



CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 274/23

In the matter between:

MUNICIPAL EMPLOYEES PENSION FUND

Applicant

and

**CITY OF JOHANNESBURG METROPOLITAN
MUNICIPALITY**

First Respondent

**BUILDING CONTROL OFFICER, CITY OF
JOHANNESBURG METROPOLITAN
MUNICIPALITY**

Second Respondent

NORDIC LIGHT PROPERTIES (PTY) LIMITED

Third Respondent

Neutral citation: *Municipal Employees Pension Fund v City of Johannesburg Metropolitan Municipality and Others* [2025] ZACC 23

Coram: Madlanga ADCJ, Kollapen J, Mathopo J, Mhlantla J, Rogers J, Seegobin AJ, Theron J, Tolmay AJ and Tshiqi J

Judgment: Seegobin AJ (unanimous)

Heard on: 19 November 2024

Decided on: 21 October 2025

Summary: [*Locus standi*] — [substitution of litigant] — [standing in review proceedings] — [legal effect of an order of substitution after *litis contestatio*] — [interest in claim]

ORDER

On application for leave to appeal from the High Court of South Africa, Gauteng Local Division, Johannesburg:

1. Leave to appeal is granted.
2. The order of the High Court is set aside and replaced with the following order:
 - “(a) It is declared that the applicant has the necessary *locus standi* to pursue the review proceedings instituted by Erf 8[...] B[...] (Pty) Limited.
 - (b) The respondents, jointly and severally, must pay the applicant’s costs associated with the determination of *locus standi* as a separated issue, including the costs of two counsel where employed.”
3. The review application is remitted to the High Court for determination of the merits.
4. The respondents, jointly and severally, must pay the applicant’s costs of the applications for leave to appeal brought in the High Court and the Supreme Court of Appeal.
5. The respondents, jointly and severally, must pay the applicant’s costs in this Court, including the costs of two counsel.

JUDGMENT

SEEGOBIN AJ (Madlanga ADCJ, Kollapen J, Mathopo J, Mhlantla J, Rogers J, Theron J, Tolmay AJ and Tshiqi J concurring):

Introduction

[1] The applicant, the Municipal Employees Pension Fund (MEPF), seeks leave to appeal the judgment and order of the High Court of South Africa, Gauteng Local Division, Johannesburg (High Court). The High Court dismissed the applicant's application solely on the basis that the applicant did not have the requisite *locus standi*¹ (legal standing) to seek a declaratory order that the third respondent's rezoning application had lapsed prior to its purported approval, or to seek, in the alternative, a review and setting aside of a decision by the first respondent to approve the third respondent's rezoning application relating to certain immovable property.

[2] The application for leave to appeal is accompanied by two further applications. In the first, the applicant seeks condonation for the late filing of its application for leave to appeal, which was filed seven days late. In the second, it seeks leave to file a further replying affidavit. I deal with these applications in due course.

[3] The first respondent is the City of Johannesburg Metropolitan Municipality. The properties that are relevant to this application fall within the area of jurisdiction of the City of Johannesburg. The second respondent is the Building Control Officer of the City of Johannesburg, in his official capacity, as the person who is responsible for the examination of building plans submitted to the City of Johannesburg for the erection of new buildings falling within its jurisdiction. The second respondent is also responsible for making recommendations regarding the approval of building plans. I shall refer to the first and second respondents collectively as the CoJ, since it is not

¹ Loots "Locus Standi to Claim Relief in the Public Interest in Matters Involving the Enforcement of Legislation" (1987) *SALJ* 131, points out, inter alia, that the term "*locus standi*" is difficult to define. It relates, however, to the capacity of a party to litigate in order to enforce a right that is legally enforceable. Whilst historically in South Africa the term "*locus standi*" or "*locus standi in judicio*" has been used, the American term "standing" is being used more frequently.

necessary to distinguish between them for purposes of this judgment. The third respondent is Nordic Light Properties (Pty) Limited (Nordic).

Background facts

[4] On 26 August 2021, the MEPF concluded an agreement of sale (the sale agreement) with Erf 8[...] B[...] (Pty) Limited (Erf 8[...]). The agreement was for the sale of a “letting enterprise” consisting of certain land (property) which was improved with commercial buildings known as the Nicolway Shopping Centre in Bryanston, for a purchase price of R1 148 billion. On 6 December 2021, the parties concluded a written addendum to the sale agreement.

[5] The sale agreement was subject to certain suspensive conditions, the last of which was fulfilled shortly before registration of transfer into the MEPF’s name, which occurred on 15 December 2021. Since then, the MEPF has been conducting the business of a letting enterprise (shopping centre) for its own account.

[6] It is common cause that at the time of the sale, the seller, Erf 8[...], was a party to ongoing litigation against the CoJ and certain other parties including Nordic. In those proceedings² Erf 8[...] sought to review and set aside a decision of the CoJ (review proceedings), whereby the CoJ had approved the rezoning of certain portions of land owned by Nordic situated adjacent to Erf 8[...]. Erf 8[...] contended, among other things, that it had not been given proper notice of Nordic’s rezoning application as required in terms of the City of Johannesburg Municipal Planning By-law, 2016 (By-law) and the Spatial Planning and Land Use Management Act³ (SPLUMA), nor did it receive notice that the rezoning application had been approved by the CoJ.

[7] Erf 8[...]’s further contention was that the *audi alteram partem* (hear the other side) principle had not been complied with and, consequently, it had been deprived of

² These were proceedings instituted by Erf 8[...] on 10 June 2021. The application was opposed by the CoJ and Nordic.

³ 16 of 2013.

its right to participate in the administrative process that led to the approval of the rezoning application, notwithstanding the fact that the rezoning would directly impact the rights of Erf 8[...] and its tenants. In particular, Erf 8[...] averred that the development would likely cause traffic congestion and this in turn would adversely affect customers of the shopping centre. Erf 8[...] maintained that the rezoning of Nordic's property (should it be permitted to stand) would allow Nordic to execute its intended development by the construction of a 10-storey building with various commercial and residential land use rights of some 34 000m², compared to the existing office building of approximately 1 400m² on Nordic's property.

[8] In Part A of the initial notice of motion dated 10 June 2021, Erf 8[...] sought an order interdicting the respondents from commencing or permitting the commencement or continuation of any construction or development activities as envisaged by the rezoning application, pending the final determination of the relief sought in Part B of the notice of motion. In Part B, Erf 8[...] sought an order reviewing and setting aside the decision of the CoJ to approve the rezoning application and for the matter to be remitted to the CoJ for reconsideration. Erf 8[...] also sought an order in terms of which the rezoning application was to be re-advertised and the notices, as prescribed by the By-law,⁴ were to be delivered to the applicant and any other affected party as contemplated by section 21(2)(k) of the By-law.

⁴ Section 21, headed "Amendment of land use scheme" reads thus:

- “(1) An owner of land who wishes to have a provision of the City's land use scheme or any provision of any other scheme which may still be applicable to the land under consideration amended, may submit an application in terms of this By-law to the City for consideration.
- (2) An application for the amendment of a provision of the City's land use scheme or any other scheme that may still be applicable to the land under consideration as envisaged in subsection (1) above shall comply with the following procedures:
 - (a) Notice of the application shall be given once by simultaneously publishing a notice in the Provincial Gazette and a newspaper that circulates within the area of jurisdiction of the application site in English;
 - (b) Such notice shall clearly reflect in terms of which section of this By-law the application is made and which land use scheme or any other scheme is applicable;
 - (c) Such notice shall reflect full details of the application including, but not limited to, the street address, the name of the township, a clear erf description of the erf concerned and the nature and general purpose of the application;
 - (d) Such notice shall further reflect the name, postal address, telephone number, fax number and e-mail address of the person submitting the application;

[9] The CoJ and Nordic, who both opposed the review application, denied that Erf 8[...] would be prejudiced by the intended development. After the filing of the review record in terms of rule 53(3) of the Uniform Rules of Court, Erf 8[...] delivered a supplementary founding affidavit and an amendment to its notice of motion in terms of rule 53(4). In its supplementary founding affidavit, Erf 8[...] raised a further ground (which it averred it discovered when perusing the review record furnished by the CoJ). This was for the setting aside of the rezoning, on the basis that the rezoning application had lapsed and was, in terms of the applicable legislation, deemed to have been refused. Erf 8[...] averred that the deemed refusal occurred prior to the CoJ's purported decision to approve the rezoning. It contended that the rezoning application was not capable of approval, the CoJ having become *functus officio* (discharged of its functions) prior to the date of the purported approval. In the amended notice of motion filed on 11 February 2022, Erf 8[...] introduced, in addition to and in the alternative to the review relief it originally sought, a prayer in Part B that the rezoning application be declared to have been refused and the promulgation of the rezoning be set aside.

-
- (e) Such notice shall further reflect that the application and its accompanied documents will lie open for inspection at specified times and at specified places at the City's offices and that any objection, comment or representation in regard thereto must be submitted timeously to the City in writing by registered post, by hand, by facsimile or by e-mail within a period of 28 days from the date of publication of the notice as envisaged in subsection (2)(a) above;
 - (f) A site notice that contains the same detail as envisaged in subsections (b) to (e) above shall be displayed on the land under consideration in English;
 - (g) Such notice shall be displayed on the land from the same date as the date of the publication of the notice mentioned in subsection (a) above;
 - (h) Such notice shall be in the format as determined by the City;
 - (i) Such notice shall be displayed in a conspicuous place on the land in question where it would be best and easily visible and can be easily read from each and every adjacent public street or other adjacent public place;
 - (j) Such notice shall be maintained in a clearly legible condition for a period of not less than 21 days from the date of publication of the notice mentioned in subsection (a) above; and
 - (k) In addition to the requirements in subsections (a) and (f) above, a letter shall also be dispatched within 7 days of date of the publication of the notice envisaged in subsection (a) above to the owners/occupiers of all contiguous erven, including those on the opposite side of a street or lane by registered post, by hand or by any other means available informing such owners/occupiers of all the detail as prescribed in subsection (2)(b) to (e) above."

[10] In its supplementary answering affidavit, the CoJ admitted that Nordic’s rezoning application was deemed to have been refused but averred that Nordic had “reinstated” its rezoning application after it had lapsed. This alleged “reinstatement” was disputed by Erf 8[...].

[11] Reverting to the sale agreement between Erf 8[...] and the MEPF, I deal briefly with certain clauses in both the sale agreement and the addendum which have been relied upon by the MEPF and which are relevant to the application.

[12] Clause 18 of the sale agreement deals with the High Court application. It provides as follows:

“18. High Court Application

18.1 It is recorded that the High Court application has been launched by the seller as a consequence of the City of Johannesburg Metropolitan Municipality (First Respondent) having approved a rezoning application . . .

. . .

18.3 The seller will, with effect from transfer, take all steps and file all necessary notices at the High Court, at its cost, to facilitate the purchaser becoming the applicant and being in a position to continue with the High Court application The seller will provide all reasonable assistance to the purchaser, after transfer, as far as may be reasonably required, provided all costs of the application, after transfer, shall be borne by the purchaser.”

[13] Clause 1 of the addendum provides:

“1.6 The transaction was concluded and the purchaser purchased the letting enterprise on the basis and with the intention of assuming the position of applicant in the High Court application by effectively taking over all of the rights, interests and obligations of the seller in and to the said application and

in the result of the application, as if the purchaser itself had launched the application initially.

...

- 1.8 The purchaser, as the future substituted applicant in the High Court application, wishes to and will continue with the application in order to procure the relief sought in Annexure ‘B’.”

[14] Clauses 3.2 and 3.3 of the addendum provide:

“3.2 In order to facilitate the purchaser becoming the applicant in the High Court application as envisaged in clause 18.3 of the agreement, the seller hereby agrees to transfer to the purchaser with effect from the date of an order of court substituting the purchaser as the applicant, all of the seller’s obligations, rights, title and interest in and to the result of the High Court application. It is recorded that the intention is that the purchaser will, from that date, be deemed to have replaced the seller as applicant as if the purchaser itself had launched the High Court application.

3.3 . . . In order to give effect to [clause] 18 of the agreement read with 2 above, the purchaser will . . . make such application to the Court as it may be advised necessary, to be substituted as applicant in the High Court application. The seller will, as provided for in [clause] 18.3 of the agreement, ‘provide all reasonable assistance to the purchaser, after transfer, as far as may be reasonably required’.”

[15] On 18 March 2022, the MEPF launched an application to be substituted in place of Erf 8[...] as applicant in the review proceedings. In that application, the MEPF relied on the terms of the sale agreement and the addendum as set out above. It further relied on the evidence already filed by Erf 8[...] in the review application on the basis that the CoJ’s decision to approve the rezoning was as prejudicial to the MEPF as it had been to Erf 8[...] for the very same reasons proffered by Erf 8[...] in the founding papers in the review application. The substitution application was not opposed. On 17 May 2022, Sutherland DJP granted an order in terms of which Erf 8[...] was substituted by the MEPF in the review proceedings.

[16] It was only when the MEPF sought to rely on clause 18 of the sale agreement and the order of Sutherland DJP to continue with the review proceedings that Nordic objected. In its heads of argument in the review proceedings, Nordic contended, for the first time, that the MEPF lacked the requisite *locus standi* to continue with the review proceedings, in that at the time of the launching of the review application the MEPF had not been the owner of the property nor a ratepayer in respect of the shopping centre. For these reasons, Nordic contended that the MEPF was not entitled to raise any objections. Nordic argued that the substitution order had no effect in law, nor did it grant the MEPF standing because such an order cannot create standing where none exists.

[17] In response to the objection, the MEPF argued that *locus standi* should not be an issue in light of clause 18 of the sale agreement and the substitution order, both of which made it clear that the MEPF intended to proceed with the prosecution of the review application in order to procure the relief as formulated in Erf 8[...]’s notice of motion. The MEPF averred that it was impermissible for Nordic to now raise *locus standi* as a defence.

[18] When the review application came before the High Court for argument, that Court directed that only the issue of *locus standi* be argued, with the merits to stand over for later determination, if necessary. After hearing argument on the issue, the Court dismissed the application solely on the basis that the MEPF lacked the necessary standing to seek the relief formulated in the notice of motion as amended.

The High Court’s reasoning on standing

[19] The High Court was of the view that constitutional own-interest standing was broader than traditional common law standing and that a litigant under the circumstances had to show that its rights were directly affected by the challenged law

or conduct. According to the High Court, the following requirements to determine standing, as set out by this Court in *Giant Concerts*,⁵ have become settled in our law:

- “(a) To establish own-interest standing under the Constitution a litigant need not show the same ‘sufficient, personal and direct interest’ that the common law requires, but must still show that a contested law or decision directly affects his or her rights or interests, or potential rights or interests.
- (b) This requirement must be generously and broadly interpreted to accord with constitutional goals.
- (c) The interest must, however, be real and not hypothetical or academic.
- (d) Even under the requirements for common law standing, the interest need not be capable of monetary valuation, but in a challenge to legislation purely financial self-interest may not be enough – the interests of justice must also favour affording standing.
- (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.”⁶

[20] The High Court found that, at the time that Nordic had filed its answering affidavit in the review proceedings, Nordic had no knowledge that the shopping centre was either sold or was in the process of being sold. It was only after Erf 8[...] filed its reply to the answering affidavit that it gained knowledge of the sale. The High Court held that, following the sale, the respondents were entitled to raise the issue of standing. Furthermore, it held that, notwithstanding the sale agreement, the substitution order did not confer standing on the MEPF where none existed. The High

⁵ *Giant Concerts CC v Rinaldo Investments (Pty) Ltd* [2012] ZACC 28; 2013 (3) BCLR 251 (CC).

⁶ *Id* at para 41.

Court was therefore of the view that the MEPF did not have standing because, at the time the review proceedings commenced, it had not been the owner of the property and was thus not adversely affected by the alleged impugned administrative action taken by the CoJ to approve the rezoning.

[21] The High Court went on to state that should the MEPF be deemed to have standing, such would constitute conferring standing retrospectively, which would be impermissible under the common law. It held that the correct position in our law is that, in order to challenge an administrative action, the affected person must prove that he or she had an interest at the time the administrative action was taken. It further held that this position rendered it impossible for subsequent owners or lessees of land to challenge an administrative action. This, that Court held, accorded with the terms of the By-laws which imposed time limitations within which, for example, rezoning decisions taken by it could be objected to or challenged. The High Court accordingly dismissed the review application with costs.

[22] The MEPF's application for leave to appeal the High Court's judgment was refused by that Court on 24 May 2023. A subsequent application for leave to appeal to the Supreme Court of Appeal was dismissed on 7 September 2023.

Before this Court

Condonation

[23] The MEPF lodged its application for leave to appeal seven days outside the timeframes provided for in rule 19(2) of this Court's rules. The order of the Supreme Court of Appeal was granted on 7 September 2023; however, the MEPF submits that its attorneys of record were only notified about the order by the Registrar of the Supreme Court of Appeal on 19 September 2023. The MEPF states that immediately upon becoming aware of the order, a consultation was set up with their attorneys to discuss the prospects of prosecuting an appeal. By 22 September 2023, the MEPF had consulted with its attorneys and provided them with instructions to

proceed with an appeal to this Court. The MEPF's counsel thereafter finalised both the application for condonation and for leave to appeal which were filed in this Court on 10 October 2023.

[24] The MEPF submits that, but for the delay in the receipt of the order of the Supreme Court of Appeal, it would have been able to file its application for leave to appeal in this Court timeously. It further submits that the respondents have not suffered any prejudice as a result of the delay and that a proper case has been made for the granting of condonation. The MEPF takes the view that it would be in the interests of justice for this Court to grant condonation as the delay is minimal and was not caused by any fault on its part. This application has not been opposed and is granted.

[25] The MEPF also seeks leave to file a replying affidavit. According to the MEPF, the replying affidavit does not introduce any new facts, but it merely seeks to address the following three matters: (a) submissions made by Nordic that accuse the MEPF of having alleged or implied improper conduct on the part of the High Court, which allegation the MEPF refutes as being patently untrue; (b) the alleged reliance by the MEPF on a cession, which allegation, according to the MEPF, is unjustified and incorrect; and (c) the reliance by Nordic on the submission that *locus standi* did not exist at the time the impugned decision was taken, which submission, the MEPF contends, is incorrect. This application, as well, has not been opposed and is granted.

Jurisdiction and leave

[26] The MEPF submits that this Court's constitutional and general jurisdiction are engaged because this matter raises a number of novel questions relating both to constitutional matters, as well as arguable points of law which are of general public importance and deserve the attention of this Court as envisaged in section 167(3)(b)⁷

⁷ Section 167(3)(b) of the Constitution provides:

“(3) The Constitutional Court—

...

of the Constitution. In particular, the MEPF argues that this Court must determine whether a purchaser of immovable property is permitted to continue with ongoing review proceedings instituted by the seller prior to the sale and transfer of the property. In addition, the MEPF submits that it is important for this Court to consider the legal effect of an order of substitution in pending litigation after *litis contestatio* (close of pleadings) and whether that order renders the issue of standing *res judicata* (finally determined).

[27] The CoJ does not agree that this matter raises any arguable points of law of general public importance. It submits that this Court has already decided in *Allpay*⁸ that a breach of administrative justice ordinarily attracts public law remedies as opposed to private law remedies. The CoJ further submits that this Court has already held that where an applicant is aggrieved by an administrative action, it must demonstrate how that action prejudices its rights and interests within the prism of administrative law. This is, the CoJ says, at odds with the MEPF's reliance on Erf 8[...]’s grounds of review.⁹

[28] Nordic agrees with the MEPF that this Court's jurisdiction is engaged because this matter raises novel issues of law which are of general public importance and that ought to be considered by this Court. It submits, however, that leave to appeal should be refused because the matter lacks prospects of success.

-
- (b) may decide—
 - (i) constitutional matters; and
 - (ii) any other matter, if the Constitutional Court grants leave to appeal on the grounds that the matter raises an arguable point of law of general public importance which ought to be considered by that Court.”

⁸ *AllPay Consolidated Investment Holdings (Pty) Ltd v Chief Executive Officer, South African Social Security Agency* [2014] ZACC 12; 2014 (4) SA 179 (CC); 2014 (6) BCLR 641 (CC) at paras 29-31.

⁹ See *Ferreira v Levin N.O.*; *Vryenhoek v Powell N.O.* [1995] ZACC 13; 1996 (1) SA 984 (CC); 1996 (1) BCLR 1 (CC) (*Ferreira*); *Giant Concerts* above n 5; and *Tulip Diamonds FZE v Minister of Justice and Constitutional Development* [2013] ZACC 19; 2013 (2) SACR 443 (CC); 2013 (10) BCLR 1180 (CC).

[29] In my view, the ambit of standing to challenge an administrative decision plainly raises a constitutional issue. Quite apart from this, the matter undoubtedly raises arguable points of law of general public importance that ought to be considered by this Court. In particular, this matter brings to the fore the important question of whether standing may be conferred by the conclusion of a sale agreement of immovable property after *litis contestatio* in review proceedings of an administrative action. It also raises the question of whether an order substituting a party in ongoing legal proceedings renders the issue of *locus standi res judicata*. The High Court took the view that standing could not be conferred retrospectively in circumstances where the party seeking standing did not have an interest at the time the administrative decision was taken, and furthermore, that an order of substitution does not confer standing where none exists. In the circumstances, I consider that our constitutional and general jurisdiction is engaged. Leave to appeal should be granted.

Submissions on the merits

MEPF

[30] The MEPF raises two arguments. The first is that it acquired Erf 8[...]’s rights and interests in result of the review application and that these rights and interests were transferred to it with effect from the date of the substitution order. The MEPF contends that upon substitution, it had the right, by operation of law, to pursue the litigation in its own name. Thus, the substitution order did not create standing where none existed; rather, it was transferred from Erf 8[...] to the MEPF. The second argument is that it acquired rights and interests in the result of the review when it became the owner of the shopping centre which, as a consequence, created a direct and substantial legal interest in the review and declaratory relief previously claimed by Erf 8[...].

[31] The MEPF submits that Erf 8[...]’s rights in the result of the review application were transferred to, and for the first time vested in, the MEPF on 17 May 2022 when

the substitution order was made. This, according to the MEPF, was more than three months after *litis contestatio*, which occurred on 8 February 2022.

[32] Placing reliance on the matter of *Waikiwi*,¹⁰ the MEPF argues that upon *litis contestatio* a new obligation was created, tantamount to a novation. What was transferred thereafter, upon a substitution order being granted, was the seller's (Erf 8[...]’s) interest in the result of the litigation. In a similar vein, the MEPF relies on *Ngubane*¹¹ in which Holmes JA said:

“Hence it seems to me that in regard to a cession after *litis contestatio*, you are not ceding your interest in the claim but in the result of the litigation.”¹²

[33] The MEPF submits that when a *res litigiosa* (the subject-matter of pending litigation) is transferred to the purchaser thereof after *litis contestatio*, the *res litigiosa* only vests in the purchaser when the court orders the substitution of the litigant. In this regard the court has a discretion to order substitution and will do so only if satisfied that the substitution will not prejudice the other side. With reference to the decision in *Brummer*,¹³ the MEPF contends that a purchaser of the interest in the result of pending litigation (such as the MEPF), who wishes to pursue the litigation in its own name, has no choice in the matter; it must apply for substitution because only upon substitution will those rights transfer to it and only then will it become entitled to proceed with the litigation in its own name. Before and until substitution, the seller is not divested of its *locus standi*.

[34] According to the MEPF, it has never been its case that it acquired *locus standi* where none existed. It submits that it neither argued nor contended that the substitution order “created” *locus standi*. Nor did the MEPF ever contend that it acquired *locus standi* “because” the substitution application was unopposed, nor that it

¹⁰ *Waikiwi Shipping Co Ltd v Thomas Barlow and Sons (Natal) Ltd* 1978 (1) SA 671 (A) at 676-8.

¹¹ *Government of the Republic of South Africa v Ngubane* [1972] (2) All SA 489 (A); (2) SA 601 (A).

¹² *Id* at para 608B.

¹³ *Brummer v Gorfil Brothers Investments (Pty) Ltd* [1999] ZASCA 6; 1999 (3) SA 389 (SCA) at 410E-H.

had “purchased” or acquired Erf 8[...]’s *locus standi*. The MEPF contends that, in terms of the sale agreement, it expressly purchased Erf 8[...]’s rights and interests in the result of the pending litigation, which rights and interests vested in the MEPF upon its substitution as applicant in place of Erf 8[...].

[35] The MEPF points out that in the High Court, Nordic argued that Erf 8[...] “purported to transfer its standing” to the MEPF when it sold the property and the shopping centre to the MEPF. The MEPF submits that this argument is simply wrong for the reasons set out above. The MEPF contends that whilst its contentions were placed before the High Court when the matter was argued, the High Court did not address these arguments either in its main judgment or in the judgment on the application for leave to appeal.

[36] The MEPF submits that in *Richardson*¹⁴ the same argument as the one raised by Nordic was presented, also in the context of standing in proceedings for the review of administrative actions relating to and arising from ownership of immovable property. However, the court in *Richardson* rejected the argument and held that an owner of land, by virtue of its status as owner, had the requisite standing to seek the review of administrative actions that were taken, not only after the applicant acquired ownership, but also before that time. The MEPF contends that the approach in *Richardson* is consistent with the “broad approach” to standing as discussed by this Court in *Giant Concerts*.¹⁵

[37] The MEPF contends that the High Court incorrectly found that the facts in *Illovo*¹⁶ were distinguishable from those in the present matter in that, once the amendment scheme in *Illovo* came into operation, the seller was required to pay the amount of R8.8 million as a services contribution. This, the MEPF submits, is incorrect. It points out that it was in fact the purchaser (the appellant before the

¹⁴ *Richardson v South Peninsula Municipality* 2001 (3) BCLR 265 (C).

¹⁵ *Giant Concerts* above n 5 at paras 36-40 and 45-6.

¹⁶ *Illovo Opportunities Partnership 61 v Illovo Junction Properties (Pty) Ltd* [2014] ZASCA 119 at paras 18-19.

Supreme Court of Appeal) who contended that the seller (the first respondent in the appeal) was liable for payment of the contribution. This contribution was levied by the municipality against the seller prior to the transfer of the property to the purchaser. The essential dispute was whether it was the seller or the purchaser that should be liable for the contribution. The purchaser applied for a declaratory order that the seller should be held liable. This, according to the MEPF, is similar to what Erf 8[...] set out to do in the present matter. The Supreme Court of Appeal in *Illovo* held that the purchaser of the property concerned indeed had the requisite *locus standi* to apply for such a declaratory order.¹⁷

[38] The MEPF further submits that the “broad approach” to standing should be applied as laid out in *Ferreira*¹⁸ and *Giant Concerts*¹⁹ in respect of a challenge by an own-interest applicant. In the present case, the MEPF submits that it placed evidence before the High Court demonstrating that its own interests or potential interests are and will be directly prejudiced and affected by the CoJ’s purported invalid decision.

[39] At the hearing of the matter in this Court, the MEPF’s counsel indicated that the MEPF would be relying on two further authorities of this Court as foreshadowed in its notice filed shortly before the hearing. These are the matters of *Swanepoel*²⁰ and *Mkhize*.²¹ In both of them the issue of transmissibility was addressed by this Court in the context of review proceedings. The MEPF contends that the relevance of these two cases flows from the respondents’ argument that *locus standi* is not something that can be transmitted from one person to another. The MEPF argues that a contrary view was expressed by this Court in both *Swanepoel* and *Mkhize* as dealt with hereunder.

¹⁷ Id at para 19.

¹⁸ *Ferreira* above n 9 at para 165.

¹⁹ *Giant Concerts* above n 5 at paras 48-9.

²⁰ *Swanepoel N.O. v Profmed Medical Scheme* [2024] ZACC 23; 2025 (1) SA 33 (CC); 2025 (2) BCLR 205 (CC).

²¹ *Mkhize N.O. v Premier of the Province of KwaZulu-Natal* [2018] ZACC 50; 2019 (3) BCLR 360 (CC).

[40] The MEPF argues that in *Swanepoel*,²² this Court said that the cause of action for review is transmissible where the executor of the deceased estate (the successor to the initial applicant who subsequently passed away) has a financial interest in the outcome of the review proceedings and not merely an interest in the right underlying the review. This approach, the MEPF submits, finds support in *Mkhize*.

[41] The MEPF points out that in *Swanepoel*²³ this Court quoted the following passage from *Mkhize*:²⁴

“Beyond this, however, the review application was brought by the deceased in terms of [PAJA], in terms of which anyone may institute proceedings for the judicial review of an administrative action. A review under PAJA determines, finally, whether an administrative action is lawful or not. It is an objective exercise, the outcome of which binds not only the litigating parties, but everyone else. The review of administrative action attaches therefore not to the party bringing the review, but to the exercise of public power itself. *It stands to reason then, that Ms Mkhize had standing both to bring and be substituted in the review application by virtue of her position as executrix of the estate and status as the legal guardian of her minor son, Phathokuhle.* This is not only because she has a direct and substantial interest in the matter, but also because she was entitled to review the Premier’s administrative action under section 6(1) of PAJA. The Supreme Court of Appeal did not have explicit regard to the nature of a PAJA review, but the outcome it reached is compatible with previous decisions of this Court. . . . Given that this Court has held that the review of public power is a constitutional matter, it follows that a broad approach to standing must be taken in such reviews. That PAJA was enacted to give effect to the constitutional right to just administrative action in section 33 of the Constitution, and so reviews under PAJA are a way of enforcing the right in section 33, also implies that the broad standing requirements in section 38 should apply to the review of administrative action.”

²² *Swanepoel* above n 20 at para 50.

²³ *Id* at para 53.

²⁴ *Mkhize* above n 21 at paras 69-70.

[42] The MEPF asserts that this Court’s reasoning in *Swanepoel* is relevant for the following reasons. First, this Court said:

“In sum therefore, Ms Steyn’s PAJA claim to just administrative action is transmissible to her deceased estate. The decision of the Appeal Board constitutes administrative action and is not merely personal in nature. The application for substitution must therefore be granted. In view of this conclusion, a related matter which requires consideration, is Mr Swanepoel’s standing to bring this application.”²⁵

[43] In addressing Mr Swanepoel’s standing, as executor, to bring the application, this Court said:

“Section 38 of the Constitution provides a broad scope for legal standing. Mr Swanepoel seeks to act on behalf of the late Ms Steyn in a review application in which he alleges that a right in the Bill of Rights has been infringed. He plainly falls within the purview of section 38. Further, given that the review of public power is a constitutional matter, a broad approach to standing must be taken. As stated, this is a PAJA review, which seeks to determine whether administrative action is lawful or not, the outcome of which binds not only litigating parties, but everyone else. The review of administrative action therefore attaches not to the party bringing the review (the applicant), but to the exercise of public power itself. These rights are thus not of a ‘purely personal nature’. Therefore, self-evidently, Mr Swanepoel has standing to be substituted in the review application.”²⁶

[44] This Court then said the following on the issue of Mr Swanepoel’s standing:

“There is another compelling basis on which he has standing – by virtue of section 6(1) of PAJA, which states that any person may institute proceedings in a court or tribunal for the judicial review of administrative action. It would be legally untenable to conclude in the face of section 6(1), that these rights are merely personal, or to liken them to claims such as one for damages under the *actio iniuriarum* (infringements of personality rights). For all these reasons, Mr Swanepoel

²⁵ *Swanepoel* above n 20 at para 56.

²⁶ *Id* at para 57.

has the requisite standing to bring this PAJA review application and to be substituted for the late Ms Steyn.”²⁷

CoJ

[45] The primary contention advanced by the CoJ is that the MEPF has not demonstrated that it falls within the categories defined in section 38²⁸ of the Constitution, particularly because the agreement of sale was a private one, made between Erf 8[...] and the MEPF to the exclusion of the respondents. The CoJ further contends that the substitution application was merely a procedural formality. In this regard, it submits that Sutherland DJP was not seized with the issue of standing, nor was the issue presented on the papers as such. The CoJ argues that the application before Sutherland DJP dealt with what was transferred – being the results of the review – and that, absent the sale agreement, there was nothing else that gave rise to the MEPF’s standing in the review proceedings. The CoJ argues that the MEPF does not satisfy the requirements for standing as articulated by this Court in *Giant Concerts* in that it has not demonstrated how its rights have been adversely or particularly affected.

[46] The CoJ contends that the MEPF would have practical difficulties in proceeding with the review because it would have to rely on the same grounds of relief as relied upon by Erf 8[...]. In effect, the CoJ says that the MEPF would not be able to advance any arguments on the merits of the review application because it was

²⁷ Id at para 58.

²⁸ Section 38 of the Constitution deals with the enforcement of rights. It provides as follows:

“38 Enforcement of rights—

Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights. The persons who may approach a court are—

- (a) anyone acting in their own interest;
- (b) anyone acting on behalf of another who cannot act in their own name;
- (c) anyone acting as a member of, or in the interest of, a group or class of persons;
- (d) anyone acting in the public interest; and
- (e) an association acting in the interest of its members.”

not there when the decision was made by the CoJ to approve the rezoning. Ultimately, the CoJ's contention in this regard is that it was Erf 8[...] that started the litigation and that it ought to have seen it through to its conclusion. As such, it did not make any difference that the property was sold and a substitution order was obtained.

[47] The CoJ places reliance on *Vandenhende*²⁹ in which the High Court dismissed a review application brought by a prospective owner/purchaser of certain immovable property on the basis that such owner/purchaser had no *locus standi* to institute review proceedings against the Minister and the local authority concerned. The CoJ argues that *Vandenhende* trumps *Richardson* since the former was decided by two Judges whilst the latter was heard by a single Judge, albeit in the same Division (the then Cape Provincial Division of the High Court).

Nordic

[48] Nordic's arguments largely mirror those of the CoJ, the exception being that it places emphasis on the terms of the sale agreement and the addendum to make the point that the MEPF's case is based on *Waikiwi* and *Ngubane*, which concerned a cession of rights and interests which remained unperfected until a substitution order had been granted. Nordic submits that the difficulty with finding that the MEPF has standing is that it goes against what was said in *Tavakoli*³⁰ that standing ought to be established on the founding papers. Nordic does, however, concede that a party need not have an interest at the time of the impugned administrative decision – a party may come after the fact and seek to assert its right to challenge a decision.

Analysis

[49] At the outset, I find that the MEPF's reliance on *Waikiwi* and *Ngubane* is misplaced. This is because those cases dealt explicitly with the cession of private rights. In *Ngubane*, for instance, the Appellate Division was concerned with the

²⁹ *Vandenhende v Minister of Agriculture, Planning and Tourism, Western Cape* 2000 (4) SA 681 (C).

³⁰ *Tavakoli v Bantry Hills (Pty) Ltd* [2018] ZASCA 159; 2019 (3) SA 163 (SCA).

question whether a claim for damages for personal injury was capable of being ceded before *litis contestatio*.³¹ The Court accepted that, as a general rule, claims of a personal nature not involving patrimonial loss cannot be transmitted to heirs or ceded at any stage before *litis contestatio* because they essentially belong to the person injured and are for his benefit only.³² Clearly the Court was concerned with cession or cedability in private law and not transmissibility of the right to pursue the public law remedy of review.

[50] Similarly, in the later case of *Waikiwi*, the Appellate Division was concerned with whether the cession of a private law right that took place after *litis contestatio* precluded the continuation of the claim in the name of the cedent. The Court held that an agreement giving effect to that cession, where the right to prosecute an action is transferred, was only permissible and effective once a court allowed the cessionary to be substituted as the plaintiff.³³ Whether or not such a substitution should be granted fell within the court's discretion. However, a court would likely refuse to grant the substitution if the other party would be prejudiced. The Court therefore, clearly dealt with a cession after *litis contestatio* and expressly established the circumstances under which the cessionary would be entitled to proceed with the action.

[51] This must have been in the minds of the MEPF and Erf 8[...] when they concluded the sale agreement and the addendum thereto, to the extent that they also sought an order of substitution in order to give effect to the sale agreement. However, in doing so, they clearly misconstrued *Waikiwi* and *Ngubane*. Whilst these cases dealt with the cession of a personal right, the present matter does not concern a cession or the transmissibility of personal rights. Rather, it concerns the transmissibility of a right to prosecute a review claim in respect of administrative action. Matters of this nature ordinarily attract public law remedies and not private law remedies.³⁴

³¹ *Ngubane* above n 11 at para 605.

³² *Id* at para 608.

³³ *Waikiwi* above n 10 at para 678.

³⁴ *AllPay* above n 8 at para 29.

Therefore, it seems to me that what is central to the determination of the issues is the need to consider the transmissibility of a right to pursue the review of an administrative action.

[52] To answer this question, regard must be had to this Court's decisions in *Mkhize* and *Swanepoel*. *Mkhize* concerned a dispute arising out of the withdrawal of the recognition of the late Zwelibhekile Sibusiso Mbuyazi (deceased) as *iNkosi* (traditional leader) of the Mbuyazi Traditional Community in KwaZulu-Natal by the Premier of KwaZulu-Natal. Following this decision by the Premier, the deceased launched a series of applications against the Premier and the other respondents, including a review application which sought to challenge a decision withdrawing his recognition as *iNkosi*. The deceased passed away on 7 July 2012 while those proceedings were pending. The respondents then filed an application to dismiss the applications that had been brought by the deceased. The grounds for the respondents' application were among others that—

“the rights of the deceased to be recognised as *iNkosi* were personal to him, that in order to be recognised as such he had to be alive and that these rights were not transmissible to his heirs or anyone else for that matter.”³⁵

[53] Ms Mkhize, acting in her capacity as the executrix of the deceased's estate and as the late *iNkosi*'s widow, opposed the respondents' application. She also brought a counter-application to be substituted as the applicant in the review application initiated by the deceased.³⁶

[54] The High Court and the Supreme Court of Appeal both dismissed Ms Mkhize's application on the basis that the deceased's right to be reinstated was a personal right and consequently it was not transmissible to Ms Mkhize.³⁷ The matter was ultimately appealed to this Court. This Court held that the matter was distinguishable from

³⁵ *Mkhize* above n 21 at para 12.

³⁶ *Id* at para 14.

³⁷ *Id* at para 17.

Ngubane as the latter case did not deal with the transmissibility of a right to review the exercise of public power. The following paragraphs are relevant:

“The correct interpretation of the Supreme Court of Appeal judgment is therefore that the applicant was barred from being substituted in the review application that the deceased brought solely insofar as that application sought to reinstate the deceased as *iNkosi*. The reason for circumscribing her standing was that only the deceased was entitled to be reinstated as *iNkosi*, and not the applicant. The Court held that the substitution, seeking that the applicant be recognised as *iNkosi*, is not possible.

However, as the Supreme Court of Appeal held, it does not follow from this that the applicant does not have standing to bring a review application. It only means that she could not seek the same relief the deceased sought. She was fully entitled to seek different relief like a declarator that the deceased was unlawfully removed from office. The Supreme Court of Appeal judgment equally recognised that Phathokuhle’s succession claim was also not extinguished.”³⁸

[55] The Court further held:

“In terms of Zulu customary law, Ms Mkhize could have been substituted as the applicant, not only because of her role as executrix but also by virtue of being the deceased *iNkosi*’s wife. *She had a substantial interest in the matter pursued by the deceased iNkosi. Her substitution would not have presented any difficulty at all.* If the review application succeeded, all that the court would do is to make a declarator that the deceased *iNkosi* was wrongfully removed.

...

This is not only because she has a direct and substantial interest in the matter, but also because she was entitled to review the Premier’s administrative action under section 6(1) of PAJA.”³⁹ (Emphasis added.)

[56] In *Swanepoel*, the Court was also confronted with a review application that had been initiated by the deceased. Upon the deceased’s passing the executor brought an application to be substituted in those proceedings. The issue was whether the

³⁸ *Mkhize* above n 21 at paras 60-1.

³⁹ *Id* at paras 362F-G and 362H-I.

deceased's (Ms Steyn's) PAJA review claim was transmissible to her deceased estate.⁴⁰ I have already quoted the relevant passages above as relied upon by the MEPF. For the sake of completeness the following extracts from the judgment are relevant:

“Central to the enquiry with regard to substitution is whether Ms Steyn's PAJA review claim is transmissible to her deceased estate. If not, then absent any review claim that the deceased estate itself may have independently and separate from that of Ms Steyn, substitution is not legally tenable

The claim in the notice of motion to ‘honour contractual commitments’ is undoubtedly one that is wholly dependent upon the review of the Appeal Board's decision – that much was conceded by counsel. *That claim, if upheld, had a direct financial interest for Ms Steyn, namely payment of her medical claims by Profmed.* If the claim was unsuccessful, she would have had to make payment from her own pocket. *This financial interest is an important factor that bears consideration in determining the transmissibility of the claim. A further important factor is the nature of the claim, which is the next topic for discussion.*

. . .

In our law of succession the estate of a deceased person does not include rights and liabilities of a purely personal nature attached to that person and that have terminated with the death of the deceased. *The right to fair administrative action can be claimed by a deceased estate, but then the right is that of the estate, not the deceased, inasmuch as that right forms part of the assets and liabilities in the estate and thus falls in the estate.* That has a direct impact on what can be claimed under the right. *Here, this Court's approach in Mkhize suggests that the personal claim to just administrative action of Ms Steyn is transmissible to her deceased estate.*

In this instance, we must holistically consider the components of the claim relating to the contractual performance relief and the claim for judicial review relief. *Viewed thus, it appears to me that the judicial review and contractual relief are transmissible.* If Ms Steyn had only claimed reinstatement as a member with no attempt to recover unpaid claims, the proceedings would be purely personal in nature and would perish with her. Where, however, the claim is for the reimbursement of

⁴⁰ *Swanepoel* above n 20 at para 44.

expenses pursuant to a wrongful termination of membership – *which has a financial component – the claim would be transmissible.*

*The cause of action for review must be transmissible where, as is the case here, the estate has a financial interest in the outcome of the review, and not only a mere interest in the right underlying the review. This approach finds support in Mkhize.*⁴¹
(Emphasis added.)

[57] Even though this Court in *Mkhize* and *Swanepoel* spoke of transmissibility in relation to review claims, this should not be understood to convey that public law claims can simply be ceded. In those two cases this Court emphasised that the substituted party had her own standing to pursue the review. In *Mkhize*, there was no surviving party with standing to pursue the claim for reinstatement of the deceased *iNkosi*, because that claim was personal to the deceased; but Ms Mkhize was found to have standing to pursue the review and the deceased *iNkosi*'s consequential monetary claim. This was by virtue of her status as the late *iNkosi*'s executrix and by virtue of her being his widow. This was said to give her a sufficient interest in the lawfulness of the late *iNkosi*'s removal and in his monetary claim which, of course, now formed part of the estate vested in the executrix.⁴² In *Swanepoel*, this Court again said that the executrix would not have had standing to pursue the review if the deceased had merely sought reinstatement as a member of the medical scheme, but the executrix did have standing because the review would determine whether the deceased had an entitlement to have unpaid claims met.⁴³

[58] So it seems to me that *Mkhize* and *Swanepoel* are authority for the proposition that, for a review claim to be “transmissible” in the sense of being capable of being pursued by an executor, the executor must have a legal interest in the outcome of the review. If the review is the basis for a monetary claim, the executor – as the representative of the deceased estate regarding its assets and liabilities – has his or her own standing to pursue the review for that purpose (though not for the purpose of

⁴¹ Id at paras 44-5, 48-9 and 50.

⁴² *Mkhize* above n 21 at paras 68-72.

⁴³ *Swanepoel* above n 20 at paras 49-50.

review relief personal to the deceased). In *Mkhize*, the widow of *iNkosi* was held to have an additional basis for standing, namely, the standing conferred by Zulu customary law on a deceased *iNkosi*'s wife. In these cases, it is not the initial applicant's standing that is "transmitted". What is meant by "transmission" in this setting is that the successor party, by virtue of his or her own interest in the review, is entitled to be substituted and to pursue the case on the basis initially advanced by the previous applicant.

[59] The effect of *Mkhize* and *Swanepoel* seems to me to be that if the deceased in those cases had died before instituting review proceedings, the executrix would in each instance have had standing to institute her own independent review. In both cases, that standing was acquired after the impugned decisions were taken, but that did not matter; what was important was that the executrix should have standing at the time she sought to come on record in place of the deceased litigant.

[60] In the present case we are not dealing with a substituted executor, but the principle is the same. In my view, the rationale for the MEPF's standing is its ownership of the property. It is precisely the same kind of standing as that of Erf 8[...] when the latter initially instituted the review. For own-interest standing as contemplated in *Giant Concerts*, I do not think one needs to be too concerned about looking for "something more"; ownership is self-evidently enough.

[61] I am of the view that the answer lies simply in the fact that the MEPF is the current owner of the immovable property. That, it must be accepted, is the gateway upon which the MEPF's substantial and financial interests are established. The consequences that may flow from the decision in the review application directly impact the current applicant, MEPF, and not Erf 8[...]. This accords with what was said in *Richardson* by the High Court:

"In every transfer of real rights, particularly transfer of right of ownership in property, as has happened in the instance of a transfer from Mrs Wells to the Trust on 12 June 1996, and in absence of any clear indication to the contrary, such transfer involves

transfer of any right, title and interest in the property so transferred. *Any right, therefore, arising from and incidental to the right of ownership of the property so transferred, such as a right to institute an action arising from ownership of such property, accrues and vests in the transferee as the successor in title in respect of such property.*”⁴⁴ (Emphasis added.)

[62] Upon acquiring ownership of the property, the MEPF stood to be negatively impacted in the very same way that Erf 8[...] would have been impacted as a result of the administrative decision to approve the rezoning application. This much is apparent from Erf 8[...]’s founding affidavit in the review application where it stated:

“Should construction commence on Portion 1 of 81 without any interim protection to the applicant, it will result in heavy earthmoving machinery as well as other heavy construction vehicles using Wedgewood Link on a continuous daily basis. It is the only vehicular access route.

I further state that [Nordic’s] property is too small to accommodate – in the form of storage space – all the building materials and equipment that will be required to construct a ten storey building and its basement. The likelihood is that it will seek permission from the City to store these on the side of Wedgewood Link.

I also believe that, in order to construct a ten storey building, the construction company will necessarily have to make use of a massive crane for purposes of lifting materials to that height. Again, the crane will have to use Wedgewood Link.

The above consequences will be devastating for the applicant and the patrons of its shopping centre, who will be forced to share this access route with construction vehicles and building materials. The prejudicial financial impact for the applicant will be enormous, difficult (if not impossible) to quantify, and irreparable.”

[63] As the MEPF correctly submits, it is not some busy-body from the outside that has come to court to waste everybody’s time on this issue. The question that begs an answer is the following: who, if not the MEPF, can proceed with the review application? It certainly cannot be adjudicated as if there is no opposition, nor can

⁴⁴ *Richardson* above n 14 at para 273G-H

Erf 8[...] be forced to persist with litigation in a matter in which it no longer has any interest.

Conclusion

[64] It follows that there can be no basis for this Court to find that the MEPF does not have the requisite *locus standi* and the right, on becoming the owner of the property and the letting enterprise, to continue prosecuting the review proceedings commenced by Erf 8[...]. Nothing more needs be said on this aspect.

Order

[65] The following order is made:

1. Leave to appeal is granted.
2. The order of the High Court is set aside and replaced with the following order:
 - “(a) It is declared that the applicant has the necessary *locus standi* to pursue the review proceedings instituted by Erf 8[...] B[...] (Pty) Limited.
 - (b) The respondents, jointly and severally, must pay the applicant’s costs associated with the determination of *locus standi* as a separated issue, including the costs of two counsel where employed.”
3. The review application is remitted to the High Court for determination of the merits.
4. The respondents, jointly and severally, must pay the applicant’s costs of the applications for leave to appeal brought in the High Court and the Supreme Court of Appeal.
5. The respondents, jointly and severally, must pay the applicant’s costs in this Court, including the costs of two counsel.

For the Applicants:

J Both SC and L M du Plessis
instructed by Strauss Scher Attorneys

For the First and Second Respondents:

E Mokutu SC, X Stemela and A Dipa
instructed by Malebye Motaung
Mtembu Incorporated

For the Third Respondent:

I Jamie SC and G F Porteous instructed
by Guthrie Colananni Attorneys

s