it has been set aside by a competent court.

[31] Peermont specifically further argues that it is uncontroversial that a matter is not *lis alibi pendens* where the other litigation has been withdrawn[32] – even where the payment of costs remains outstanding.[33] It refers in that regard to a judgment of Lopes J that:

'Where actions have been withdrawn, but the costs still not paid, that does not provide a basis for the *lis pendens* defence. In *RSA Faktors Bpk v Bloemfontein*

---

[32] *Partridge v Blake* (1894) 4 CTR 280; *Nedbank Limited v Sekgala* 2015 JDR 1976 (GP) paras 14 – 17; AC Cilliers *et al* "Temporary Stay of Proceedings" in *Herbstein and Van Winsen: Civil Practice of the High Courts and the Supreme Court of Appeal of South Africa* 5ed, 2009 ch10-p310. Cf. *Ntshiqa v Andreas Supermarket (Pty) Ltd* 1997 (1) SA 184 (TkS). *Ntshiqa*, however, distinguishable from the present case as the withdrawal was 'brought subsequent to the institution of the … application and only after the respondent had raised the defence of *lis pendens*' (at 191E–F); and the withdrawal, although it was dated at an earlier date, was 'an annexure to the replying affidavit' (at 191H–I) and '[appeared] to have come to the respondent's notice when the replying affidavit was served a few days before the matter was argued' (at 191H–I), meaning that the respondent had 'not had an opportunity to address the question of the withdrawal' (at 191I–J).

[33] *RSA Faktors Bpk v Bloemfontein Township Developers (Edms) Bpk en andere* 1981 (2) SA 141 (O) at 144G – 145C.

Township Developers (*Edms*) *Bpk en andere* 1981 (2) SA 141 (O) the court reiterated that a defence of *lis pendens* rests upon the existence of a pending earlier action and depends on the actual existence of the other action. The payment of costs is not regarded as part of the action in law and the costs procedure does not form part of the original action between the parties.'[34]

[32] The Galaxy parties contend that Peermont's allegations in this respect are not supported by the position which it has adopted in its 2016 review or with the indisputable facts and that Peermont's argument regarding the binding force of the Premier and MEC's decision to withdraw their 2015 proceedings (brought under case no. 1366/15) is also legally unsustainable.

[33] The debate as to the status of the MEC's review in the light of the notice of withdrawal filed in respect thereof is an interesting and controversial one. I do not intend summarising the arguments advanced in respect thereof. As indicated earlier I cannot entertain any debate in respect thereof in the absence of the Premier and MEC being parties or seeking leave to intervene and being joined in these proceedings, or at least being heard. If I am wrong in that regard and should there ordinarily be no legal impediment to decide whether the MEC's withdrawal of her review is valid or not, and as to what might have continued in its place, in this stay application, then I nevertheless consider it highly undesirable to do so and would exercise my discretion against entertaining any debate on these issues in the absence of the Premier and MEC first being heard. Although no express relief is sought in regard to the validity of the withdrawal of the MEC's review in the notice of motion in this stay application, any decision as to its validity or otherwise as a preliminary finding to any of the relief claimed in the present application, where that is a live issue in other proceedings, should be avoided. It could result in conflicting findings being reached by this court.

---

[34] *Body Corporate of Valence House (SS: 183/1992) v Malani NO and others* [2015] JOL 33407 (KZD) para 7(c) at 10.

The Afrisun review

[34] The exact status as to whether there is at present a review pending under case number 1366/2015 by Afrisun as a duly admitted party to that litigation, also is uncertain. It appears to be dependent upon the interpretation of the order of 5 February 2015 which granted '. . . leave to intervene without prejudice to any party to raise any arguments in this respect (under case no's 1472/2015 and 1366/2015).'

[35] It is not necessary to resolve that issue of interpretation in this stay application as the Galaxy parties do not rely[35] in their founding affidavit on the Afrisun review as pending litigation which would justify the Peermont application being stayed. If not so confined, then to the extent that the notice of motion might include the Afrisun review as the basis for the stay of the Peermont review, it is not clear and certain that there presently is a pending review by Afrisun under case number 1366/2015, but even if there is, Peermont is not yet admitted as a party to the proceedings under case number 1366/2015. However even if I am wrong in that regard, and the application by Peermont to intervene was to be viewed as a *lis* by it to any review under case number 1366/2015,[36] then I am in any event of the view that I should exercise my discretion against staying the Peermont review.

The Discretion not to Stay Proceedings

[36] Peermont also argued in the alternative that even if this Court was to find that the Peermont application is *lis alibi pendens*, it enjoys a discretion not to stay the Peermont application, based on what is just and equitable in the circumstances of the case and on 'considerations of fairness and convenience'.[37]

[37] In the light of my conclusion that it is not an instance of *lis alibi pendens*, it is not necessary to consider this argument in any great detail. I however refer to it briefly in the event of my main conclusion regarding *lis alibi pendens* being

---

[35] See para 14 or 15 above of this judgment and para 29 of the founding affidavit.
[36] Which would be either the MEC's review if it continues, or the Afrisun review.
[37] *Caesarstone* n28 paras 34 and 36. See also *Kempster Sedgwick (Pty) Ltd v Rajah* 1959 (1) SA 314 (N) at 317A–D; and *Loader v Dursot Bros (Pty) Ltd* 1948 (3) SA 136 (T) at 138 – 139.

incorrect, as I am disposed in the exercise of my discretion, and assuming I erred in concluding that it is not an instance of *lis alibi pendens*, to have refused the stay of the proceedings.

[38] The present would be an appropriate instance for the exercise of such discretion because it would not be just and equitable to stay the Peermont application, and further that the balance of convenience does not favour such an order, because:

38.1 If the MEC's review is indeed found to have terminated and the intervening parties are not entitled to take conduct of that matter, the only sensible course that had remained for Peermont was to have launched the Peermont application. It should not be criticised for doing so, particularly as the approach Peermont has adopted flowed from the Premier and MEC's purported withdrawal of the MEC's review, and at times the Galaxy parties' insistence that the MEC's review had terminated.

38.2 The Peermont review of the impugned decision could achieve the resolution of that matter far more expeditiously than the revival (which might be open to some doubt) and then prosecution of the MEC's review, or its non-revival and the review contemplated in the Afrisun application. The MEC's review, having been withdrawn, can probably only proceed if the Afrisun application to set aside the withdrawal of the MEC's review is successful. In that eventuality, a plethora of interlocutory matters remain which will first have to be resolved before the review can proceed. The review is thus unlikely to proceed in the foreseeable future, whereas the Peermont application is unencumbered by these obstacles and hence capable of more speedy resolution.

38.3 The expeditious consideration of the validity of the impugned decision would benefit all parties, who have been waiting for this matter to be considered and resolved for more than three years, which would also be in the general best interest of the administration of justice.

38.4 Peermont does not seek to predetermine the issues in the Afrisun application. Peermont's argument proceeds on the assumption (rightly or wrongly) that the MEC's review has been withdrawn, and does not concern itself with the validity or lawfulness of that decision. It holds no implications for the Afrisun application and

review and none of the parties to the Afrisun application would be prejudiced in a manner which cannot be compensated by an appropriate order as to costs if the Peermont review was to proceed. Should the MEC review be revived, or the Afrisun review proceed in the meantime, then it could simply be heard together with the Peermont application.[38]

Costs

[39] Both parties have employed two counsel[39] and have asked for the costs of two counsel if their contentions are vindicated. The matter is obviously of importance to the parties. It is also somewhat novel. In the exercise of my discretion on costs I am disposed to acceding to their requests and allowing the costs of two counsel where so employed.

Order

[40] The application is dismissed with costs, to include the costs of two counsel where so employed.

_____

KOEN J

[38] To which Afrisun is in any event a party being the twentieth respondent.
[39] Peermont's heads of argument were signed by Mr Snyckers SC and Ms Goodman. However only Mr Snyckers appeared at the hearing.

APPEARANCES

FOR APPLICANT:	M Pillemer S C with P B J Farlam S C
Applicant's attorneys:	Edward Nathan Sonnebergs
C/o	Tatham Wilkes Inc.
Tel.: 033 345-3501	
Ref.: Mr H Drummond/Gisela/03A1349/16	

FOR FIRST RESPONDENT:	F A Snyckers S C
First Respondent's attorneys:	Webber Wentzel
C/o	Viv Greene Attorneys
Tel.: 033 342 2766	
Cell: 083 613 0487	
Ref.: S H Warber	