REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

21/7/17

CASE NO: 19857/2017

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED.

SIGNATURE 21: 07: 2017 DATE

In the matter between:

CITY OF TSHWANE METROPOLITAN MUNICIPALITY	Applicant
and	
BUSINESS CONNEXION (PTY) LIMITED	First Respondent
AFRICAN GATEWAY CONVENTION AND EXHIBITION PRECINCT (PTY) LIMITED	Second Respondent
PRECINCT DEVELOPERS RF (PTY) LIMITED	Third Respondent

PUBLIC INVESTMENT CORPORATION Fourth Respondent

GOVERNMENT EMPLOYEES PENSION FUND Fifth Respondent

JUDGMENT: REASONS

AC BASSON, J

[1] There were two applications before this Court. On 17 March 2017 the first application (hereinafter referred to as "the main application") was launched by the applicant (the City of Tshwane Metropolitan Municipality). The first respondent in the main application is Business Connexion (Pty) Ltd; the second respondent is African Gateway Convention and Exhibition Precinct (Pty) Ltd; the third respondent is Precinct Developers (RF) (Pty) Ltd; the fourth respondent is the Public Investment Corporation and the fifth respondent is the Government Employees Fund. Only the second and third respondents have filed papers in the main application.

[2] On 22 March 2017 the second respondent gave notice of its intention to oppose and on 3 April 2017 the second respondent filed its answering affidavit together with a counter-application. The applicant filed opposing papers in the counter-application.

[3] On 12 April 2017, when the matter served before the urgent court - the second respondent raised the issue pertaining to the non-joinder of the following three respondents: (i) The developer of the property in dispute, Precinct Developers (RF) (Pty) Ltd "Precinct"); (ii) the Public Investment Corporation ("PIC") and; (iii) the Government Employees Pension Fund ("GEPF"). This necessitated the bringing of an interlocutory joinder application in the unopposed motion court

during the week of 8 – 21 April 2017 to join the said three entities as the third, fourth and fifth respondents respectively, in the main application.

[4] The Deputy Judge President thereafter directed that the matter be heard on the normal opposed roll in the week of 1 – 5 May 2017. The papers are voluminous and the matter was argued over the course of two days.

[5] On 4 April 2017 the first respondent filed a Notice to Abide in terms of which it undertook not to take beneficial occupation of the Business Connexion building until lawfully permitted to do so. In a further clarificatory statement to abide dated 2 May 2017, the first respondent stated that should the applicant succeed in the main application, it will not take occupation of the building until a temporary occupancy certificate as envisaged in the counter-application has been issued to the second respondent and accordingly undertook to abide by the decision of this Court. This development is significant in that, as from 4 April 2017, the impetus for an interdict (as per the main application) effectively fell away. (I will return to this point herein below.)

Order sought in the main application

[6] The applicant sought interdictory relief until the conditions as set out in prayers 2.1 to 2.11 of its Notice of Motion have been complied with. In essence the applicant sought an order to interdict the second respondent and other persons or entities, most notably, the first respondent, from unlawfully taking up accommodation of the building that has allegedly been unlawfully constructed on the applicant's property without the approval of building plans by the applicant. (I will refer to this building as the "Business Connexion building"). The interdict is sought pending the submission of the following documents, plans and reports by the second respondent to the applicant for such approvals as provided for in the relevant town planning scheme pertaining to the property: a comprehensive geology report submitted in respect of the subject property indicating the safe developable areas approved

by the Council for Geoscience (prayer 2.1); a Dolomite Risk Management Plan ("DRMP") in respect of the subject property (prayer 2.2); a Master Site Development Plan ("MSDP") in accordance with the applicant's Urban Design Framework ("UDF") (prayer 2.3); the approval of an amended UDF that accords with the MSDP (prayer 2.4); the submission and approval of a traffic impact study in respect of the *entire* development on the subject property in accordance with the submitted MSDP and the UDF (prayer 2.5); an engineer's certificate certifying that the final layout of structures and wet surfaces of the subject property accords with the geological findings and recommendations of the Council for Geoscience (prayer 2.6); until building plans have been approved in respect of all improvements erected on the subject property (prayer 2.7); an engineer's certificate whereby the engineer states that he/she has studied the relevant geological report and that it has been established that the necessary measures with regard to building work, drainage of the buildings and the site and the installation of wet services in respect of the whole development on the subject property is safe as far as possible from a geological point of view (prayer 2.8); until such time that the applicant has approved the consolidation of portion 3 and the remainder of Erf 84 Verwoerdburgstad Township and until a consolidation diagram has been registered (prayer 2.11); until officials of the applicant have conducted all inspections of occupancy (prayer 2.10); and until a certificate of occupancy in respect of the building has been issued. Such approvals are required before a building plan can be approved and before a certificate of occupancy can be issued in respect of the constructed Business Connexion building.

[7] The applicant submitted that the main application is urgent in light of the fact that the first respondent intended taking up occupation of the newly constructed Business Connexion building on land of which the applicant is the registered owner. The Business Connexion building comprises 36 637m2 gross lettable office space consisting of 5 storeys and 2 parking levels and has a releative small footprint if regard is had to the subject (entire) property. It was

common cause that the first respondent intended taking up occupation on 15 April 2017. There was also general consensus between the parties that 1 July 2017 is the final occupation date.(I will return to this issue of the description of what comprises the "subject property" or "entire property" herein below.)

[8] On day two of argument and in reply, counsel on behalf of the applicant informed the Court that the applicant has decided to abandon the relief sought in terms of all the prayers except for the relief sought in prayer 2.7 and prayer 2.11. Effectively therefore, all that the applicant persisted with was for an order that the first respondent be interdicted from occupying the Business Connexion building until the applicant has approved the building plans of the said building (prayer 2.7) and until the applicant has issued a certificate of occupancy in respect of the building erected on the subject property in accordance with the provisions of the National Building Regulations and Building Standards Act[1] ("the NBRBSA").

[9] In light of these developments it is, for purpose of the main application therefore not necessary to deal with the disputes, most of which are interpretational disputes, in respect of the relief sought in the prayers that have effectively been abandoned by the applicant. These interpretational disputes do, however, remain alive in as far as the counter-application is concerned and will accordingly be dealt with briefly in respect of the orders sought in the counter-application.

[10] The rationale for the interdict sought in the Notice of Motion has, in any event, effectively fallen away in light of the fact that, as from 4 April 2017, the perceived threat of occupation has fallen away. In law, there is accordingly no justification for the granting of any interdict.

[11] In light of the imminent date of occupation, 15 May 2017, in terms of the sub-

[1] Act 103 of 1977.

lease agreement with the first respondent, this Court handed down the following two orders: One in respect of the main application and one in respect of the counter- application with reasons to follow at a later date.

ORDERS

Order in the main application:

"1. The application is dismissed.

2. The applicant to pay the costs of the second and third respondents on an attorney and client scale, including the costs occasioned by the employment of two counsels in respect of both respondents.

Order in the counter-application:

"1. Declaratory Orders:

1.1 That on a proper interpretation of Amendment Scheme 3164C, approved in respect of the properties mentioned in paragraph 2.1.1 hereof and incorporated into the aforementioned Scheme in terms of Section 57(1) of the Town Planning and Townships Ordinance, 15 of 1986, on 16 April 2008, (referred to as "the Scheme"):

1.1.1 Such Scheme imposed no duty on the Second Respondent or the Joint Venture, i.e. the Second Respondent, the Financier and all the Consultants and project members appointed in order to bring about the BCX Office Development, to submit a Master Site Development Plan (referred to as a "MSDP") and to obtain approval therefore from the Applicant as a prerequisite for the approval of a Site Development Plan or for the approval of Building Plans in respect of such Office Development on the properties known as Portion 3 of Erf 84 and the Remainder of Erf 84, Verwoerdburgstad Township, in aggregate extent 14,6830 hectares (referred to as the "Office Development").

1.1.2 The reference to an "Approved UDF" contained therein does not refer to a specific Urban Design Framework which was submitted by the Second Respondent in 2007 and was approved by the Applicant on 8 February 2008, but to the general meaning of an Urban Design Framework to be refined by a Site Development Plan in respect of any future exercise of land use rights in terms of such Scheme in respect of the properties mentioned in paragraph 1.1.1 hereof.

1.1.3 Compliance with the Urban Design Framework requirements contained in the Scheme does not trigger the provisions of clause 31 of the Tshwane Town Planning Scheme 2014 as amended.

1.2 The Office Development constructed on the properties mentioned in paragraph 1.1.1 hereof, in the context of the evidence of Messrs. Kok & Human incorporated as ANNEXURE RJC4 and RJC6 to the Answering Affidavit of the Second Respondent, be declared as in compliance with the Scheme provisions as far as same refer to Geological and Structural Safety of the structure of the Office Development.

1.3 The Consolidation Application lodged with the Applicant in respect of the properties mentioned in paragraph 1.1.1 hereof on 25 September 2014, in terms of Section 92(2)(c) be deemed to have been approved by the Applicant and that the Second Respondent subject to the *mandamus* sought in paragraph 2.1 hereof, after date of this Order, continue to register such Consolidation in the Offices of the Surveyor General and the Registrar of Deeds.

1.4 In circumstances where the Applicant has already approved of the Site Development Plan in respect of the Office Development on a part of the properties mentioned in paragraph 1.1.1 hereof, the approval of the Urban

Design Framework envisaged in paragraph 2.2 hereof, not be considered as a prerequisite for approval of Building Plans of the Office Development.

2. *Mandamus*:

2.1 The Applicant is ordered to within 2 (two) working days from the date of this Order in its capacity as landowner of the properties mentioned in paragraph 1.1.1 hereof in writing authorize the Second Respondent to lodge the consolidation application envisaged in paragraph 1.3 hereof for registration as envisaged in that paragraph.

2.2 The Applicant is ordered to consider any document lodged by or on behalf of the Second Respondent as an Urban Design Framework in respect of the properties mentioned in paragraph 1.1.1 hereof within a period of 30 (thirty) days from this Order in the context of the Declaratory Orders issued above, and decide on such document within a period of 60 (sixty) days after date of submission thereof.

2.3 The Applicant must consider and decide on the Building Plans of the Office Development lodged by the Second Respondent within a period of 21 (twenty one) days from the date of this Order.

2.4 The Applicant must, within 7 (seven) days after receipt of an Application for consent, (to be valid for a maximum period of 12 (twelve) months) in terms of Section 7(6) of the National Building Regulations and Building Standards Act, Act 103 of 1977 (referred to as the "NBRBSA"), decide on such Application and if same is not approved, simultaneously furnish the Second Respondent with written reasons for refusing such Application and that the Applicant within 7 (seven) days after receipt of an Application for temporary occupation certificates, (to be valid for a maximum period of 12 (twelve) months), in terms of section 14(1)A of the NBRBSA decide on such Application, and if refused, simultaneously furnish the

Second Respondent with written reasons for such refusal.

3. Costs of this Application are granted in favour of both the Second and Third Respondents respectively on a punitive scale i.e. Attorney and client scale, including the costs occasioned by the appointment of two (2) Counsel, by the Respondents."

Relevant background facts

[12] This matter concerns two adjacent properties situated in Centurion. This property is registered in the name of the applicant. The property originally comprised of a land measuring approximately 18,491 hectares. This property was later subdivided into 4 portions: Portion 1 of Erf 84; Portion 2 of Erf 84; Portion 3 of Erf 84 and the remainder of Erf 84 (14,3192 hectares). There is currently an application pending for the consolidation of Portion 3 and the remainder of Erf 84 into one Erf.

[13] This application concerns only Portion 3 of Erf 84 and the remainder of Erf 84. These two properties are referred to in the papers as the "subject property" (or the "entire property"). In order to avoid confusion, a diagram depicting the two properties was handed up to the Court and marked "Exhibit A". For ease of reference Portion 3 of Erf 84 is depicted in yellow and will, for ease of reference, be referred to in this judgment as the "yellow" part of the subject property. The adjacent property – the remainder of Erf 84 – is depicted in "pink" and will be referred to in this judgment as the "pink" part of the subject property. The importance of this distinction will become clear later in the judgment.

[14] Central to the dispute in this matter is the Business Connexion building that was erected on the yellow part of the subject property which is the building in respect of which the applicant sought an order to interdict the first respondent from taking up occupation until such time as the building plans have been

approved and until such time as a certificate of occupation in respect of the Business Connexion building has been issued. This building, although it is situated at the subject property, it only has a footprint of approximately 37,000m^2. The Town Planning Amendment Scheme (approved in 2008) provides for the potential of 150,000m^2 of office rights to be exercised on the subject property.

[15] This development is the result of the development initiatives of the applicant in its capacity as a local authority and owner of the subject property. During the year 2000 the applicant developed a vision to establish a governmentally orientated precinct on the subject property that is situated in Centurion. The vision was to accommodate an international convention center, hotels, commercial facilities and facilities to accommodate the office for the European Union and the African Union. For this purpose, various erven were consolidated to become Erf 84. The development of the Business Connexion building constitutes only one of these development initiatives of the applicant.

[16] On 8 July 2004, the applicant concluded a written concession agreement and a head lease agreement with the second respondent in terms of which the second respondent would be required to develop, construct and operate, *inter alia*, a convention centre and certain other commercial developments on the subject property. Two addendums were concluded to the concession agreement in the year 2005 and 2008 respectively. At the time it was contemplated that the second respondent would also construct the City of Tshwane International Convention Centre (with a floor area of 10 000m^2) and later increased to the size of 80 000m2 ("the TICC"). This development is depicted on the pink area of the subject property. This particular development was later excluded from the Land Availability Agreement by way of a decision taken by the Mayoral Committee of the applicant. In terms of this decision the *"city takes back the right to implement Convention Centre*". The consequence of this exclusion was that the second respondent no longer had any role to

play in the development and construction of the TICC and that the TICC will be developed "*exclusively*" by the applicant. The importance and relevance of this exclusion will become more apparent where I deal with the interpretational disputes that exist between the parties.

[17] I interpose here to make a few remarks regarding the relationship that exists between the applicant and the second respondent: The Business Connexion building was developed as part of the development initiative of the applicant. In terms of the Concession Agreement between the applicant and the concessionaire, the second respondent shall be responsible for obtaining all necessary planning permissions and clearances for the development on the site including rezoning, consolidation and environmental requirements. Upon the request of the concessionaire, the applicant "*shall use reasonable endeavours to assist the Concessionaire in connection with the Concessionaire's application for planning permissions and/or clearances made pursuant to clause 12.1*". In terms of the third addendum to the Concession Agreement (18 April 2011), the concessionaire shall be entitled to develop and do everything necessary to complete the project "*unimpeded by Tshwane*". In respect of the obligations on the applicant it is specifically recorded that "*Tshwane shall do everything necessary to allow the Concessionaire to fulfill its obligations vis à vis Tshwane and vis à vis all third parties with whom the Concessionaire may contract for the completion of the Project*". Tshwane further has the obligation to assist the concessionaire in obtaining planning approvals and other legal requirements pertaining to the project. Of relevance is also the following obligation: *"17.2 No authority, approval or consent required to be given by Tshwane to AGCEP in terms of this Agreement shall be unreasonable withheld or delayed*". For this purpose, the second respondent appointed various service providers, *inter alia*, Mesure Facility Management (Pty) Ltd, to facilitate the administrative arrangements between the applicant and the second respondent in order to develop the property of the applicant in accordance with the head lease agreement concluded

between the applicant and the second respondent as well as the sub-lease agreement concluded with the developer.

[18] Pursuant to the Concession Agreement the first respondent identified as a tenant Business Connexion ("Telkom"). At the time of this application, the first respondent was contractually bound to relocate more than 3000 employees to the Business Connexion Building. Moreover, at the time, the first respondent has already incurred costs of more than R50 million for the procurement and installation of infrastructure to accommodate the staff component as well as its information technology, communications systems and data.

[19] On behalf of the applicant it was submitted that it should be borne in mind that the applicant acts in two capacities in respect of the subject property: On the one hand it acts in the capacity as a Municipality and on the other hand it acts as the owner (and business partner) in respect of the subject property. Although it is undoubtedly so that the applicant - as a Municipality - is statutorily obliged to carry out certain statutory obligations, the same applicant (Municipality) is also obliged to carry out the duties conferred upon it in terms of the Concession Agreement. I should, however, interpose here to point out that it was not once suggested by any of the parties that, because of the peculiar relationship between the parties in terms of the Concession Agreement, the applicant – as a Municipality – should not fulfill its statutory obligations. It is, however, important to note that the applicant, as owner of the property and business partner, has very specific obligations in terms of the Concession Agreement which is to "*use reasonable endeavours to assist the Concessionaire in connection with the Concessionaire's applications for planning permissions...*". If regard is had to the papers it appears that the applicant did in fact assist the second applicant to fulfill its duties until November 2016 when, for reasons not entirely clear to the Court, suddenly changed course.

[20] On 16 April 2008 the subject property became rezoned in terms of section 57(1)(a) of the 2986 Ordinance. The scheme conditions (the zoning) appear from the Amendment Scheme 3164(C) ("the Amendment Scheme").[2] The Amendment Scheme is integral to the dispute between the parties and more in particular in respect of how the provisions of the Amendment Scheme should be interpreted. I will briefly return to the interpretational disputes hereinbelow. Suffice to point out at this stage that the Amendment Scheme does not deal with town planning controls such as density (clause 6); coverage (clause 7); height (clause 8) and building lines (clause 11). In terms of the Amendment Scheme all of these issues must be dealt with in accordance with the relevant approved UDF. Under "General" (clause 20) it is stated that, before approval of the SDP, an engineering geologist must certify that the final layout of structures and wet services are in accordance with the geological findings and recommendations of the Council for Geoscience. Furthermore, before the approval of the SDP, a dolomite Risk Management Plan "*specific to the development*" must be submitted to the applicant for approval.

[21] It is significant also to point out that the Amendment Scheme was approved in respect of the entire precinct area of ± 19 hectares and envisaged a diversity of land use components with an aggregate development floor area of approximately 240, 000m^2. From a cursory reading of the Amendment Scheme and having regard to the scale of the precinct, it is clear that it never was intended to realize the potential development in one single phase development. This conclusion is supported by the terms of the Concession Agreement concluded between the applicant and the second respondent which envisages a proportionate and phased exercise of land use rights over a period of time on "*defined portions*" of land by way of specific site development plans.

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[2] Dated 16 April 2008.

[22] On 6 July 2009 the applicant and the second respondent concluded a Notarial Deed of Master Lease in respect of the subject property in terms of which the second respondent leases the subject property from the applicant at the nominal rental of R100.00 per annum for a period of 99 years with the right to erect buildings thereupon and to let same to prospective tenants on condition that the termination of the Master Lease and all improvements erected on the subject property will become the property of the applicant at no costs. A third addendum to the Concession Agreement was concluded on 28 April 2011. It should however, be noted that this dispute does not concern a contractual dispute between the parties. The dispute only concerns the building and occupation of the Business Connexion building that was constructed on the pink part of the subject property and which was leased to the first respondent.

[23] On 24 January 2008, the second respondent submitted a UDF (referred to as the "2008 UDF") reflecting the initial development concept agreed to in the Concession Agreement. According to the founding affidavit a *"UDF is a design tool that provides a physical interpretation of a Municipality's vision and strategies pertaining to a specific precinct and must accord with a Municipality's SDF (Spatial Development Framework)*". The UDF therefore presents a visual display of the development concept.

[24] It is common cause that after the initial 2008 UDF was submitted, no less than 17 or 18 further UDF's were submitted. These updated UDF's were necessitated by the fact that the Municipality's vision pertaining to the precinct (and in this case the subject property) constantly changed and evolved over the years. I will return to this aspect herein below.

[25] On 29 July 2012 (as already pointed out) the Mayoral Committee resolved to exclude the TICC land from the Concession Agreement in terms of clause 22.2.2 of the Master Lease for want of the applicant and the second respondent having reached a written agreement that would entitle the second

respondent to the use and enjoyment of the TICC land for the remaining duration of the lease period. In terms of this resolution, it was resolved that the Land Availability Agreement be amended to exclude from it the TICC. It was further resolved that the TICC would be developed "*exclusively*" by the City. If regard is had to Exhibit A, it appears that whereas the Business Connexion building is depicted on the yellow area the TICC is depicted on the pink area.

[26] The relationship between the applicant and the second respondent can therefore be described as somewhat peculiar. In terms of the Concession Agreement and the subsequent Notarial Deed of Master Lease, this property would revert back to the second respondent after a period of 99 years. Until such time the applicant has the right to erect buildings on the subject property and to let same to prospective tenants, subject to the condition that at the termination of the Master Lease, all improvements erected on the subject property will become the property of the applicant at no costs. In all practical respects therefore the relationship can aptly be described as a joint venture between the applicant and the second respondent in respect of the development of the subject property. Although the applicant - and it was so acknowledged by all parties – is a Municipality which carries with it certain statutory obligations attached to Municipalities in general, the applicant is also the business partner of the second respondent in respect of the subject property. As such the parties were in agreement that the applicant - as a Municipality - has certain statutory obligations with regards to building plans and land use management. More in particular, the parties were ad idem that the applicant has a statutory duty to enforce the provisions of the NBRBSA; the National Building Regulations;[3] the Spatial Planning and Land Use Management Act[4] and Tshwane Land Use By-Law.

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[3] GNR 2378/1990 promulgated in terms of section 17(1) of the NBRBSA.
[4] Act 16 of 2013.

[27] To this end, and giving effect to the Concession Agreement, the second respondent commenced with earthworks on the subject property on 5 March 2014. The construction of the Business Connexion building took place over a period of approximately two years and with the full knowledge and co-operation of the applicant on its own land. The approximate costs of the project are R880 million.

[28] On 25 September 2014 the application for consolidation was submitted. On 29 January 2015, the second respondent substantially changed the development concept and submitted a SDP in respect of the office development.

[29] On 2 April 2015, the applicant approved the SDP submitted by the second respondent. There is some dispute about whether or not the SDP for the Business Connexion building was approved unconditionally or whether it was approved subject to the finalization of the new UDF depicting the new development concept envisaged by the second respondent that was to be informed by the office development fitting in with the initial development concept. I will briefly return to this dispute herein below.

[30] During August 2015, the second respondent submitted an amended UDF for approval.

[31] On 5 August 2015 the applicant specifically consented to the second respondent concluding a long-term sub lease agreement with the third respondent in respect of the lease agreement accommodating the Business Connexion building. The conclusion of this sub-lease agreement is significant because as at 5 August 2015 the applicant (as the business partner of the second respondent and as a Municipality) was fully aware of the conclusion of a sub-lease agreement in respect of a building that was to be constructed on its (the applicant's) property. Also significant is the fact that the applicant was fully aware of the fact that the first respondent, in terms of the sub-lease

agreement, intended to take up occupation of the Business Connexion building. On 3 November 2015 the applicant consented to the conclusion of the sub-lease agreement between the third respondent and the first respondent. Accordingly, as far back as August 2015, the applicant was aware of the fact that the third respondent had concluded a long-term lease agreement with the first respondent. The applicant was also aware of the fact that the Government Employers Pension Fund funded the construction of the Business Connexion building.

[32] On 10 December 2015 the second respondent submitted building plans for the Business Connexion building and in February 2016 construction on the building commenced with the full knowledge of the applicant.

[33] On 1 November 2016 the applicant served a contravention notice in terms of section 4(1) of NBRBSA on the second respondent's agents and contractors. In this notice the second respondent was notified that it should immediately cease with construction until such a time as the applicant had approved in writing building plans in respect thereof, alternatively to demolish the building and to remove the material.

[34] On 1 February 2017, the second respondent submitted a new MSDP. On 20 February 2017, the applicant rejected the new MSDP received on 1 February 2017 for failure to comply with the "approved" UDF: it does not comply with the approved 2008 UDF; it does not contain the town planning controls mentioned in clause 31 of the Tshwane 2014 Scheme; the geology, as requested by clause 20 of the Amendment Scheme, is not addressed; and no power of attorney is attached. Furthermore, the MSDP must comply with the geotechnical conditions of the Amendment Scheme.

[35] On 23 February 2017, the applicant served another contravention notice in terms of section 4(1) of the NBRBSA on the second respondent.

[36] On 17 March 2017 the applicant launched the urgent application for relief in respect of the essentially completed Business Connexion building. The effect of the relief sought was to effectively leave the building unoccupied until the second respondent has complied with eleven actions and conditions of the applicant set out in the Notice of Motion. As already pointed out, the applicant has since abandoned its insistence on compliance with nine of these conditions.

What, according to the applicant, is the process that must be followed culminating in the approval of building plans and the issuing of an occupancy certificate?

[37] As a first step, if regard is had to the Amendment Scheme, a Dolomite Risk Management Plan for the *entire* subject property (which includes the yellow and the pink area) must be submitted in the approval process and not only in respect of the portion (or footprint) on which the Business Connexion building was erected (the yellow area).

[38] As a second step, an engineer's certificate must be submitted to certify that the final layout of the structures and wet surface of the entire subject property accords with the geological findings and recommendations of the Council of Geoscience. This requirement is, according to the applicant, in respect of the *entire* subject property (pink and yellow).

[39] As a third step, the Municipality will consider whether the developable portions of the *entire* subject property allow for development that accords with the MSDP for the entire subject property site which in turn should accord with the approved 2008 UDF. I interpose here to point out that it was in dispute whether it is a lawful requirement to require of the second respondent to submit a MSDP. According to the applicant it is a lawful requirement and one which derives from a reading of the Amendment Scheme and the alleged common understanding between the applicant and the second respondent. On

behalf of the second respondent it was submitted that this is not a lawful requirement and furthermore that no reference to a MSDP will be found in any legislation nor in the Amendment Scheme. Mr Liversage on behalf of the applicant, although conceding that no such reference to a MSDP will be found in any legislation nor in the Amended Scheme, nonetheless insisted that it was a requirement. As already pointed out, prayer 2.3 of the Notice of Motion requiring the submission of a MSDP was subsequently abandoned. I will return to this requirement as it is an issue that remains alive for purposes of the counter-application.

[40] As a fourth (and next step), the second respondent must submit a SDP in respect of the entire property (yellow and pink area) and not only in respect of a portion (the pink area) thereof.

[41] Only once these steps have been followed and complied with can the second respondent submit its building plans together with an engineer's certificate in which it is stated that he/she has studied the relevant geological report and that he/she has established the necessary measures with regard to the intended construction.

[42] Before abandoning nine of the eleven prayers, it was the applicant's case in the founding affidavit that the second respondent permitted the construction of the Business Connexion building before having submitted a Dolomite Risk Management Plan in respect of the entire subject property; a certificate by an engineer certifying the final layout of the structures and wet surfaces in accordance with the geological findings and recommendations of the Council for Geoscience; a MSDA for the entire subject property and one which accords with the 2008 UDF and; a certificate with the building plans by an engineer stating that the property is safe from a geological point of view.

[43] It is also categorically denied in the founding affidavit that the applicant has ever lawfully granted any permission to the second respondent or any of its agents or contractors to construct the building without first having complied with the scheme conditions contained in the Amendment Scheme. This is a startling statement in light of the following: The applicant and the Municipality have been engaged in what can effectively be labeled as a joint venture since July 2004 when the Concession Agreement (and subsequently amended a few times) was concluded. Since then the parties have continuously and sometimes on a daily basis engaged with one another in respect of the development of the subject property and more specific, the Business Connexion building. This much is borne out by the voluminous papers that served before this Court (over 700 pages). In fact, the Court was informed that the hundreds of e-mails and letters that have been exchanged between the parties have not even been included in the papers before Court simply as not to overburden the already voluminous papers. In fact, in the founding affidavit it is confirmed that the relationship between the applicant and the second respondent extends over a period of 13 years since the conclusion of the Concession Agreement. During this lengthy period there were numerous meetings and consultations between the second respondent, the second respondent's agents, its professional teams and the applicant.

[44] I have also referred to the fact that approximately 17 different versions of the UDF were negotiated between the parties depicting the intended development on the subject site. As recent as October 2016 a workshop was conducted where all the relevant stakeholders were in attendance. In light of these facts, it is, in my view, inconceivable that the applicant was blissfully unaware of what was going on and what was being constructed on a property that the Municipality not only own, but on a property where the applicant is an active participant in the development of the subject property.

[45] I have also debated at length with Mr. Liversage why there was such a complete inaction on the part of the applicant in respect of what is now alleged to constitute contraventions on the part of the second respondent especially in light of the fact that construction on the Business Connexion building had commenced approximately 15 months ago with the full knowledge of the applicant. Mr. Liversage was, however, unable to offer a plausible explanation as to why the applicant waited months before it issued a contravention notice and why it only sought to interdict the construction of a building with a sizable footprint at a time when the building is virtually completed. There is simply no plausible explanation before this Court for this complete inaction on the part of the applicant. This inaction becomes even more inexplicable if regard is had to the fact that in August 2015 – even before construction had commenced – the applicant had consented to the long-term sub-lease agreement concluded with the first respondent. When construction on the building commenced, the applicant was therefore fully aware of the immense size of the development, the extraordinary costs of the construction and most significantly, the intended completion date of the construction and the intended date of occupation of the building.

Statutory framework

[46] Lengthy and detailed reference was made in the papers regarding the constitutional and statutory functions all municipalities have in terms of the Constitution read with section 12 of the Local Government: Municipal Structures Act.[5] It is not necessary to refer in detail to these obligations. Suffice to point out that it is accepted by the Court and all the respondents that Municipalities (such as the applicant) have duties in terms of, *inter alia*, the NBRBSA; the National Building Regulations[6] ("the Regulations"); the Spatial

[5] Act 117 of 1998.
[6] GNR. 2378/1990 promulgated in terms of section 17(1) of the NBRBSA.

Planning and Land Use Management Act ("SPLUMA");[7] Tshwane Land Use By-Law and the 1986 Ordinance.

[47] Of particular importance to this dispute are the provisions of section 4(1) of the NBRBSA which prohibits any person from erecting any building without the prior approval of the applicant which approval must be in writing:

> "4 Approval by local authorities of applications in respect of erection of buildings
> (1) No person shall without the prior approval in writing of the local authority in question, erect any building in respect of which plans and specifications are to be drawn and submitted in terms of this Act."

[48] It was not in dispute that the applicant has the right in terms of this section to approve or refuse, as the case may be, the approval of the building plans. Where the plans concern a building that is larger than $500m^2$ section 7(1) specifically requires that the Municipality must exercise its discretion within a period of 60 days after receipt of the application. It is accepted that a Municipality will only approve building plans if such plans also comply with other applicable laws such as the laws governing land use. In this particular case, there must be compliance with, *inter alia*, the Centurion Town-Planning Scheme[8] and the Tshwane Town-Planning Scheme.[9]

[49] A Municipality will refuse to approve a building plan if it is satisfied that the building to which the application in question relates will probably or in fact be dangerous to life or property.

[50] In terms of section 14 of the NBRBSA occupancy of a building is further subjected to the obligation to be in possession of an occupancy certificate having been issued in terms of section 14(1)(a) of the NBRBSA. The owner of

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[7] Act 16 of 2013.
[8] Of 1992 and revised in 1999.
[9] Of 2008 and revised in 2014.

any building, or any person having an interest thereon, who occupies or uses such a building or permits the occupation or use of such building without a certificate of occupation having been issued in terms of section 14(1)(a) of the NBRBSA in respect of such building, shall be guilty of an offence.

Counter-application

[51] In the second respondent's counter application, it applied for declaratory orders declaring that -

Prayer 2.1.1: The Amendment Scheme 3164C imposes no obligation upon the second respondent to submit a MSDP as a prerequisite before a SDP or a building plan can be approved;

Prayer 2.1.2: The reference to *"approved UDF"* does not refer to the UDF submitted by the second respondent and approved by the applicant on 8 February 2008, but to the general meaning of an UDF to be defined by a SDP of any future exercise of land use rights in terms of the Scheme;

Prayer 2.1.3: Compliance with the UDF requirements in the Amendment Scheme does not trigger the provisions of clause 31 of the Tshwane Town-Planning Scheme, 2014;

Prayer 2.2: The office development be declared in compliance with the scheme provisions of the Amendment Scheme as far as geological and structural safety is concerned;

Prayer 2.3: The consolidation application be deemed to have been approved by the applicant in terms of section 92(2)(c), subject to the *mandamus* sought in prayer 3.1 of the counter-application; and

Prayer 2.4: In circumstances where the applicant has already approved the SDP in respect of the office development, the approval of the UDF does not constitute a prerequisite for the approval of building plans.

[52] The second respondent also sought the following mandatory orders:

Prayer 3.1 That the applicant be ordered to, within 2 days, authorise the second respondent to lodge the consolidation application for registration;

Prayer 3.2: That the applicant be ordered to consider any document lodged by the second respondent as an UDF in respect of Portion 3 and the Remainder of Erf 84 Verwoerdburgstad Township ("the subject property") within a period of 30 days in the context of the declaratory orders and decide thereupon within 60 days after submission;

Prayer 3.3: That the applicant be ordered to consider and decide on the building plans of the office development within 21 days from the date of this order; and

Prayer 3.4: That the applicant, within 3 days of the order, furnish reasons why, pending the approval of building plans, a consent in terms of section 7(6) of the National Building Regulations and Building Standards Act 103 of 1977 ("the NBRBSA") should not be granted for a period of 12 months in respect of the office development and why a temporary certificate of occupancy should not be issued in terms of section 14(1A) of the NBRBSA, valid for 12 months.

Interpretational dispute

[53] Central to the counter-application is whether on a proper interpretation of the amendment scheme:

(i) The respondents were obliged to submit for approval an MSDP in respect of the *entire* property, as opposed to only in respect of the sub-lease site (Business Connexion building footprint);

(ii) Whether the respondents had to submit for approval an UDF in respect of the *entire* property, as opposed to the sub-lease site;

(iii) Whether the respondents had to submit for approval a Traffic Impact Assessment in respect of the *entire* property, as opposed to the sub-lease site;

(iv) Whether the approval of the Site Development Plan ("SDP") was an unqualified approval or an approval subject to certain conditions. Central to this dispute is the correct interpretation of the expression UDF as repeatedly used in the amendment scheme.

[54] It was submitted on behalf of the second respondent that there is a need for the declaratory orders set out in the Notice of Motion by virtue of the fact that the applicant's persistent misinterpretation of the Scheme and the Amendment Scheme has already, for a period of two years, delayed the approval of the second respondent's building plans.

[55] The first four declaratory orders pertain to the Amendment Scheme by virtue of which the Land Use rights have been granted and currently vests in the subject property. The Amendment Scheme constitutes subordinate legislation and must therefore be interpreted in accordance with the principles of the interpretation of statutes.

[56] The correct legal approach to interpretation is now well settled and has been authoritatively laid down by the Supreme Court of Appeal in *Natal Joint*

Municipal Pension Fund v Endumeni Municipality[10] where the court held as follows:

> "[18] Over the last century there have been significant developments in the law relating to the interpretation of documents, both in this country and in others that follow similar rules to our own. It is unnecessary to add unduly to the burden of annotations by trawling through the case law on the construction of documents in order to trace those developments. The relevant authorities are collected and summarised in *Bastian Financial Services (Pty) Ltd v General Hendrik Schoeman Primary School*. The present state of the law can be expressed as follows: Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. *Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective, not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document.*[11] Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation; in a contractual context it is to make a contract for the parties other than the one they in fact made. The 'inevitable point of departure is the language of the provision itself', read in context and having regard to the purpose of the provision and the background to the preparation and production of the document.
>
> [19] All this is consistent with the 'emerging trend in statutory construction'. It clearly adopts as the proper approach to the interpretation of documents the

[10] 2012 (4) SA 593 (SCA).
[11] Court's emphasis.

second of the two possible approaches mentioned by E Schreiner JA in *Jaga v Dönges NO and Another; Bhana v Dönges NO and Another*, namely that from the outset one considers the context and the language together, with neither predominating over the other. This is the approach that courts in South Africa should now follow, without the need to cite authorities from an earlier era that are not necessarily consistent and frequently reflect an approach to interpretation that is no longer appropriate. The path that Schreiner JA pointed to is now received wisdom elsewhere. Thus Sir Anthony Mason CJ said:

> 'Problems of legal interpretation are not solved satisfactorily by ritual incantations which emphasise the clarity of meaning which words have when viewed in isolation, divorced from their context. The modern approach to interpretation insists that context be considered in the first A instance, especially in the case of general words, and not merely at some later stage when ambiguity might be thought to arise.'

More recently, Lord Clarke SCJ said 'the exercise of construction is essentially one unitary exercise'."

"Entire property" v "Sub-Lease Site"

[57] The applicant's stance in the main application was that the second respondent – who is the developer in terms of the concession agreement (as amended) – must, although it is only engaged in the development of a particular site (the Business Connexion building) compile and submit a SDP in respect of the entire adjoining property (approximately 14 hectares in extent) under circumstances where such developer has no control as to what is to be developed or constructed on such adjoining property. More in particular the developer has no knowledge of the coverage, height, density which typically are matters to be addressed in an SDP. \

[58] I am in agreement with the submission that, to require under these circumstances that the reference made to an SDP in the Amendment Scheme must be interpreted to have a wider meaning to imply that the SDP refers to

the entire property and not only the site, is unworkmanlike and impractical. Consequently, the interpretation contended for by the applicant should be avoided.

Site development plan ("SDP")

[59] No requirement exists either in terms of the Amendment Scheme or in terms of Tshwane Town Planning Scheme that the developer must submit an SDP for the entire property (including the adjoining property). It is also significant to point out that, although an SDP as well as a landscape development plan are required to be submitted to the applicant, the applicant has never required of the second respondent to submit a landscape development plan for the entire property. Again, even if this had been required, the result would similarly have been impractical simply because of the fact that the developer would not have had the requisite knowledge of what development was intended, nor would the developer have control over it simply in light of the fact that the second respondent had been excluded from the development process in respect of the remainder of the property.

Master Site Development Plan ("MSDP")

[60] The applicant initially insisted that the second respondent must submit a MSDP and that the MSDP must, in terms of the Amendment Scheme, be filed in respect of the entire property.

[61] On a plain reading of the Amendment Scheme, no direct or indirect reference to the expression of a "MSDP" or a "Master Site Development Plan" can be found. This much was also conceded by counsel on behalf of the applicant. It was also conceded that no reference to a MSDP will also be found in any applicable legislation. More in particular, no requirement can be found in the Amendment Scheme that an MSDP in respect of the entire property had to be

filed and approved. In the circumstances, I am satisfied that the second respondent has made out a case for the relief sought in respect of the MSDP.

Geological studies/assessments and certifications

[62] Having concluded that an interpretation that the SDP implies a site development plan for the entire site and not only for the specific site would result in an unworkmanlike, impractical and absurd result, it needs to be considered whether a geological study ought to have been done in respect of the entire property as opposed to only the subject property.

[63] In this regard I am in agreement with the submission that considerations of safety and structural stability must be done in the context of a proposed development and that those considerations are entirely dependent on an assessment of the intended structures in tandem with the underlying geological foundation. One cannot perform such an exercise in vacuum or in isolation divorced from the size and concomitant weight of the proposed structures. It would furthermore result in an impractical and absurd result to require of the second respondent to conduct a geological assessment in circumstances where the developer is incapable of performing such an assessment and without having any knowledge of the proposed size and concomitant weight of other proposed structures. In this regard I have already pointed out that the second respondent has been excluded from the development of the other proposed structures on the property.

Dolomitic studies

[64] Following from the above, it is similarly incorrect to argue that it is a requirement in terms of the Amendment Scheme that dolomitic studies in respect of the *"entire property"* must be submitted. If regard is had to the Amendment Scheme it is explicitly stated that before the approval of the SDP, "a dolomite Risk Management Plan *specific to the development*" must be submitted to the

applicant for approval. It is common cause that the only "*development*" on the entire property at present is the Business Connexion building. Furthermore, if regard is had to the papers this requirement was in any event been fully complied with.

Traffic impact assessment

[65] The same argument applies in respect of the Traffic Impact Assessment. The developer would have no knowledge of the proposed or eventual development on the adjoining properties (i.e. the entire property) and accordingly, to expect of the second respondent to submit a Traffic Impact Assessment report in respect of the entire property (as opposed to the sub-leased site) would be both impracticable and would lead to absurd results. Again, it was common cause that the volume of traffic is dependent upon the use the land it is put to. At present and in light of the Mayoral decision already referred to, the second respondent cannot be expected to have knowledge of what developments will eventual be constructed on the adjoining property. Moreover, it is significant to point out that the Amendment Scheme does not impose, as prerequisite for the approval of any plans, that a Traffic Impact Assessment must be submitted.

Outstanding updated UDF

[66] One of the reasons advanced by the applicant in the founding affidavit for not being able to approve the building plans for the Business Connexion building is the fact that the second respondent has not submitted an approved (updated) UDF and secondly, that the updated UDF must relate to the entire property as opposed to the sub-leased site. However, as pointed out, the applicant has also abandoned its insistence on compliance with this requirement.

[67] At the heart of this dispute is the interpretation of the expression Urban Design Framework. The applicant interprets the Amendment Scheme as if it refers to a

specific historical 2008 "*approved*" UDF. This interpretation is disputed by the second respondent with reference to what is contained in the Amendment Scheme and with reference to the purpose of a UDF in practical terms.

[68] If regard is had to the uses permitted and as set out in the Amendment Scheme, it appears that it includes a wide range of (possible) developments ranging from a convention and exhibition center, a medical suite, a hotel, a retail industry, a bank, a nursery a school, a place of worship, a clinic, a public transport facility and recreation club, to name but a few. An office development (such as the Business Connexion building) is but one of the numerous land uses permitted by the Amendment Scheme.

[69] From a mere reading of the Amendment Scheme, it is therefore clear that it is directed at a variety of future (possible) developments in accordance with the approved land use rights which future developments shall at all relevant times be subjected to a UDF refined by way of a SDP. In this regard I am in agreement with the submission that, at best, a UDF in practice constitutes a conceptual urban design representation of the potential realisation of a development on an identified property configuration and size reflecting the possible built form of land use components envisaged in the context of an identified concept or approved land use right. A UDF is therefore not an exact or site specific regulatory prescriptive document and, at best, constitutes a wide framework reflecting a contextualised spatial implementable vision of how the development can be implemented.

[69] In the present matter it is common cause that the UDF had been amended approximately 18 times which, in my view, confirms the fact that a UDF is sensitive to change from time to time and, as and when the contextualised visions in respect of a specific development change. In this regard Mr Bredenkamp ("Bredenkamp") – a professional practicing architect - explained

that he was tasked to comply with the UDF requirements pertaining to the Business Connexion building. He also confirmed that no less than 18 different UDF scenarios have been prepared in respect of the subject property. He also confirmed that the Amendment Scheme does not refer to a MSDP but only to a UDF that has to be approved in conjunction with a SDP in respect of the development concerned. He, however, explained that, although the role players sometimes adopted the reference by the applicant to the UDF (stipulated in the Amendment Scheme) as a MSDP, a UDF and a MSDP are not interchangeable expressions. He importantly confirmed that the different versions of the UDF were prepared over time and that those versions were duly informed by instructions received from the developers of the office development and written instructions and requests received from the applicant. He also confirmed that the latest UDF was duly informed by the applicant's own prevailing design document which was drawn up by Royal Haskoning and dated November 2014. He lastly confirmed that at no stage during his continuous liaison and discussions with the applicant, was it ever mentioned or recorded that none of the UDF's prepared or generated, *inter alia* on instructions of the applicant, constituted a futile exercise and that it strictly had to comply with the development concept proposed in 2008.

[70] It is significant to point out that, although the applicant acknowledged that the "*approved*" 2008 UDF is outdated, it nonetheless insisted that the latest (amended) UDF must be approved as a prerequisite before any building plans will be approved. The applicant has since abandoned its insistence that the second respondent should seek an approval of the newest UDF.

[71] I am, in any event, not persuaded by the argument that the UDF has to be "*approved*" in the sense that a formal approval process must be followed before the UDF will be considered to have been "*approved*". Whilst counsel on behalf of the applicant contended on the one hand that a formal approval process had to be followed before a UDF would be considered to be an

"*approved*" UDF, counsel also conceded that no less than 18 UDF's were put forward over the years and that each time such an (amended or updated) UDF was the product of negotiation between the parties. Counsel on behalf of the applicant was also not able to point the Court to any document in which this process of approval is set out or required.

[72] I am therefore persuaded that the expression "*Urban Design Framework*" can only mean "*the development concept agreed to from time to time*". To conclude otherwise would lead to an absurd result.

[73] Was the UDF that was submitted in respect of the Business Connexion building (the sub-lease site) agreed to between the parties? If regard is had to the papers as a whole, it is clear that the parties have agreed on the development concept of the building: Not only did the applicant consent to the sub-lease, the applicant was also fully involved in the drafting of the various UDF's.

[74] Of significance is also the fact that the Business Connexion building is fully depicted on the latest SDP which is the product of negotiations between the applicant and the developer. It is also significant that this latest approved SDP contains far more details than what would ordinarily be required under a broad general design framework.

[75] The approval of the SDP therefore constitutes, in my view, full compliance of the Amendment Scheme's requirements under clause 6 (density), 7 (coverage), 8 (height), 10 and 11 (building lines) and sets out the full details relating to the intended development. I am therefore in agreement with the submission that the approval of the latest SDP - which is but the last one in a long line of SDP's -necessarily results in the conclusion that it constitutes full compliance with the scheme requirements and that any additional

documentation in the form of an Urban Design Framework ("UDF") had fallen away or had been waived;

[76] I am further in agreement with the submission that in light of the aforegoing the respondents are entitled to presume that administrative acts are valid, which is explained as follows by Lawrence Baxter, *Administrative Law* at 355:

> "There exists an evidential presumption of validity expressed by the maxim *omnia praesumuntur rite esse acta*; and until the act in question is found to be unlawful by a court, there is no certainty that it is. Hence it is sometimes argued that unlawful administrative acts are 'voidable' because they have to be annulled."

[77] An ancillary dispute to the dispute regarding the SDP is the contention on behalf of the applicant that the SDP has only been conditionally approved. In this regard reference was made to the "*Site Development Plan and Landscape Development Plan Submission Document*" which refers to the requirements relating to the approval/conditional approval of the SDP. Although it is stated as part of the comments on this document that the evaluation of the SDP *is "in order subject to the letter from Measure dated 2 April 2015 and the finalisation of the Urban Design Framework"*, the actual approval at the foot of this document reflects no condition and is completely unqualified. Having regard to the document, I am not persuaded that the approval of the SDP and the LSDP was conditional and I am also not persuaded that what appears to be an unqualified approval is now converted into a conditional approval because of a comment raised as part of the evaluation process. It was also contended on behalf of the applicant that because Mr Stander (Head: Architectural Division and Strategic Projects of Mesure Professional Services) has referred to the approval as conditional, it should be accepted that the approval was conditional. In this regard I am in agreement with the submission that this clearly was an erroneous legal conclusion by the professional consultant and one which is not binding upon the parties or the Court.

Failure to issue occupation certificate

[78] The applicant's failure to issue an occupation certificate is predicated on the absence of approved building plans and secondly and somewhat tentatively on the alleged safety risk. No evidence was placed before the Court to substantiate this allegation. In order to bring finality to the dispute it was ordered that the applicant must consider and decide on the building plans within a period of 21 days of the date of this order and thereafter, within seven days of receipt of an application for consent decide on the issue of the occupation certificates.

[79] Lastly in respect of costs, I am of the view that costs should follow the result and that, in light of the applicant's conduct in these proceedings, a punitive costs order is warranted inclusive of the cost of two counsel.

AC BASSON

JUDGE OF THE HIGH COURT

Appearances:

For the applicant:

Adv. Liversage (SC)

Instructed by Dial Mogashoa Attorneys

For the second respondent:

Adv. JG Wasserman (SC)

Adv. JA Venter

Instructed by Adriaan Venter Attorneys & Associates

For the third respondent:

Adv. MC Marits (SC)

Adv. SG Marits

Instructed by Weavind & Weavind attorneys