

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

CASE NUMBER: 2021/56565

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED.
[REDACTED]	
O. SALMON	22 MAY 2024

In the interlocutory applications between:

BALWIN PROPERTIES LTD	Applicant
and	
AXTON MATRIX CONSTRUCTION (PTY) LTD	First Respondent
YAHWEH 1 CONSTRUCTION AND PROJECTS CC	Second Respondent

In the intervention application of:

ATTACQ WATERFALL INVESTMENT COMPANY (PTY) LTD	First Applicant
WITWATERSRAND ESTATES (PTY) LTD	Second Applicant
BALWIN PROPERTIES LTD	Third Applicant

In the Review Application between:

AXTON MATRIX CONSTRUCTION (PTY) LTD	First Applicant
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YAHWEH 1 CONSTRUCTION AND PROJECTS CC	Second Applicant
and	
THE HEAD OF DEPARTMENT: ROADS AND TRANSPORT - GAUTENG PROVINCIAL GOVERNMENT	First Respondent
THE MEMBER OF THE EXECUTIVE COMMITTEE FOR ROADS AND TRANSPORT - GAUTENG PROVINCIAL GOVERNMENT	Second Respondent
THE CHAIRPERSON: BID ADJUDICATION COMMITTEE: ROADS AND TRANSPORT - GAUTENG PROVINCIAL GOVERNMENT	Third Respondent
THE CHAIRPERSON: BID EVALUATION COMMITTEE: ROADS AND TRANSPORT - GAUTENG PROVINCIAL GOVERNMENT	Fourth Respondent
THE DEPARTMENT OF ROADS AND TRANSPORT - GAUTENG PROVINCIAL GOVERNMENT	Fifth Respondent
EDWIN CONSTRUCTION (PTY) LTD	Sixth Respondent

Coram: Salmon AJ
Date of hearing: 23 April 2024 - (MS Teams)
Handed down on: 22 May 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:

1. This is an application for leave to appeal brought by Axton Matrix Construction (Pty) Ltd and Yahweh 1 Construction and Projects CC in respect of a judgement I gave on 19 February 2024. The order against which they seek leave to appeal has a number of ancillary facets to it but the essential premise is that I granted leave to Balwin Properties Ltd to join as an applicant and as a respondent in proceedings where Axton Matrix Construction (Pty) Ltd and Yahweh 1

Construction and Projects CC seek the review and setting aside of a tender, together with other substantive relief.

2. I refer to that judgement as the 'main judgement'. I will refer to the applicants as in the main judgement - ie, as the joint venture - and to the present respondent as Balwin. As before me previously, Mr Tshikila appears for the joint venture, together with Ms Lingenfelder, and Mr Watson, together with Ms Louis, appears for Balwin.
3. After the application for leave to appeal had been lodged, I requested counsel to submit brief heads of argument addressing the question of appealability. It was a concern of mine that the orders in the main judgement were not appealable, and having heard Mr Tshikila and Mr Watson, I remain concerned. Indeed, in my view, the orders are not appealable. I hold so and the following briefly explains why.
4. I say 'briefly', because it is not the purport of this judgement to engage in a treatise into the seemingly varied landscape of appealability subsequent to the decision of the Supreme Court of Appeal in Zweni.¹ Both counsel, to whom I am grateful for their studied submissions and written arguments, referred me to much of the debate that has coursed through recent decisions, including that of the Constitutional Court.
5. When all is said and done, the principles of Zweni are to apply to questions of appealability, and that "*any deviations from the Zweni test must be clearly defined and justified to provide ascertainable standards consistent with the rule of law.*"² So, for example, where there can be considered the interests of justice (in assessing appealability) when an interim interdict at stake, this would provide an acceptable deviation providing an ascertainable standard consistent with the rule of law. But, absent such a consideration, deviations are not permitted and the Zweni principles govern the question of appealability.
6. The paramount integer, at least insofar as the present application is concerned, is whether my orders dispose of any of the relief that is at stake in the main proceedings - that is to say, the review application brought by the joint venture. The answer, in my view, is no. All that the orders in the main judgement effect are a joinder of Balwin, and ancillary procedural relief such as the admission of affidavits.

¹ Zweni v Minister of Law and Order 1993 (1) SA 523 (A)

² Knoop NO and others v National Director of Public Prosecutions [2024] 1 All SA 50 SCA at [22], approving this dictum from TWK Agriculture Holdings (Pty) Ltd v Hoogveld Boerderybeleggings (Pty) Ltd 2023 (5) SA 163 SCA at paragraph [30].

7. Without presuming to repeat in any verbatim way what Mr Watson submitted, the categorization he presented is a useful way of addressing the question. Broadly speaking, mere procedural issues, which are not appealable, direct the proceedings and what is to happen in their regard. They have a frame of reference (and import) which is internalized to the proceedings, and nothing about the questions in issue in the proceedings are decided. On the other hand, once the decision regulates rights and/or directs the conduct of a party, whether it be in its relationships with another party or not, *outside* the proceedings, that is when appealability arises.
8. Granting Balwin leave to intervene in the review application has no such import or effect. Yet, does the permitted intervention fall within what the Supreme Court of Appeal has prescribed as the test for appealability nonetheless? Although no portion of the relief claimed in the review application will be disposed of, does Balwin's joinder constitute one of the acceptable deviations? Does it lead to a just and reasonably prompt resolution of the *real* issue between the parties?³
9. In my view it does not. As stated by Keightley AJA in Knoop,⁴ the curtailment is necessary to prevent piecemeal appeals. It is not impossible, but it is difficult to conceive of something more lending to a piecemeal adjudication of the real issue between parties and that is an appeal process, first, about whether one of them should be joined or not.
10. For the foregoing reasons, I hold that the orders in the main judgment are not appealable and I therefore refuse the application for leave to appeal, with costs. Mr Watson asked for the costs of counsel to be awarded on the B scale.⁵ That is appropriate including given the overall context of the dispute between the parties.
11. Accordingly, I make the following order:
 1. The application for leave to appeal is dismissed;
 2. Axton Matrix Construction (Pty) Ltd and Yahweh 1 Construction and Projects CC are ordered to pay the costs of the application, jointly and severally the one paying the other to be absolved, including the costs of two counsel on the B scale.

³ Knoop, loc cit. My italics.

⁴ *Loc cit*

⁵ Cf Mashava v Enaex Africa (Pty) Ltd and Others Case No. 2022/18404 GLDJ an unreported judgment of Wilson J dated 22 April 2024.



O. SALMON
Acting Judge of the High Court
Gauteng Division, Johannesburg

Heard: 23 April 2024 - (MS Teams)
Delivered: 22 May 2024

Appearances:

For Applicants
(in the Leave to Appeal): Adv. Simphiwe Tshikila
Adv Anscha Lingenfelder
Instructed by Orelowitz Inc.

For Respondent: Adv. David Watson
Adv. Chiara Louis
Instructed by Padayachee Attorneys Inc.