

SOUTH AFRICA / JUDGMENT

Balwin Properties Ltd v Axton Matrix Construction (Pty) Ltd and Another (21/56565) [2024] ZAGPJHC 154 (19 February 2024)

[2024] ZAGPJHC 154

COURT

South Gauteng High Court, Johannesburg

BEFORE

Salmon AJ

CASE / FILE NUMBER

21/56565

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REPUBLIC OF SOUTH

AFRICA

IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

DIVISION, JOHANNESBURG

Case no.: 21/56565

REPORTABLE:

NO
OF
INTEREST TO OTHER JUDGES: NO
REVISED.
19
February 2024
In the interlocutory

applications between:

BALWIN
PROPERTIES LTD
APPLICANT
AND
AXTOM
MATRIX CONSTRUCTION (PTY) LTD 1st
RESPONDENT
YAHWEH
CONSTRUCTION AND PROJECTS CC 2nd
RESPONDENT
In
the intervention application of
ATTACQ

WATERFALL INVESTMENT COMPANT (PTY)LTD 1st
APPLICANT
WITWATERSRAND
ESTATES (PTY)LTD
2nd APPLICANT
BALWIN
PROPERTIES LTD
3rd
APPLICANT
In
the review Application between
AXTON
MATRIX CONSTRUCTION (PTY) LTD
1st APPLICANT
YAHWEH
CONSTRUCTION AND PROJECTS CC 2nd
APPLICANT
And
THE
HEAD OF DEPARTMENAT ROADS AND TRANSPORT
1st RESPONDENT
GAUTENG
PROVENCIAL GOVENMENT
THE
MEMBER OF THE EXEUTIVE COMMITTEE FOR ROADS
2nd RESPONDENT
AND
TRANSPORT GAUTENG PROVINCIAL
GOVERNMENT
THE
CHAIRPERSON BID ADJUDICATION COMMITTEE 3rd
RESPONDENT
FOR
ROADS AND TRANSPORT GAUTENG PROVINCIAL
THE
CHAIRPERSON BID EVALUATION COMMITTEE ROADS 4th
RESPONDENT
AND
TRANSPORT GAUTENG PROVINCIAL GOVERNMENT
THE
DEPARTMENT OF ROADS AND TRANSPORT GAUTENG
5th RESPONDENT
PROVINCIAL
GOVERNMENT

Coram: Salmon AJ
Date
of hearing: 19 October 2023 - (MS Teams)
Handed
down on: 19 February 2024
This
judgment is deemed to have been delivered electronically by
circulation to the parties' representatives via email and
the
same shall be uploaded onto the caselines system.

JUDGMENT

SALMON AJ:

INTRODUCTION

1. The proceedings before me involve essentially an application by Balwin Properties Limited ("Balwin") to intervene in an application brought by Axton Matrix Construction (Pty) Ltd ("Axton") and Yahweh 1 Construction & Projects CC ("Yahweh") against five respondents who circumscribe (for want of a better expression) the Gauteng Roads Department, and one other. Embodied in the proceedings before me are interlocutory applications in relation to Balwin's intervention application.
2. The proceedings against the Gauteng Roads Department concern an application to review and set aside the disqualification of Axton and Yahweh from a tender for the construction of a portion of the K60 Highway in Midrand. (That application is referred to as the "Review Application".) The tender was awarded to Edwin Construction (Pty) Ltd, which is cited as the Sixth Respondent in the Review Application.
3. For the sake of easy reference, I refer to Axton and Yahweh, collectively, as the "Joint Venture" or the "Joint Venture parties"; to the five Gauteng Provincial Government respondents as the "Gauteng Roads Department"; and to Edwin Construction (Pty) Ltd as "Edwin". I refer to Balwin's application to intervene in the Review Application as "Balwin's Intervention Application" and to the appurtenant interlocutory applications as the "Interlocutory Applications". When I refer to parties taking steps, and suchlike, this is to be understood - unless obviously otherwise
 - as happening via their attorneys of record.
4. Together with Balwin, Attacq Waterfall Investment Company (Pty) Ltd ("Attacq") and Witwatersrand Estates (Pty) Ltd ("Witwatersrand Estates") sought to intervene in the Review Application. (I refer to Attacq, Witwatersrand Estates and Balwin, compendiously, as the "Developer parties".) Put simply, the Developer parties brought an application to intervene based on the same facts and same Founding Affidavit. Axton and Yahweh agreed to the intervention by Attacq and Witwatersrand Estates, which is now fait accompli, but came to

oppose the intervention by Balwin, as they still do. The distinction in this regard is a matter to be addressed in due course.

5. The Interlocutory Applications are the following: (a) an application for the admission of a supplementary affidavit in Balwin's Intervention Application; (b) an application to amend the Notice of Motion in its Intervention Application; and (c) an application for condonation for the late delivery of that application to amend.
6. According to Mr Tshikila, who appeared for the Joint Venture parties, Balwin's Intervention Application is determinative of the Interlocutory Applications; at least, in the following sense. If Balwin is denied the right to intervene, its affidavit to supplement its position in its Intervention Application, and its application to amend the Notice of Motion in its Intervention Application, and its application for condonation for the late delivery of that application to amend, all become superfluous. From a certain perspective, there is merit in this submission.

BACKGROUND

7. During March 2021, the Gauteng Roads Department invited tenders for the construction of a portion of the K60 between Maxwell Drive and Allandale Road in Midrand. This is a fairly major arterial bisecting what must be one of the fastest-growing developed and developing residential areas in Gauteng. The land surrounding the K60 belongs to Witwatersrand Estates, on which land both Attacq and Balwin have major property developments – and, as will be seen, pending property developments.
8. The Joint Venture submitted a tender for the bid. During June 2021, the bid was disqualified (during the pre-qualification stage) on the basis that it did not comply with the mandatory requirements of the Tender Data. In due course, the Department awarded the tender to Edwin. Following an urgent application launched on 1 December 2021 by the Joint Venture, on 18 January 2022, Justice Kathree-Setiloane interdicted those tender parties (effectively) from concluding any contracts for the construction of the K60, pending the determination of a contemporaneously-launched application by the Joint Venture to review the grant of the tender. That is to say, this is the Review Application.
9. Specifically, framed as a Rule Nisi, the Joint Venture set out to seek an order that the Gauteng Roads Department and Edwin show cause why the following relief, inter alia, should not be granted:

1.1 That the decision(s), taken on or after 11 November 2021 (or thereafter), to disqualify alternatively reject the first and second applicants' tender for Tender ORT 38/11/2019 for the Construction of Road K60 between Maxwell Drive and Allandale Road ("the Tender") is reviewed and set aside;

1.2 Any and all contract(s) concluded between the first and/or second and/or third and/or fifth respondents with any other entity, pursuant to the aforesaid Tender is declared unlawful, invalid, reviewed and set aside;

1.3 The Tender is hereby awarded to the joint venture between the first and second applicant.

1.4 In the alternative to 1.3 above, the first and/or second and/or third and/or fifth respondents are ordered to award the Tender to the joint venture between the first and second applicants.

1.5 In the alternative to 1.4 above, the first and/or second and/or third and/or fifth respondents are ordered to evaluate the Tender afresh, and include in such evaluation process the tender submitted by the joint venture between the first and second applicants.

10. Later, when once the record of the Gauteng Roads Department proceedings had become available, an amended Notice of Motion (dated 28 September

2022) revised the relief[1] sought by the Joint Venture parties to the following:

1. That the decision(s), taken by the first, alternatively third, alternatively fourth respondents in or after June 2021, to disqualify alternatively reject the first and second applicants' tender for Tender ORT 38/11/2019 for the Construction of Road K60 between Maxwell Drive and Allandale Road ("the Tender") is declared unlawful, invalid, reviewed and set aside.
2. That the decision, taken by the first respondent on or about 1 December 2021, to award the Tender to the sixth respondent is declared unlawful, invalid, reviewed and set aside.
3. Any and all contract(s) concluded between the first and/or second and/or third and/or fifth respondents ("the Department") with the sixth respondent, pursuant to the aforesaid Tender is declared unlawful, invalid, reviewed and set aside;
4. The first, second, third, fourth and fifth respondents are, jointly and severally, ordered to compensate the first and second applicants in the sum of R27 678 596.32 exclusive of VAT, alternatively such sum as may be found by the Court as just and equitable.
5. The amount referred to in paragraph 4 above shall be paid within thirty (30) days of this order into a bank account to be nominated by (or on behalf of) the first and second applicants, which nomination shall be made within ten (10) days of this order.
6. In the alternative to paragraphs 4 and 5 above:
 - 6.1. The Tender is hereby awarded to the joint venture between the first and second applicant; alternatively
 - 6.2. The first respondent is ordered to award the Tender to the joint venture between the first and second applicants; further alternatively
 - 6.3. The first and/or second and/or third and/or fifth respondents are ordered to evaluate the Tender afresh, and include in such evaluation process only the tenders submitted by:

6.3.1. The joint venture between the first and second applicants; and

6.3.2. The sixth respondent...”

11. The relief sought is no longer framed as a Rule Nisi, and there are other substantive differences between this amended Notice of Motion and the initiating Notice of Motion (the claim for damages, for example). Save that the pursuit of a damages claim in Motion proceedings – particularly for a “just and equitable” sum - may introduce difficulties (and, in which case, the relief in prayer 6 of the amended Notice of Motion looms still foremost in the Joint Venture parties’ sights as the main relief) nothing turns on these differences for present purposes.
12. In the meantime, during 2017 and 2018, Attacq and Witwatersrand Estates had entered into Memoranda of Agreement with, in particular, the Gauteng Department of Roads & Transport – in due course to become the Fifth Respondent in the Review Application. I refer to those Memoranda of Agreement as “the 2017/18 MOA”. Shorn of frills, Attacq and Witwatersrand Estates had thereby committed themselves – financially, and by way of land availability - to support the upgrade of the K60, and had already invested millions of rands accordingly. Although not a party to the 2017/18 MOA, in turn, Balwin had committed financially to Attacq in light of its extensive residential development interests - given the impending upgrade of the K60 - and had, accordingly,

already paid out several millions of rands.

13. For reasons which are not relevant, the Review Application moved somewhat slowly. In September 2022, perturbed that their interests were being prejudiced, the Developer parties brought an application to intervene. According to their Notice of Motion, the order to be sought (once having intervened) is to direct the Gauteng Roads Department to perform in terms of the 2017/18 MOA, “by completing the expeditious conclusion of the Project contemplated in such memoranda”. Indeed, that ‘project’ was and is the K60 upgrade which is what the tender was all about. In the Founding Affidavit supporting their intervention, the Developer parties say they are not partial to who gets the tender; just that the upgrade must take place – because, for so long as it does not, their prejudice grows. In due course, Justice Wepener was appointed to case manage the proceedings. (Several meetings have been held with Wepener J, with resultant directions.)
14. On 27 September 2022, the Joint Venture parties delivered their Replying Affidavit in the Review Application. However, before any order of Court effecting the joinder of the Developer parties, information came to Balwin’s attention which made it think that the Joint Venture had failed to disclose a material conflict of interest in its bid submission, and therefore made it rethink its position on the status of the Joint Venture vis à vis the award. It took the following steps: first, it notified Wepener J, and the parties, that it wished to intervene in the Review Application instead as a respondent – in order, therefore, to oppose the relief sought by the Joint Venture parties.

15. This was by way of a letter dated 21 October 2022, which letter also alluded to an intention to file a supplementary affidavit in which the information in question is to be placed before the Court relating to the review proceedings; and, indeed, relating to the appropriate remedy (in due course) there. The letter did not say what the information is. Subsequent to its receipt, the Joint Venture informed the Developer parties that, although they did not agree that there was any basis for their joinder, in order to avoid delays, they consented to all three Developer parties joining the Review Application.
16. Then, on 11 January 2023, by way of a Notice annexed to a so-called supplementary affidavit that it delivered, Balwin notified its intention to seek the following relief in the Review Application:
 1. Granting the Third Applicant for Intervention leave to intervene and be joined as the Seventh Respondent in the main application under case no. 21/56565 so as to seek an Order in the main application in the following terms:
 - 1.1 directing the Fifth Main Respondent to perform in accordance with its obligations stipulated in clause 5 of the memoranda of agreement concluded between it and the First Intervening Applicant on around 17 February 2017 and during December 2018, including by procuring the expeditious completion of the Project contemplated in such memoranda;[2]
 - 1.2 the First and Second Applicants' application be dismissed; and
 - 1.3 granting costs, jointly and severally, on an attorney and client scale against the First and Second Applicants, and any other party who opposes this application, jointly and severally, on a party and party scale.
 - 1.4 Directing that the affidavit of Ibrahim Mia dated 31 August 2022 shall serve as the Third Intervening Applicant's founding affidavit for the relief sought in paragraph 1.1 above, and that the affidavit of Raaziq Ismail to which this Notice is attached shall serve as the Third Intervening Applicant's answering affidavit in the main application brought by the First and Second Applicants.
17. In short, in addition to seeking leave for the acceptance of the initial Founding Affidavit in the Developer's intervention application (in order to sustain the relief Balwin continues to seek, qua applicant regarding the 2017/18 MOA) it also seeks the admission of the supplementary affidavit, in order to serve as its answering affidavit in the relief it seeks, qua respondent, dismissing the Review Application. This supplementary affidavit purports to explain Balwin's position, and references the new information which prompted its part volte face. It might be easier to use the indicator "Supplementary Affidavit" in its regard.

18. Shortly after the delivery of this Notice – annexed to the Supplementary Affidavit – steps giving rise to the Interlocutory Applications took place. Balwin served a Notice to Amend the Notice of Motion in the Developer parties' Application to Intervene. This was in order to substitute the relief in the initiating Notice of Motion (of the Developer parties' intervention application) with the relief mentioned in paragraph [16] above. The Joint Venture parties objected to the intended amendment. Balwin served an application to amend but missed the regulated deadline to do so by one day, so the Joint Venture parties filed an irregular proceedings Notice. Balwin then delivered an application for condonation for being (one day) out of time, and which the Joint Venture parties have opposed.
19. These interlocutories are dealt with later on in this judgment. At this juncture, it is as well to deal with the ostensibly anomalous situation presented by Balwin's revised positioning. After all, it seeks to intervene now wearing the cap of a Respondent in the Review Application. However, the mandamus relief it intends to seek (against the Gauteng Roads Department) in the Review Application, coupled with references to its reliance on a "founding affidavit" and an "answering affidavit" indicate that it must seek, in effect, to be applicant and respondent in the same application. In proceedings already somewhat mired by the involvement of several parties with differing interests and the attendant interlocutory episodes, simplicity and clarity may be thought preferably as attributes to win the day.
20. However, as submitted by Mr Watson (who, together with Ms Louis, appeared for Balwin), the orders sort by Balwin wearing these two different hats are not mutually inconsistent. Moreover, he submitted, there could be no objection to Balwin seeking the mandatory order, regarding the 2017/2018 MOA, as an applicant in one separate set of proceedings, whilst intervening as a respondent in the Review Application in order to oppose the relief there sought, and then having the proceedings consolidated. So, at first glance perhaps procedurally unwieldy, there is nothing juridically defective in Balwin's approach. It might even save everyone's time.
21. Whether Balwin can seek the order regarding the 2017/18 MOA (the mandamus against the Gauteng Roads Department) – Mr Tshikila argues it cannot – is to be addressed shortly. In any event, on 17 January 2023 and by agreement of all the parties to the Review Application, Justice Wepener (in case management) granted an order joining Attacq and Witwatersrand Estates to the Review Application, as they had sought from the outset. Pertinently, the Order by Justice Wepener reads:
 1. The first and second intervening applicants be granted leave to intervene and be joined as the third and fourth applicants in the main application under case no. 21/56565 ("the main application"), so as to seek an order in the main application directing the fifth main respondent to perform in accordance with its obligations stipulated in clause 5 of the memoranda of agreement concluded between it and the first intervening applicant on around 17 February 2017 and during December 2018, including by procuring the expeditious completion of the Project contemplated in such memoranda;

2. The affidavit filed in support of this application shall serve as the first and second intervening applicant's founding affidavit in the main application; and..."
22. Thus, two consequences occur. First, the Founding Affidavit of the Developer parties in their intervention application is before the Court in the Review Application. I revert to the significance of this in due course. Next, the (amended) Notice of Motion in the Review Application must be read as incorporating a prayer along lines which encompass the specific relief Attacq and Witwatersrand Estates wish to pursue (and for which Justice Wepener authorised their joinder). It does not appear from the Caselines record whether, technically, an amendment to this effect has been made to the (already once-amended) Notice of Motion in the Review Application, but I do not think the technicality or formality matters.
23. What does matter is the import of this order. That is, of course, that Balwin's joinder – at least, qua applicant – to the Review Application is now to be determined not on the initial Notice of Motion, nor the amended Notice of Motion, but with this relief in mind. This has a bearing in that it is no longer the case that – to quote from Mr Tshikila's

Heads of Argument:

"the issues presented for determination in the main application administrative law review issues under PAJA. The question is whether

the Department's administrative law obligations were fulfilled, both I the rejection of the main applicant's tender, and in the award of the tender to Edwin." (sic)

There is now (also) a common law mandamus at stake.

24. Whether Balwin needs to seek the mandamus relief, given that the other Developer parties are now doing precisely that, is another question – though that fact does not affect Balwin's right or entitlement to intervene.

INTRODUCTION TO THE BALWIN INTERVENTION APPLICATION.

25. Despite Mr Tshikila's submission that it is not necessary to deal with the Interlocutory Applications if Balwin's Intervention Application is not successful, I am not sure that it is that straight-forward, albeit initially and mostly a sensible proposition.
26. This is because Balwin seeks to intervene in the Review Application, effectively, in the two respects already referred to. Firstly, although not in name or status as an applicant, yet it seeks relief and therefore must be clothed and empowered (with standing) to do so as if an applicant - along with the other Developer parties so as to seek the specific relief they seek. Secondly, it seeks to intervene (now, in name and status) as a respondent, where it opposes the grant of the relief the Joint Venture parties seek in the Review Application - but on the grounds of the new evidence which has come to light and which it wishes to place before the Court. The Joint Venture parties oppose Balwin's intervention for whatever purpose.

27. Theoretically, the Court can grant Balwin's intervention to seek relief (that is to say, as an applicant) but not grant relief to intervene as a respondent; and, vice versa. In either of these events, it does not axiomatically follow that the relief sought by Balwin in the Interlocutory Applications is to fall away, as if any underlying causa has been neutered. Theoretically, the Court may still admit the Supplementary Affidavit (to reference another instance) – there is a self-standing application for its admission - notwithstanding that Balwin's application to intervene as Seventh Respondent in the Review Application is dismissed. And, of course, the Court can condone the delivery, one day out of time, of an application to amend notwithstanding that it declines to grant the amendment. I deduce, therefore, that Mr Tshikila's point was not so much about the interlocutories automatically falling away; but, more that, if intervention on both scores was not to be permitted, ergo, Balwin would have no standing to seek any relief, interlocutory or otherwise.
28. This, in turn, plays onto the adjudication of Balwin's (theoretically) dichotomous intervention applications – and,

the Joint Venture parties' opposition thereto. Whilst Balwin's locus standi to seek leave to intervene must, and will be examined, it does seem more than passing strange that the Joint Venture parties initially

consented to the joinder of all the Developer parties – and Attacq and Witwatersrand Estates, indeed, have been joined thus

- yet Balwin is now being put to the test, in order to pursue exactly the same relief. And this, only since it placed before the parties its Supplementary Affidavit in which evidence newly-come-to-light is raised. What makes this strange, is that Balwin is being called upon to prove its entitlement so to intervene, yet in initially consenting to the joinder of all three Developer parties the Joint Venture parties had recorded their denial that any of them had the right to do so. The Joint Venture parties did not record, for example, that they agreed that Attacq had locus standi due to its contractual privity in light of the 2017/18 MOA, but that Balwin did not. It is the good right of the Joint Venture parties to call upon opponents to prove things, but the distinction now drawn does carry with it an element which harks towards the admonition of Harms DP that 'litigation is not a game'.^[3] It is partly this which underpins Mr Watson's request for a punitive costs award – something to be addressed below.
29. One further aspect requires comment in this preliminary discussion. Assume Balwin had not joined with Attacq and Witwatersrand Estates in the attempt to intervene in the Review Application – in other words, purely and simply to obtain a mandamus that the Gauteng Roads Department get a move on with the upgrade of the K60. The unfolding scenario would have been that Attacq and Witwatersrand Estates would have been joined, following the agreement thereto recorded by the Joint Venture parties. What was to prevent Balwin from bringing its own independent application to seek the same mandatory interdict? Only that it had locus standi to do so. If it would have locus standi, it becomes difficult to conceive of a

premise upon which it should be denied leave to intervene. There again, what was to prevent Balwin from bringing its own independent application to interdict the grant of an award to the Joint Venture for the K60 project on the basis of the information which had latterly come its way? Only that it had locus standi to do so. If it would have locus standi, it becomes difficult to conceive of a premise upon which it should be denied leave to intervene in order to oppose the grant of that relief.

30. The nevertheless persuasive arguments of both Mr Watson and Mr Tshikila in relation to Balwin's Intervention Application drew no distinction between Balwin's position as if an applicant to seek the mandamus relief, and as a respondent to have the Review Application dismissed. It is correct, as they both submitted, that the entitlement (with this nomenclature I do not exclude the obtaining discretionary elements) to intervene postulates self-interest and/or public

interest, which are different creatures in this context as the discussion below demonstrates. But, whilst the issue – joinder

vs intervention – generally boils down to a 'direct and substantial interest' evaluation, there is a distinction[4], perhaps more so in light of the fact that the mandamus relief must now be considered (for it would be artificial - and formalistic in the extreme - not to do so) as being prayed for in the Review Application.

31. The reason is this. Once Attacq and Witwatersrand Estates seek the mandamus as they are set up to do, the question of them joining interested parties (notionally) arises. Put differently, would they have not joined Balwin? And, again put differently, why would - or should - they have not joined Balwin? This answer requires an enabling factual matrix, of course, but it is not too difficult to divine.
32. What of the facts? Although the Supplementary Affidavit is not, yet, the Founding Affidavit in support of the intervention by all three Developer parties is before the Court. It shows certain facts, referenced below, which are not the subject of any genuine or bona fide dispute. It is perhaps worth noting that, in that Founding Affidavit, the allegation is made that:

"12. The intervening applicants have a direct and material interest in the Project, and consequently in any proceedings that may delay or impact its successful completion."

33. This allegation is admitted by the Gauteng Roads Department in its answering affidavit. No answering affidavit was delivered by the Joint Venture Parties; they did, however, deliver a "Replying Affidavit" (albeit they not applicants in casu) addressing allegations made by the Gauteng Roads Department in its Answering Affidavit but in which, still, no issue is taken with the aforementioned allegation on behalf of, inter alia, Balwin - nor the admission thereof by the Gauteng Roads Department. (It may be mentioned, here, that the Gauteng Roads Department does not oppose the mandamus relief sought by Attacq and Witwatersrand Estates – they say, however, that until the interdict imposed by Kathree-

Setiloane J is lifted or overruled, they cannot do anything.)

34. It is apparent from what I have recorded in the above paragraph that there is no answer to the allegations deposed to on behalf of the Developer parties (including, therefore, Balwin[5]) in order to substantiate the averment of their direct and substantial interest in both the Project and in proceedings that may delay or impact its successful conclusion. The facts in this regard are prefaced by the assertion of Mr Ibrahim Mia, a director of Witwatersrand Estates, that, although the Developer parties are agnostic as to who is appointed to undertake the Project, their

concern is:

“... to ensure that (a) the appointment process is finalised expeditiously and without further undue delay so that the Project can be completed as soon as possible, and (b) the entity appointed has the necessary expertise and experience to complete the construction safely and efficaciously.”

These are concerns of moment when the interests of the Developer parties are borne in mind.

35. The above-postulated factual matrix embraces the following averments, which are not subject to any dispute:
- The Attacq Group are the founders and developers of Waterfall City, a suburb north of Johannesburg;
 - Attacq is responsible for the development of specific areas at the Waterfall Estate mainly focussed around the Mall of Africa CBD and industrial portions east of the N1;
 - Balwin is responsible for a portion of the residential development that has been undertaken at the Waterfall Estate, through two developments
 - namely, the Polo Fields Development and Munyaka Development. It has constructed 1020 units in the Polo Fields Development, and intends to build a further 492 units. In the Munyaka Development, it has completed 1079 units to date, and intends to build a further 4000 units;
 - The construction of that portion of the K60 comprising the Project is essential to the further growth and development of Waterfall City, in that it will connect Waterfall to an east-west transport corridor. Without it, further development is stymied, placing at risk 4492 units currently planned for development by Balwin and, with it, thousands of jobs;
 - The intervening applicants have also made substantial investments in the Project. In terms of the 2017/18 MOA, Attacq and Witwatersrand Estates undertook to make certain financial contributions to the Project, as well as assuming responsibility for procuring the investigation, design, and supervision of construction of the Project up to completion;

· In terms of an agreement between Attacq and Balwin, the latter is liable to for 50% of the additional amounts (comparing the 2017 MOA contribution and the 2018 MOA contribution liabilities of Attacq);

· In short, the Developer parties are partial funders of the Project. Delay in completion of the Project is also prejudicing them because it has a knock-on effect on the timing of developments at Waterfall Estate. Moreover, for so long as the Project is delayed, there is the continued risk that the costs associated with it will escalate.

36. Given that the Attacq and Balwin developments are significantly dependant upon the upgrade of the K60 – not only timeously, but also competently so – it seems a challenging notion to gainsay Mr Mia’s allegation that all the Developer parties have a direct and substantial interest in the Review Application. Indeed – even if to be assessed on this basis – the prospect of Attacq likely having to join Balwin in an application Attacq brought to seek the relief it now seeks starts to loom large.

37. But, submits Mr Tshikila, that interest – particularly of Balwin’s (and the quality of the other Developer parties’ interests now being historic) – is only financial, and a financial interest does not equate to the interest that our law requires to constitute a party’s right to intervene. Leaving aside a determination as to the correct categorization of Balwin’s interest and leaving aside the separate issues of own-interest standing and public-interest standing in light of the Constitution, I am not convinced that this is correct in absolute terms.

DIRECT AND SUBSTANTIAL INTEREST

38. The authorities on joinder are plentiful and it is not necessary to undertake any wide-ranging review. It is perhaps not even necessary

to delve into the potential distinction between joinder (proper) as an applicant, which would require locus standi to seek the particular relief, and joinder as a respondent which would require merely a direct and substantial interest in the subject

matter of the dispute. (I note that the current discussion concerns the basic position at common law; I advert to the Constitutional

position further below.) The trite position is that a party who has a direct and substantial interest in the subject matter of a dispute must be joined.[6] This is also referred to as a “legal” interest. What is meant by this “direct and substantial interest” was addressed in Henri Viljoen[7] and that decision is accepted as setting the benchmark; it has been followed and applied countless times since. In short, a purely

financial interest does not constitute a legal (direct and substantial) interest.

39. That control over who can, and who cannot, make representations to a Court – for only a party to the proceedings can – makes for common sense. When a court of law is seized with an adjudication about (for example) the legalities of a right, and/or its enforcement, downstream or upstream ramifications or consequences to other parties which are

denominated purely in terms of financial loss or gain are not relevant to that legal determination. Those interests do not engage with the lis. This is why a classic example is of a sub-tenant, who has no interest – the etymology of which is the Latin word *interesse*, meaning “to be or lie between” – in a legal dispute between her lessor and the owner about their lease.

40. But, as the Constitutional Court explained in *Giant Concerts*:^[8]

“e. Standing is not a technical or strictly defined concept. And there is no magical formula for conferring it. It is a tool a court employs to determine whether a litigant is entitled to claim its time, and to put the opposing litigant to trouble.”

f. Each case depends on its own facts. There can be no general rule covering all cases. In each case, an applicant must show that he or she has the necessary interest in an infringement or a threatened infringement. And here a measure of pragmatism is needed.”

41. Can it really be contended that Balwin’s interest in the Gauteng Roads Department being directed to conclude the K60 project as expeditiously as possible is exclusively to be denominated in terms of “klinkende munt”? Nearly 5000 houses for someone needing and/or wishing to live in the area cannot be built; thousands of jobs are at risk. Even if Balwin could, somehow, build the units to which it is committed, the necessary infrastructure – correctly, here, at least, framed in terms of traffic access – to serve the development will not be in place. These are pithy considerations. In my view, they must mean that Balwin has an interest of substance in joining to seek the relief (that is being sought by Attacq and Witwatersrand Estates) in the Review Application.

42. Bearing in mind, in addition, the Constitutional Court’s imperative cited a few paragraphs above, this disposes of Mr Tshikila’s submission that Balwin has no contractual nexus with the Gauteng Roads Department, and so it cannot seek to assert a contractual right against the Gauteng Roads Department – in contradistinction with Attacq and Witwatersrand Estates. It has its own interest of substance, and which is toe-to-toe concerned with the mandamus relief.

43. If the foregoing finding is wrong on the own-interest assessment, it garners support in the approach postulated by the Constitutional

Court in *Giant Concerts*:^[9]

“The interests of justice under the Constitution may require courts to be hesitant to dispose of cases on standing alone where broader concerns of accountability and responsiveness may require investigation and determination of the merits. By corollary, there may be cases where the interests of justice or the public interest might compel a court to scrutinise action even if the applicant’s standing is questionable. When the public interest cries out for relief, an applicant should not fail merely for acting in his or her own interest.”

44. Therefore, I agree with Mr Watson's submissions that, also, Balwin has a public interest standing which is triggered insofar as the relief the Developer parties seek is concerned. This is because, to quote from his written argument:

"The total economic impact of the developments, namely the impact on the broader economy, is approximately R6.4 billion. Balwin will also employ, in total, 18,292 people in respect of the projects, affecting R167 million in wage taxes to be received by the state. The total value of the developments, namely the value of the units sold, is R4.8 billion, totalling R39.8million in rates and taxes per year to be earned by the state once completed.... Finally, the halt on the construction of the K60 affects the traffic flow into and around these developments, which is dependent on the construction of the K60."

45. In the circumstances, I hold in favour of Balwin's application for leave to intervene as if an applicant pursuing the mandamus relief, though the intervention as a respondent to oppose the relief sought by the Joint Venture parties is not necessarily to be determined on the same footing.
46. There is the question of public interest when it comes to the award of a state tender. In this regard, the passage from Giant Concerts cited above bears repetition:

"... there may be cases where the interests of justice or the public interest might compel a court to scrutinise action even if the applicant's

standing is questionable. When the public interest cries out for relief, an applicant should not fail merely for acting in his or her own interest."

47. Put differently, can a member of the public not put her hand up and say, "I have facts which did not come to light in any public participation process but which indicate reason why the public tender should not be awarded to "X"?" It is difficult to fathom a reason why a party in that position should not be permitted to put the facts before the Court, and make submissions thereon. The only way someone can do so is by being a party to the proceedings. To deny that person the opportunity of putting the facts before the Court – by denying it intervention – is surely to deprive the Court of facts which (and one assumes for the purposes of the exercise that they are relevant) it requires in order to dispense justice?
48. But, as Mr Tshikila submitted, it is not so simple. Section 38 of the Constitution grants the "right to approach a competent court" to (relevantly) "(d) anyone acting in the public interest" but it is only an entitlement where "a right in the bill of Rights has been infringed or threatened." Therefore, Balwin still has to demonstrate the threat to a Constitutional right before any question of public interest is triggered.
49. And, Mr Tshikila continued, Balwin cannot seek refuge under the Constitution where it did not identify the Constitutional right in the Founding Affidavit in support of its intervention application.

50. The latter is an accurate statement of fact when regard is had to the Founding Affidavit in the Developer parties' intervention application. But that related to the intervention in order to pursue common law mandamus relief; under consideration now is an intervention to oppose (inter alia, but not indifferently so) the grant of the contract for the K60 upgrade to the Joint Venture. Mr Watson's answer to this is twofold.
51. First, the Review Application being proceedings in terms of the Promotion of Administrative Justice Act, once the background facts are all set out, it is not necessary to specify the precise statutory provision.[10] In any event, section 38 of the Constitution is to be read into PAJA (in terms of which the Review Application is premised) following the dictate of Justice Cameron in *Giant Concerts*: [11]

"PAJA, which was enacted to realise section 33, confers a right to challenge a decision in the exercise of a public power or the performance of a public function that "adversely affects the rights of any person and which has a direct, external legal effect". PAJA provides that "any person" may institute proceedings for the judicial review of an administrative action. The wide standing provisions of section 38 were not expressly enacted as part of PAJA. Hoexter suggests that nothing much turns on this because "it seems clear that the provisions of section 38 ought to be read into the statute." This is correct."

52. Further, as the Constitutional Court explained in *Lawyers for Human Rights*: [12]

"[t]he issue is always whether a person or organization acts genuinely in the public interest. A distinction must, however, be made between the subjective position of the person or organization claiming to act in the public interest on the one hand, and whether it is, objectively speaking, in the public interest for the particular proceedings to be brought. It is ordinarily not in the public interest for proceedings to be brought in the abstract. But this is not an invariable principle. There may be circumstances in which it will be in the public interest to bring proceedings even if there is no live case. The factors set out by O'Regan J [13] help to determine this question. The list of relevant factors is not closed. I would add that the degree of vulnerability of the people affected, the nature of the right said to be infringed, as well as the consequences of the infringement of the right are also important considerations in the analysis". [14]

53. Moreover, Mr Watson submitted, the position Balwin requires be put before the Court in the Review Application has an important bearing on a remedy. If the tender was marred by an irregularity, and if it was a reviewable irregularity, the Court would be obliged to declare the administrative decision invalid. [15] Thereupon, the Court must determine the remedy, which is to be a just and equitable order. [16]
54. In *Allpay*, [17] Justice Froneman stated the following under the rubric "Proper approach to remedy":

"[29] In Steenkamp Moseneke DCJ stated:

“It goes without saying that every improper performance of an administrative function would implicate the Constitution and entitle the aggrieved party to appropriate relief. In each case the remedy must fit the injury. The remedy must be fair to those affected by it and yet vindicate effectively the right violated. It must be just and equitable in the light of the facts, the implicated constitutional principles, if any, and the controlling law. It is nonetheless appropriate to note that ordinarily a breach of administrative justice attracts public-law remedies and not private-law remedies. The purpose of a public-law remedy is to pre-empt or correct or reverse an improper administrative function. . . . Ultimately the purpose of a public remedy is to afford the prejudiced party administrative justice, to advance efficient and effective public administration compelled by constitutional precepts and at a broader level, to entrench the rule of law.”

The emphasis on correction and reversal of invalid administrative action is clearly grounded in s 172(1)(b) of the Constitution, where it is stated that an order of suspension of a declaration of invalidity may be made 'to allow the competent authority to correct the defect' (own emphasis). Remedial correction is also a logical consequence flowing from invalid and rescinded contracts and enrichment law generally.

[30] Logic, general legal principle, the Constitution and the binding authority of this court all point to a default position that requires the consequences of invalidity to be corrected or reversed where they can no longer be prevented. It is an approach that accords with the rule of law and principle of legality.

[31] In the merits judgment this court stated:

“Once a finding of invalidity . . . is made, the affected decision or conduct must be declared unlawful and a just and equitable order must be made. It is at this stage that the possible inevitability of a similar outcome, if the decision is retaken, may be one of the factors that will have to be considered. Any contract that flows from the constitutional and statutory procurement framework is concluded not on the state entity's behalf, but on the public's behalf. The interests of those most closely associated with the benefits of that contract must be given due weight. Here it will be the imperative interests of grant beneficiaries and particularly child grant recipients in an uninterrupted grant system that will play a major role. The rights or expectations of an unsuccessful bidder will have to be assessed in that context.”

[32] This corrective principle operates at different levels. First, it must be applied to correct the wrongs that led to the declaration of invalidity in the particular case. This must be done by having due regard to the constitutional principles governing public procurement, as well as the more specific purposes of the Agency Act. Second, in the context of public-procurement matters generally, priority should be given to the public good. This means that the public interest must be assessed not only in relation to the immediate consequences of invalidity — in this case the setting-aside of the contract between SASSA and Cash Paymaster — but also in relation to the effect of the order on future procurement and social-security matters.

[33] The primacy of the public interest in procurement and social-security matters must also be taken into account when the rights, responsibilities and obligations of all affected persons are assessed. This means that the enquiry cannot be one-dimensional. It must have a broader range.

55. Does Balwin fit the bill insofar as public-interest standing, to oppose the relief sought by the Joint Venture, is concerned? Can it be said, objectively speaking, to be acting in the public interest? According to its Supplementary Affidavit (to serve as an Answering Affidavit in opposing the relief the Joint Venture seeks), where Balwin speaks as an entity substantially and significantly (and, both directly and indirectly)

involved in the public community affected,[18] three grounds are raised.

56. First, the Gauteng Roads Department has no discretion to condone the Joint Venture's non-compliance with mandatory pre-qualification criteria. This premise is argumentative, based on the Rule 53 record. Next, the Joint Venture's bid actually contained two bid amounts: one of almost R300 million, and another of almost R340 million, giving rise to disqualification, anyway. The third ground is that Yahweh failed to disclose a material conflict of interest.

57. The following appears from the Record of the proceedings to adjudicate the tender – the Rule 53 record, in other words, to be before the Court in the Review Application[19] in due course. Yahweh is a close corporation. It has a sole member, Ms Phumeza Mangcu. Ms Mangcu completed the tender documentation on behalf of Yahweh. One of these documents is a Compulsory Enterprise Questionnaire. In its section 6, under the rubric "Service of the State" it enquires, inter alia, whether any sole proprietor, partner in a partnership, director, manager, principal shareholder or stakeholder in a company or close

corporation is currently or has been within the last 12 months in the service of a variety of state and municipal bodies. One of the identified capacities is "a member of an accounting authority of any national or provincial public entity". Ms Mangcu signed a declaration, on 16 April 2021, affirming that this did not apply to her. In other words, she was not in any such service.

58. Annexed to Balwin's Supplementary Affidavit, in support of its contention that there was a material non-disclosure by the Joint Venture parties, is the 2020 – 2021 Annual Report of Gauteng Enterprise Propeller. According to the Report (a publication of Gauteng Province) Gauteng Enterprise Propeller is a public body established in terms of the Schedule 3C listing of provincial public entities as provided in the Public Finance Management Act 1999. Its existence, functions and duties are governed by the Gauteng Enterprise Propeller Act 2005. Its mandate is to drive the revitalization of township economies, enhanced participation of SMMEs and Co-ops in the Province's mainstream economy, and the growth and development of eleven identified sectors: from agro-processing to tourism, to minerals beneficiation to creative industries.

59. According to the Report, further, Ms Mangcu is the Deputy Chairperson of the Board and was appointed to this position with effect from 1 October

2020. In addition, she is the Chairperson of the Risk and Governance Committee. The Board is identified as the “Accounting

Authority” – which it is, in terms of and for the purposes the Public Finance Management Act.[20]

60. Prima facie, therefore, the declaration by Ms Mangcu that she was not a member of an accounting authority is open to doubt and Balwin contends that Ms Mangcu’s position should have been disclosed in the tender bid by the Joint Venture. Although the scope of a party’s

competence to intervene is ringfenced from the merits of the proceedings into which it wishes to intervene, it is difficult to

assess and adjudicate objectively speaking Balwin’s public interest with a mind disabused of the information Balwin intends to be put before the Court. For it is only qua party that it can put the information before the Court, and it is equally difficult to gainsay the suggestion that it is in the public interest that the Court determining the Review Application - in due course, and whatever remedy is to follow its adjudication – has before it the information. This is obviously not any finding, intimated or otherwise, on the cogency of the information and its relevance to the tender process. As Mr Tshikila informed me during argument, Yahweh has an answer to the allegations.

61. But all this indicates, in my view, that Balwin has public interest standing to oppose the relief sought by the Joint Venture parties,

and I hold accordingly. Yet, if that finding is wrong, in my view, Balwin gets home on own-interest as contemplated by section 38 of the Constitution. First, as Justice Ackermann made clear in *Ferreira v Levin*, [21] although a person acting in their own interest must allege that a right in the Bill of Rights has been infringed or threatened, such a person does not have to allege that his or her own right has been infringed or threatened. Instead, such a person must simply show that he or she has a sufficient interest in obtaining the relief claimed.

62. Next, in this regard, reference is also made to what Justice Cameron stated in *Giant Concerts*: [22]

“The object of the standing requirement, the Court held, was that courts “should not be required to deal with abstract or hypothetical

issues, and should devote its scarce resources to issues that are properly before it”. The Court held that own-interest standing

does not require that a litigant must be the person whose constitutional right has been infringed or threatened: “What the section requires is that the person concerned should make the challenge in his or her own interest.” That was plainly the

case with the applicants. The core of their complaint was that they were required to answer questions that might incriminate them, and which might later be used in evidence against them. This meant that the provision directly affected their interests. Even though the “direct” interest lay in the potential impact of the challenged provision on their interests – since no prosecution was impending or threatened – their wish to secure a ruling on the provision was not hypothetical or academic, but raised a real and substantial issue. They therefore had sufficient interest in having it resolved.”

And, again:[23]

“[42] The impact of the Constitution on own-interest standing is evident in Ferreira, Eisenberg and Kruger. However, it is in my view necessary to emphasise that in each of those cases the own-interest litigant showed that his or her

interests or potential interests were “directly affected” by the action sought to be challenged. It should be noted that the own-interest provision in section 38(a) is not isolated – it stands alongside section 38(b)-(e). These provisions create scope for public interest, surrogate, representative and associational challenges to illegality. The risk that an unlawful decision could stand because an own-interest litigant cannot establish standing is diminished by the fact that broad categories of other litigants, not acting in their own interest, are entitled to bring a challenge.

[43] The own-interest litigant must therefore demonstrate that his or her interests or potential interests are directly affected by the unlawfulness sought to be impugned.”

63. In my view, the facts set out above encapsulate what the above authorities embrace as providing own-interest standing as well. Accordingly, I hold that Balwin has a basis to intervene as a Respondent in the Review Application.

THE INTERLOCUTORY APPLICATIONS

64. These can be disposed of without much ado. First, the question of condonation for Balwin seeking to amend the Notice of Motion (in its Application to Intervene) one day late. In the context of the litigious water that has already passed under the bridge, and the time frames involved, making Balwin seek condonation for being one day out of time is short on merit and nothing short of vexatious. I grant condonation, and as a mark of disapproval the Joint Venture will pay costs on the scale of attorney and client.

65. Next, the amendment to the Notice of Motion. It will be remembered that the amendment sought is of the Notice of Motion in the original Application to Intervene brought by the Developer parties, in terms of which they sought leave to intervene so as to seek the mandamus relief. Attacq and Witwatersrand Estates, the First and Second Applicants in that application, have been joined. The amendment

is only that – at this stage, it is not a seeking of the relief (and as to which is dependent upon the amendment).

66. The amendment sought is simply in respect of prayers in the Notice of Motion. As Kuper J noted in *Tomassini*,^[24] not granting an amendment in certain circumstances “might lead to the necessity of introducing further actions in order to arrive at the same position that could be arrived at by a simple amendment of the pleadings.” (This is the point I have made above.) True, the amendment sought by Balwin does change the scope and referencing of the prayers because now it seeks to intervene as a respondent, and so the Notice of Motion in question needs to reflect its position as Respondent, and also the relief relates to one of its affidavits on record being a Founding Affidavit and another being an Answering Affidavit.
67. But it is difficult to see how the amendment per se causes prejudice to the Joint Venture parties. The mandamus relief is already to be read into the Notice of Motion in the Review Application. If Balwin is granted leave to intervene as a Respondent in the Review Application, as I have already found, then per force it opposes the grant of the relief sought by the Joint Venture parties and in which event it would ask for the application in that

regard to be dismissed anyway. Introducing a prayer for costs, now, cannot cause prejudice if only because the award thereof – of a punitive nature or otherwise – is in the discretion of the future Court and which it will exercise judicially. Either Balwin will make out a case for such award as it will (in due course) be seeking, and concomitantly persuade the exercise of judicial discretion, or it won't.

68. The relief governing the positioning of the respective affidavits – one as founding and one as answering – is also neither here nor there when once the intervention is to be approved. The Joint Venture parties have had the opportunity of responding to the allegations and may exercise further opportunities with a Court's leave.
69. I therefore propose to grant the relief sought by Balwin to amend the Notice of Motion.
70. Lastly, the question of the Supplementary Affidavit. Balwin seeks its admission, in particular to serve as the Answering Affidavit in its opposition to the relief sought in the Review Application. Once Balwin is granted leave to intervene qua Respondent, of course, it is entitled to deliver an answering affidavit. The Joint Venture parties have delivered an affidavit (dated 2 May 2023) addressing the Supplementary Affidavit^[25]
- and their prejudice, if any, is minimal. Besides, it is a long-accepted principle that a Court should be advantaged by all the

facts and legal contentions relating to the issues before it. Given the somewhat wide-ranging scope of the relief sought from all sides in the Review Application, the pruning of what ought to be before the Court and what not is an exercise that carries more threat to the administration of justice than it does avail. I admit the Supplementary Affidavit.

COSTS

71. I find for Balwin in its various applications and (save in respect of the condonation issue and where costs have already been decided on the punitive scale) in my view there is no reason why costs should not follow the result.
72. Mr Tshikila did not, but Mr Watson does ask for costs (where costs are sought, now) to be awarded on the punitive scale. It is true that the Joint Venture's stance has been less than conducive to a fluid processing of the litigation; they withdrew consent to Balwin's intervention only when the newly-acquired facts set out in the Supplementary Affidavit were presented; and, they have thrown allegations of mala fides at Balwin. On the other hand, nor has Balwin's rather mercurial positioning contributed to a smooth run-up to procuring a hearing of the Review Application.
73. It is clear that the Review Application carries significant consequences, and with the high stakes there is likely to abound what could be termed, even if only euphemistically, as gamesmanship. I do not suggest that litigating in such a way is to be condoned, but both sides have contributed, albeit in varying ways, to the overall fray. I decline to grant the request for punitive costs.

FURTHER DIRECTIONS?

74. The question of Uniform Rule 12 arises. This provides that, in relation to applications for leave to intervene, the Court "may... give such directions as to further procedure as to it may seem meet."
75. Taking into account the orders I make, the present position in regard to the proceedings seems[26] to be the following:

75.1. The Main Review Application

75.1.1. The First and Second Applicants, ie the Joint Venture parties, have delivered their Founding Affidavit.

75.1.2. Gauteng Roads Department have delivered Answering Affidavits and Supplementary Answering Affidavits.

75.1.3. The First and Second Applicants have delivered their Replying Affidavit.

75.1.4. The Rule 53 Record has been lodged (presumably by the Joint Venture parties in terms of Rule 53(3)), as has a Supplementary Rule 53 Record.

75.1.5. As Seventh Respondent, Balwin has delivered an Answering Affidavit (in the form of its Supplementary Affidavit) to oppose the grant of the relief sought by the Joint Venture parties.

75.1.6. The Joint Venture parties (First and Second Applicants) have filed an affidavit in opposition to the admission of that Supplementary Affidavit but have not delivered a Reply to that (now) Answering Affidavit of Balwin. It must be given the opportunity to do so and I propose to give directions in this regard.

75.2. The Mandatory Relief Application

75.2.1. Attacq and Witwatersrand Estates, as Third and Fourth Applicants for the mandamus relief only, have delivered their Founding Affidavit. (Balwin, as a Respondent, has joined issue for the mandamus relief, based on that Founding Affidavit.)

75.2.2. Gauteng Roads Department, as First to Fifth Respondents in the mandatory relief application, have delivered an Answering Affidavit to the Founding Affidavit of the Developer parties.

75.2.3. The Joint Venture parties have delivered a “Replying Affidavit” to the Answering Affidavit of Gauteng Roads Department.

76. It is in the interests of all parties, and the public, that the proceedings are prosecuted expeditiously. I therefore make the following order.

1. The application by Balwin Properties Ltd for condonation for the late filing of an application to amend the Notice of Motion of Attacq Waterfall Investment Company Pty) Ltd, Witwatersrand Estates (Pty) Ltd, and itself, as applicants, dated 1 September 2022 is granted.
2. Axton Matrix Construction (Pty) Ltd and Yahweh 1 Construction and Projects CC are ordered, jointly and severally the one paying the other to be absolved, to pay the costs of the application for condonation on the scale of attorney and client, such to include the costs of two Counsel.
3. The application by Balwin Properties Ltd to amend the Notice of Motion dated 1 September 2022 is granted.
4. Axton Matrix Construction (Pty) Ltd and Yahweh 1 Construction and Projects CC are ordered, jointly and severally the one paying the other to be absolved, to pay the costs of the application for the amendment, such to include the costs of two Counsel.
5. Balwin Properties Ltd is granted leave to intervene as Seventh Respondent in the Review Application.
6. For the sake of certainty, Balwin Properties Ltd is granted leave to intervene also to join with Attacq Waterfall Investment Company Pty) Ltd and Witwatersrand Estates (Pty) Ltd in order to seek the mandatory relief against the Fifth Respondent, with the Founding Affidavit of Ibrahim Mia dated 31 August 2022 to serve as its Founding Affidavit for such purposes.

7. Axton Matrix Construction (Pty) Ltd and Yahweh 1 Construction and Projects CC are ordered, jointly and severally the one paying the other to be absolved, to pay the costs of the application for the intervention of Balwin Properties Ltd, such to include the costs of two Counsel.
8. The Supplementary Affidavit of Mohamed Raaziq Ismail dated 11 January 2023 is admitted and stands to serve as the Answering Affidavit of Balwin Properties Ltd, qua Seventh Respondent in the Review Application.
9. Axton Matrix Construction (Pty) Ltd and Yahweh 1 Construction and Projects CC are ordered, jointly and severally the one paying the other to be absolved, to pay the costs of the application for the admission of the said Supplementary Affidavit, such to include the costs of two Counsel.
10. Axton Matrix Construction (Pty) Ltd and Yahweh 1 Construction and Projects CC are granted leave to deliver affidavits in Reply to the Supplementary Affidavit of Mohamed Raaziq Ismail dated 11 January 2023, as the Answering Affidavit Balwin Properties Ltd in the main proceedings, if so desired, within fifteen days from the date of this order.
11. Upon the delivery of such Reply, or the expiry of the said fifteen day period, which ever comes first, unless the Court upon application by a party (or Justice Wepener in Case Management) directs otherwise, the practices and procedures for setting down the Review Application, including the application for mandatory relief, are to apply forthwith.
12. The aforesaid orders do not preclude a party approaching the Court (or Justice Wepener in Case Management) for other or different relief pertaining to the proceedings.

SALMON AJ

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

For the Applicant:

Adv. Dave Watson

Adv. Chiara Louis

For the 1st and 2nd Respondents: Adv. Simphiwe Tshikila

[1] Cf. Uniform Rule 53(4).

[2] This is the relief sought by the Developer parties from the outset.

[3] Cadac (Pty) Ltd v Weber-Stephen Products Co and Others 2011 (3) SA 570 (SCA) at [10].

[4] Cf. the discussion in Erasmus, Superior Court Practice (Juta) ad Rule 12 (Commentary).

- [5] This is not changed by the admission of the affidavit (by Wepener J) as being the Founding Affidavit of Attacq and Witwatersrand Estates in the Review Application. The factual allegations are not disputed.
- [6] SA Riding for the Disabled Association v Regional Land Claims Commissioner 2017 (5) SA 1 (CC) at 5A–D
- [7] Henri Viljoen (Pty) Ltd v Awerbuch Brothers 1953 (2) SA 151 (O)
- [8] Giant Concerts CC v Rinaldo Investments (Pty) Ltd 2013 (3) BCLR 251 CC at [41].
- [9] At [34].
- [10] Cf. Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others 2004 (4) SA490 CC at [27].
- [11] Supra, at [29].
- [12] Lawyers for Human Rights v Minister for Home Affairs 2004 7 BCLR 775 CC at [18]
- [13] The “factors set out by O’Regan J” are those in the learned Justice’s minority judgement in Ferreira v Levin; Vryenhoek v Powell 1996 1 BCLR 1 (CC) paragraph 234. They include: whether there is another reasonable and effective manner in which the challenge can be brought; the nature of the relief sought, and the extent to which it is of general and prospective application; and the range of persons or groups who may be directly or indirectly affected by any order made by the court and the opportunity those persons or groups have to present evidence and argument to the court.
- [14] In his minority judgment, Madala J added that “another important factor to be taken into account when deciding whether a party has public interest standing is the egregiousness of the conduct complained of” – paragraph [73]. This is not an irrelevant consideration in the context at hand.
- [15] Ergo, not (putatively) make that decision.
- [16] Section 172(1)b of the Constitution.
- [17] Allpay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer, South African Social Security Agency and Others 2014 (4) SA 179 (CC) at [29] to [33]. Footnote references have been omitted.
- [18] This consideration does not exclude the general public interest in the sanctity of state tender processes.
- [19] As the parties select – Rule 53(3); cf SACCAWU v President, Industrial Tribunal 2001 (2) SA 277 SCA.

[20] Section 49.

[21] Supra, at [168].

[22] Supra, at [37]. Footnote references have been removed.

[23] At [42] to [43].

[24] Tomassini v Dos Remendos 1961 (1) SA 226 (W) at 228 D

[25] Although not in Reply, as would be on assumption that the affidavit is before the Court.

[26] At least, according to Caselines.

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Prepared on 11 October 2026 · Esheria