



NOT REPORTABLE

CASE NO: SA 35/2020

IN THE SUPREME COURT OF NAMIBIA

In the matter between:

**UNISTRAT PROPERTY DEVELOPMENT FIVE SEVEN
TWO SEVEN (PTY) LTD**

Appellant

and

**CHAIRPERSON FOR THE COUNCIL OF THE
MUNICIPALITY OF WINDHOEK**

First Respondent

THE COUNCIL FOR THE MUNICIPALITY OF WINDHOEK

Second Respondent

**THE CHAIRPERSON OF THE MANAGEMENT
COMMITTEE**

Third Respondent

**THE CHIEF EXECUTIVE OFFICER: WINDHOEK
MUNICIPALITY**

Fourth Respondent

Coram: SHIVUTE CJ, DAMASEB DCJ and HOFF JA

Heard: 8 July 2022

Delivered: 28 October 2022

Summary: In an application for reviewing and setting aside certain decisions taken by the second respondent, the second respondent raised a point *in limine* that the appellant had no *locus standi* to bring the application.

The court *a quo* upheld the point *in limine* and dismissed the application.

On appeal various grounds were raised *inter alia* that the court *a quo* erred and misdirected itself by finding that the appellant had failed to comply with the provisions of s 42 of the Companies Act, 28 of 2004, and that the appellant had failed to prove a legal *nexus* between itself and the second respondent.

Held, the court *a quo* correctly found that the provisions of s 42 of the Companies Act had not been complied with by the appellant. Section 42 requires that where a contract, made in writing by a person professing to act as an agent for a company not yet incorporated, that company may at the time of incorporation, ratify or adopt the acquisition of rights and obligations contained in that contract, by means of a statement in its memorandum, on registration, to that effect.

The appellant failed to comply with the statutory requirements. This was fatal in respect of its contention that the contents of a joint venture agreement, between different *persona* and the second respondent, conferred certain rights on the appellant, in terms of which it was justified to launch the review application.

It is common cause that the appellant was not a party to the joint venture agreement, and that the second respondent had no dealings with the appellant but with the parties forming the joint venture agreement, in respect of the sale of an immovable property.

Held, the court *a quo* was justified in finding that the appellant failed to prove a legal *nexus* between itself and the persons which formed the joint venture.

Held, the court *a quo* did not err or misdirect itself by finding that the appellant failed to prove that it had the required *locus standi* to launch the review application.

Held, the appeal is dismissed with costs.

APPEAL JUDGMENT

HOFF JA (SHIVUTE CJ and DAMASEB DCJ concurring):

[1] This is an appeal against a dismissal of an application for review by the High Court (court *a quo*).

Background

[2] The appellant approached the court *a quo* praying for the following court orders:

- (a) That the decision by the first and second respondents dated 29 November 2016 communicated to the applicant on 8 December 2016 be reviewed and set aside.
- (b) That the decision made by the first and second respondents dated 5 September 2018 communicated to the applicant on 13 September 2018, be reviewed and set aside.
- (c) That the first and second respondents be directed to enter into an agreement of sale with the applicant, in respect of Erf 5727, Windhoek, on the terms and conditions contained in the decision made by the first

and second respondents on 11 November 2013, awarding the applicant the tender to purchase Erf 5727, Windhoek, within 30 days of this order.

(d) Costs of one instructing and one instructed legal practitioner.

[3] The appellant in its founding affidavit stated that the relief was premised on the failure by the first and second respondents to act in the manner required by their own tender documents as well as the deed of sale, which formed part of the respondents' own tender documents. The relief was further sought on the basis of the alleged failure by the first and second respondents to comply with the requirements of Art 18 of the Namibian Constitution as well as on the alleged non-compliance by the respondents with the provisions of the Local Authority Act 23 of 1992 (the Act) when inviting, convening, requisitioning and constituting the Council that made the decision of 29 November 2016.

[4] The review application was opposed and the following points *in limine* were raised by the respondents: firstly, the wrong party was before court; secondly, there was non-compliance with the provisions of rules 76, 77 and 65(4) of the Rules of the High Court; thirdly, there was an unreasonable delay in bringing the review application, and fourthly, there was no contractual relationship between the parties.

Factual background

[5] This matter emanates from a closed tender allocation for an unimproved business zoned vacant Erf 5727, situated in Bahnhof Street, Windhoek (the

property). This was done by the second respondent through an expression of interest to the public to participate in the purchase and development of the property. Four entities, including Unistrat Property Investment submitted bids. Following an evaluation process conducted by an evaluation committee of the second respondent, the tender was awarded to Unistrat Property Investments Joint Venture (the JV) at a fee of N\$12 000 000, and the JV was informed in writing on 11 November 2013 that its bid was successful. In a letter dated 28 January 2014 the JV unconditionally accepted the award.

[6] The tender document, which is a draft deed of sale, provided for the purchase price and method of payment. The JV which had the choice to select the preferred method of payment undertook to provide payment by means of a 'bank guarantee'.

[7] It was a condition precedent that if the applicable payment or guarantee was not made or submitted timeously, the tender would not commence but would be null and void. It was also a condition that where the formal agreement was not signed after a request to do so, or where the signed documents were not returned, the second respondent may cancel the agreement and claim damages.

[8] In a letter dated 24 March 2014 and addressed to the JV, the second respondent informed the JV that the purchase price of N\$12 000 000 was payable, and that once proof of payment had been submitted, the second respondent would arrange for the signing of the deed of sale.

[9] Subsequently in a letter dated 25 March 2015 the JV was reminded that a period of 12 months had passed since the letter of March 2014, and that the agreement would be null and void if the JV failed to finalise the sales transaction within the agreed period of time. The JV was requested to finalise the sale within 30 days from the date of that letter.

[10] In an email addressed to the JV on 14 April 2015 it was pointed out that the sales transaction was not yet finalised and that, that reminder would be a final one before the allocation of the property to the JV would be cancelled.

[11] In a subsequent letter the second respondent was informed by the JV that a funder, the Sefudi Group, would provide the primary funding. The second respondent was also informed that the JV had engaged the Development Bank of Namibia as well as Standard Bank of Namibia, both of whom had expressed willingness to form a financing consortium with a view to fulfil the role of 'guarantor'.

[12] The second respondent replied in a letter dated 28 May 2015, pointing out that the second respondent did not work with third parties other than banks or financial institutions and could not accept the letter of intent from the Sefudi Group. The JV was further informed that the 'transaction has now been over extended and the Municipality of Windhoek considers submitting a report to the Council for the Municipality of Windhoek with regard to the status of it'. The JV was urged to provide the second respondent with a bank guarantee within 14 calendar days.

[13] The JV failed to deliver the required bank guarantee. The second respondent subsequently through a letter dated 8 December 2016 (about three years after the property had been allocated to the JV), informed the JV that the second respondent had resolved to cancel the allocation of the property to the JV.

[14] The JV, through its legal representative, addressed a letter dated 16 January 2017 to the second respondent, claiming that the JV was not given an opportunity to be heard, and further that the second respondent was *functus officio* and could not have reconsidered its decision until a final written agreement had been entered into. Nevertheless, the JV, on 17 May 2018, lodged an appeal with the second respondent to revisit its decision to cancel the allocation of the property to the JV. Pursuant to deliberations, the second respondent resolved on 5 September 2018 to afford the JV a further opportunity by conditionally suspending the 29 November 2016 decision and giving it 30 days to finalise the sale transaction. The resolution of 5 September 2018 was communicated to the JV in a letter dated 13 September 2018. In the same letter, the JV was also informed that the purchase price has been re-evaluated to an amount of N\$26 639 000 failing payment, the allocation would automatically be cancelled. The JV once again failed to comply with the decision of the second respondent whereupon the transaction lapsed.

Proceedings in the court *a quo*

[15] The court *a quo* correctly pointed out that the second respondent was the only juristic person amongst the respondents which was capable of being sued in its own name and that the other respondents were mere functionaries of the second

respondent and whatever functions they may have performed relating to the present matter, they had done so for and on behalf of the second respondent. Their actions therefore did not attract personal liability. The court *a quo* instead of referring to all the respondents, only referred to the second respondent in its judgment as 'the Council'.

[16] The court *a quo* explained that the issues before it were; firstly, whether the appellant had made out a case entitling it to the relief sought; and secondly, given the fact that the Council's decision of 29 November 2016 sought to be reviewed and set aside, was made against the JV and prior to the incorporation of the appellant, and the Council's decision of 5 September 2018 was made after the appellant was incorporated, whether the appellant had acquired rights or interests in the subject matters of those decisions, and if so, how and when.

[17] In the consideration of the aforementioned issues, the court *a quo* started off by dealing with the point raised *in limine* that a wrong party was before court; that since the decision to allocate the property was made in favour of the JV and not the appellant, the JV was a necessary party to the proceedings and should have been joined.

[18] The court *a quo* referred to the response of the appellant to the aforementioned point *in limine*, namely that in a supplementary affidavit the appellant conceded that the property was indeed allocated to the JV, but that in terms of the JV agreement, the members of the JV retained the discretion to incorporate the JV into a company in the event the application of the property was successful. The court *a quo*

stated that the appellant pointed out that following the successful allocation of the property, the JV was incorporated into a company on 24 June 2016.

[19] The court *a quo* pointed out that the property was allocated to the JV by the Council's resolution of 31 October 2013 and the offer was accepted by the JV on 26 January 2014, thus long before the incorporation of the appellant.

[20] The court *a quo* explained that although the point *in limine* raised was that 'a wrong party was before court', it is legally correct to determine whether the appellant had the legal standing to bring the application. This was so, according to the court *a quo*, because the Council's case was that it never had any dealings with the appellant, but that it had dealings with the JV, and that in essence, the Council challenged the appellant's standing to be granted the orders prayed for in the notice of motion.

[21] The court *a quo* further expressed the view that before it could order the appellant to join the JV, the appellant must satisfy the court *a quo* that it had the necessary standing to be before court and to be granted such an order. Therefore, according to the court *a quo*, the issue of standing of the appellant must first be determined before other ancillary matters, including whether the JV should be joined as a necessary party could be considered.

[22] The court *a quo* then explained that the legal position is prescribed by s 42 of the Companies Act 28 of 2004 (the Companies Act). With reference to discussions

and commentary by well-known authors on the subject, the court *a quo* stated that the gist of the legal position was to be summarised as follows:

[34] At common law, a person cannot conclude a contract on behalf of a non-existent principal. As regards a company, before its incorporation it cannot conclude a contract and cannot be bound by representations made by a person on its behalf. It follows also that, the company cannot be bound by estoppel to anything done before its incorporation. This position relating to companies was changed by the Legislature with the introduction of s 35 of the Companies Act, 1973 (now section 42 of the Companies Act, 2004)'.

[23] The effect of s 42 was, as pointed out by the court *a quo*, 'that a company may within a reasonable time after its incorporation, ratify or adopt any contract made in writing by a person professing to act as its agent or trustee before its incorporation'. Thus for 'a company to exercise that power, its memorandum must on its registration contain as an object of the company the ratification or adoption of that particular contract or the acquisition of rights and obligations arising from such contract; and two copies of the contract in writing, one certified by a notary public, must have been lodged with the Registrar of Companies together with the memorandum and articles of association'.

[24] The court *a quo* concluded, by applying the said legal principles to the matter before it, that it was apparent that neither the appellant nor the members of the JV had complied with the statutory requirements set out in s 42 of the Companies Act. The court *a quo* pointed out that although the deponent to the appellant's affidavit contended that the members of the JV 'always retained the discretion' to incorporate

the JV into a company, the fundamental challenge facing the appellant was that the appellant was not in existence when the members of the JV formed the JV. The appellant could not therefore testify as to the intention of the members of the JV. The appellant's position, according to the court *a quo*, was further exacerbated by the fact that the members of the JV were not party to the proceedings before the court *a quo*, and the JV itself, being an unincorporated entity, and therefore not a juristic person *could not* for that reason sue or be sued. The JV was therefore not capable of being joined as a party to the proceedings before the court *a quo*.

[25] In respect of the question whether there was proof that the rights and obligations acquired by the members of the JV were ceded or in any manner transferred to the appellant, the court *a quo* referred to the provisions of clause 3.2 of the JV agreement which provided as follows:

'3.2 Termination

The operation of the Joint Venture and the validity of the Agreement shall terminate if and when it becomes evident that the Joint Venture will not be awarded the contract, or, if the Joint Venture secures the Contract, when all obligations and rights of the Joint Venture and Members in connection with the Contract and the Agreement have ceased and or been satisfactorily discharged.'

[26] The court *a quo* expressed the view that as far as the Council was concerned, the rights and obligations of the JV members arising from the contract had been terminated *vis-à-vis* the Council. It was pointed out that the JV's members were not before court and that there was no proof that the deponent to the appellant's affidavit

had the mandate to speak on behalf of the members of the JV. The court *a quo* further stated that the appellant did not claim that the procedure prescribed by s 42 of the Companies Act had been complied with whereby the rights and obligations vested in the members of the JV were transferred to it.

[27] The court *a quo* concluded, firstly, that the appellant lacked the necessary standing to enforce the rights which vested in the members of the JV when the property was allocated to the JV, and secondly, that there was no evidence that the rights and obligations of the members of the JV were ever ceded or transferred to the appellant at any stage whether in terms of s 42 of the Companies Act or in terms of the common law.

The notice of appeal

[28] The appellant in its notice of appeal raised 14 grounds of appeal. I shall refer only to the grounds relevant to the determination of the point raised *in limine*. I need not set out all the grounds of appeal for the reasons that some of the grounds of appeal were misconceived in view of the point raised *in limine*; the nature of some grounds was such that it was not necessary for the court *a quo* to have considered those contentions; some grounds were extensions of previous grounds raised, and some were irrelevant to the point raised *in limine*.

[29] The grounds of appeal relevant to the adjudication of this appeal are the following:

- '1. The learned judge *a quo* erred and misdirected himself on the facts and/or the law in that:
 - 1.1 the court incorrectly held that
 - (a) the appellant failed to comply with the provisions of s 42 of the Companies Act 2004, No 28;
 - (b) the appellant as a matter of fact failed to prove a legal *nexus* between it and the second respondent.
 - 1.2 the court incorrectly held that there was no legal *nexus* between the appellant and Unistrat Property Investment Joint Venture ("the JV").
2. The court effectively (and incorrectly) found that the wrong party was before court.
- 3 The learned Judge *a quo* further misdirected himself, by raising *mero motu* (and without providing the parties an opportunity to address the court on the aspect) a factual and legal question related to whether or not the appellant had complied with section 42 of the Companies Act which was not raised on the papers.
4. The learned judge *a quo* accordingly erred in finding as a matter of fact and/or law that there was non-compliance with section 42 of the Companies Act in circumstances where the appellant had not been required to address compliance with that statutory provision by way of the case that served for adjudication.'

[30] The appellant *inter alia* sought an order remitting the review application to the court *a quo* for determination on the merits.

The submissions on appeal

By the appellant

[31] In its heads of argument the appellant refers to a preliminary point raised by the second respondent in its answering affidavit (in paragraph 3 thereof) as follows:

‘The decision of the second respondent to award the allocation was made in favour of Unistrat Property Investment Joint Venture (JV). The party before this Honourable Court is Unistrat Property Development Five Seven Two Seven (Pty) Ltd. Second respondent did not deal with the applicant before this Honourable Court. There is neither an explanation as to why a wrong party is before this Honourable Court.’

[32] The appellant’s interpretation of the aforementioned quotation appears in paragraph 7 of its heads of argument, *inter alia*, as follows:

‘. . . The complaint that the Respondents raised for a determination by the court *a quo* was whether there was an explanation as to why the Appellant and not Unistrat Property Investment Joint Venture (JV) instituted the proceedings as the Applicants. We submit that this was the limited matter for determination by the court *a quo*.’

[33] The appellant in its heads of argument submitted that it had provided an explanation in its supplementary affidavit (paragraph 4.2) why the appellant was the party before court and not Unistrat Property Investment Joint Venture (JV) as follows:

‘Insofar as it may be necessary to deal with this fact, I point out that initially the land that is the subject matter of this application was allocated to Unistrat Property Investment JV. This is the predecessor of the Applicant in terms of the Joint-Venture Agreement for Unistrat Property Investment JV particularly Clause 3.1 thereof, the members of the Joint Venture always retained the discretion to incorporate the Unistrat Property Investment JV in the event that their application with the second respondent is successful. It is common cause that such an application was successful. Consequently, on 24 June 2016 Unistrat Property Investment JV was incorporated under the name of the applicant bearing Registration No. 2016/0721. I attach hereto

bearing annexure 1A a copy of the aforesaid registration document. In the premise, I submit that the status of the applicant has been fully properly explained.'

[34] It was submitted on behalf of the appellant that the parties to the Joint Venture Agreement agreed to incorporate should the Joint Venture secure the contract, that it was common cause that the Joint Venture secured the contract, and therefore the jurisdictional fact required in terms of the Joint Venture Agreement to incorporate was present. It was submitted that the appellant provided an explanation why it was before the court *a quo*.

[35] The appellant refers to the response of the second respondent to appellant's explanation as it appears in paragraph 4.2 of the second respondent's second supplementary affidavit where the deponent to the supplementary affidavit stated as follows:

'4.2 I submit that the second sentence¹ of paragraph 4.1 of the Applicant's supplementary affidavit is misplaced. This is because, if Applicant is truly a successor of Unistrat Property Investment Joint Venture – then it was Applicant's duty to obtain from its predecessor all the documents which the predecessor had in its possession, including the copies of the tender documents which were signed by Applicant's predecessor.'

[36] The appellant's view was that the aforementioned response by second respondent is a response not to the explanation provided by the appellant, but rather to a demand for the production, as part of the review record, of the actual tender

¹ The second sentence of paragraph 4.1 of the appellant's supplementary affidavit reads as follows: 'It is important that the respondents must produce the tender submission of the predecessor to the applicant namely: UniStrat Property Development Investment JV'.

submission made by the appellant to the second respondent. As such, it was submitted that the 'query' raised by the second respondent is not an actual denial of the allegations made relating to whether the appellant is the Joint Venture's successor.

[37] The appellant develops the aforementioned view by referring to the last sentence of paragraph 4.2 of the second supplementary affidavit of the second respondent which reads as follows:

'The Applicant's predecessors' members are those that are still members or Directors and should have known better.'

[38] The appellant's interpretation of this sentence is that the second respondent accepts that the appellant's members 'are the *personas* who were the members of the Joint Venture' – which is a crucial fact according to the appellant.

[39] The appellant submitted that the 'factual allegation that utilizing clause 3.1 of the Joint Venture Agreement, the JV was incorporated as the applicant is not disputed'.

[40] The appellant submitted in its heads of argument that the court *a quo* determined the legal position regarding the relationship between pre-incorporation of a company and pre-incorporation contracts. On this point it was submitted that the appellant was not afforded an opportunity to place evidence before the court *a quo* in respect of s 42 of the Companies Act and to make submissions thereon. The

appellant refers in its heads of argument to authority to the effect that a presiding judge cannot go on a frolic of his or her own and decide issues which were not put or fully argued before him or her.

[41] During oral submissions on appeal, the legal practitioner for the appellant repeated this submission. When this court sought clarification on this point, the picture painted drastically changed. Counsel on behalf of the appellant informed this court that the judge *a quo*, at the hearing, *mero motu* raised this issue with the parties and that the parties were forewarned that the court *a quo*, amongst others, would consider s 42 of the Companies Act. Counsel on behalf of the appellant further informed this court that at the time the appellant was not only unable to address the issue raised by the court *a quo*, but also did not request more time to consider the point in order to prepare and to make submissions thereon.

[42] Regarding the finding by the court *a quo* that the appellant failed to prove a legal *nexus* between itself and the JV, it was submitted that as a fact the second respondent's view was that the directors of the appellant and the members of the Joint Venture were the same *persona*, thus establishing the required legal *nexus*.

By the respondents

[43] The legal practitioner on behalf of the second respondent supported the judgment of the court *a quo*.

Evaluation

[44] The ground of appeal that the court *a quo* misdirected itself by *mero motu* raising the point whether or not the appellant had complied with the provisions of s 42 of the Companies Act, without affording the parties an opportunity to address the court *a quo*, is in view of the admissions made by appellant's counsel during oral argument, misconceived, disingenuous and defeats the very essence of that ground of appeal.

[45] The court *a quo* was perfectly entitled to raise the said point *mero motu* and to give the parties an opportunity to address it. Appellant's counsel was not only not ready to address the court on the point raised, but never requested more time in order to consider the point and to address the court *a quo* at a later stage. In these circumstances, raising this ground of appeal, is baseless and needs no further consideration on appeal.

[46] In respect of the point *in limine* that the wrong party was before court, the court *a quo* observed that except for the explanation by the deponent to appellant's affidavit as to why the JV was formed, and the intention of the members of the JV, no counter-argument had been advanced on behalf of the appellant against the second respondent's point of law. This observation by the court *a quo* was never questioned on appeal. In my view it must therefore be accepted that there was no answer to the point raised *in limine* on its merits.

[47] It is in my view nevertheless expedient to consider the submissions on behalf of the appellant on this point raised *in limine*, ie in respect of the *locus standi* of the appellant in bringing the review application in the court *a quo*.

[48] It would be useful to start off by considering the interpretation of the point raised by the appellant. This interpretation concluded that the matter for determination by the court *a quo* was whether there was an *explanation* as to why the appellant and not the JV instituted the proceedings as the applicant. In my view it is a convenient misinterpretation of the preliminary point raised, by concluding that the second respondent only sought an *explanation*. The crux of the point *in limine*, considered in context, is that the appellant had no *locus standi* in launching the review application.

[49] It is not surprising that the appellant latched on the contention that an *explanation* had indeed been provided as to why the appellant was the applicant in the court *a quo*, since as observed by the court *a quo*, there was no counter-argument presented by the appellant's legal practitioner on this point of law.

[50] This court needs to analyse the explanation given in order to determine whether or not there is any substance in it. It is common cause that the tender was awarded to the JV. In the explanation given, it was contended by the appellant, firstly that the JV was the predecessor of the appellant, since clause 3.1 of the JV agreement provides that the members of the JV always retained the discretion to incorporate the JV in the event that their application with the second respondent was

successful; and secondly that it was common cause that their application was successful.

[51] Clause 3.1 of the joint venture agreement reads as follows:

‘3.1 Establishment and purpose

The Joint Venture established by the Members in terms of this Agreement is an unincorporated association with the exclusive purposes of securing and/or executing the Contract for the benefit of the Members. The Members of the Joint Venture may, however, at their discretion incorporate the association should it secure the Contract.’

[52] The ‘Contract’ is defined in the JV agreement as ‘the contract with the City of Windhoek for the purpose of securing and/or executing the purchase of Erf 5727, Windhoek, Namibia, for which the Joint Venture has been formed’.

[53] In my view, what should be determined is whether the appellant is correct in its contention that the JV had been incorporated and secondly, whether the contract was secured.

[54] In respect of the contention that the JV was incorporated, the second respondent disputed this and made the point in its second supplementary affidavit that the Joint Venture agreement marked as annexure 1A to the appellant’s supplementary affidavit does not constitute a juristic person’s registration document – rather this is an agreement between the parties to the joint venture. The appellant was put on terms to prove that the joint venture agreement is the registration

document which merged and/or incorporated Unistrat Property Development JV into the appellant.

[55] In my view, the appellant failed to prove that the JV had been incorporated for the following reasons:

- (a) The appellant in paragraph 4.2 of its supplementary founding affidavit contented that the JV was incorporated under the name of the appellant on 24 June 2016 bearing registration no. 2016/0721. A document, annexure 1A, was attached as proof of such purported incorporation. Annexure 1A boldly proclaims that it is a *joint venture agreement* entered into between certain parties. This document does not constitute the certificate of incorporation of a juristic person.
- (b) Secondly, annexure RK16² which forms part of the exhibits on appeal consists of two parts. The first part being the founding statement of a corporation named 'Unistrat Property Investments CC', and the second part being a certificate of incorporation which reflects the registration number of Unistrat Property Investment CC as CC/2012/3746 and further reflects that Unistrat Property Investment CC 'has been registered and the above-named close corporation was this day

² Annexure RK16 was attached to the founding affidavit in an application brought on behalf of the second respondent in terms of the provisions of rule 6(1) of the Rules of this Court. In this application, annexure RK16 was attached in support of the submission that the appellant had no *locus standi* to have brought the review application in the court *a quo*.

incorporated in terms of the Close Corporation Act 1988'.³ This document was signed by the Registrar of Close Corporations on 21 May 2012. What annexure RK16, shows is that Unistrat Property Investment CC (which was a party to the JV agreement), was incorporated in terms of the Close Corporation Act, and not that Unistrat Property Investment JV was incorporated, under the name of the appellant, bearing registration number 2016/0721 in terms of the Companies Act. The certificate of incorporation bearing registration number 2016/0721 does not form part of the appeal record.

[56] The court *a quo* stated in its judgment (in paragraph 28 thereof) that the deponent⁴ to the appellant's founding affidavit 'points out that following the successful allocation of the property, the JV was incorporated into a company on 24 June 2016. He attaches a copy of the applicant's certificate of incorporation, together with the copy of the JV agreement. It is to be recalled in this connection that the property was allocated to the JV by the Council's resolution of 31 October 2013 and the offer was accepted by the JV on 28 January 2014; thus long before the incorporation of the applicant'.

[57] It must be observed that annexure RK16 was not before the court *a quo* when the review application was heard. Annexure RK16 is, as far as I can determine, the only 'certificate of incorporation' in the appeal record. This document relates to the incorporation of a close corporation and not that of a company. On the assumption that the appellant's 'certificate of incorporation' was indeed before the court *a quo* (but

³ Close Corporation Act 26 of 1988 as amended.

⁴ The deponent to appellant's founding affidavit was not a party to the JV.

absent from the appeal record) then the appeal record is to that extent incomplete – the certificate of incorporation of the appellant was indeed a crucial document which could have assisted the appellant in proving that it was the successor to the JV and that there was thus a legal *nexus* between itself and the JV.

[58] In my view, contrary to the contention by the appellant that the JV is the predecessor of the appellant, the documents before this court conclusively disprove this contention. There is no evidence at all that the JV had been incorporated. The appellant in the circumstances failed in its attempt to explain how it came about that the appellant, a company, instituted the proceedings in the court *a quo*. The appellant thus failed to make out a case entitling it to the relief sought in the review application.

[59] The intention expressed in clause 3.1 of the joint venture agreement that the members of the joint venture may at their discretion incorporate the joint venture, should it secure the contract, remained just that, namely an unfulfilled intention or unfulfilled resolution.

[60] Clause 3.1 provides further that the members of the joint venture would incorporate the JV 'should it secure the Contract'. In my view it should be clear from the appeal record that the JV never secured the contract. No enforceable agreement of sale of the immovable property (Erf 5727) was signed between the JV and the second respondent. On this score the JV could never have been incorporated in the absence of a signed sales agreement between the JV and the second respondent.

[61] The contention by the appellant that the second respondent accepted that the appellant's directors were the *persona* who were the members of the joint venture, is misplaced. The second respondent's stance on this point, seen in context, was that it disputed that the appellant was the successor of the JV. The sentence: 'The applicant's predecessors' members are those that are still members or Directors and should have known better', was in my view interpreted out of context.

[62] If indeed, for the sake of argument, it had been proven that the JV had been incorporated into a company, then in order to claim a legal *nexus* between the appellant and the JV, the provisions of s 42 of the Companies Act must nevertheless have been complied with. This means that appellant's memorandum, on registration, must have contained a statement that an object of the company was the ratification or adoption of the JV agreement or the acquisition of rights and obligations arising from such agreement. In addition thereto two copies of that agreement or contract, one of which must have been certified by a notary public, must have been lodged with the Registrar of Companies together with the lodgement for registration of the memorandum and articles of the company.

[63] No evidence providing compliance with the provisions of s 42 was before the court *a quo*. This was fatal to the appellant's review application.

[64] In my view the finding by the court *a quo*, that the appellant failed to prove that there was a legal *nexus* between the JV and the appellant, cannot be faulted. The court *a quo* was justified in the circumstances to have found that the appellant lacked

the necessary *locus standi* to enforce the rights which vested in the members of the JV when the property was allocated to the JV. The appellant was indeed the 'wrong party' before the court *a quo*.

[65] In the result, the following order is made:

The appeal is dismissed with costs.

HOFF JA

SHIVUTE CJ

DAMASEB DCJ

APPEARANCES

APPELLANT:

L Ihalwa (with her WNK Simson)

Instructed by Sisa Namandje & Co. Inc.

SECOND RESPONDENT:

F Kwala

Of Kwala & Company Inc.