



Reportable:	YES / NO
Circulate to Judges:	YES / NO
Circulate to Magistrates:	YES / NO

**IN THE HIGH COURT OF SOUTH AFRICA
NORTHERN CAPE DIVISION, KIMBERLEY**

Case No: 1723/2020
Heard: 17/05/2021
Delivered on: 09/07/2021

In the matter between:

AIMING HIGH DEVELOPMENT CORPORATION
t/a EVOLUTION INVESTMENT HOLDINGS (PTY) LTD Applicant

and

SOL PLAATJE LOCAL MUNICIPALITY 1st Respondent

**KIMBERLEY REHABILITATION &
DEVELOPMENT (PTY) LTD** 2nd Respondent

**NDI GEOLOGICAL CONSULTING
SERVICES (PTY) LTD** 3rd Respondent

Coram: Mamosebo J et Snyders AJ

JUDGMENT ON REVIEW

MAMOSEBO J

[1] The relief that the applicant, Aiming High Development Corporation, seeks is the following:

- 1.1 Reviewing and setting aside of a Resolution taken by the Sol Plaatje Municipal Council on 22 July 2020;
- 1.2 A declaratory order that the applicant is entitled to the transfer of property known as Erf 5337, Kimberley;
- 1.3 An order compelling the Municipality to transfer the property to Aiming High Development Corporation; and
- 1.4 Costs of the application to be awarded against the Municipality.

The Parties

- [2] The applicant is Aiming High Development Corporation t/a Evolution Investment Holdings (Pty) Ltd (Registration number 2014/140437/07), a company registered in accordance with the laws of the Republic of South Africa with its registered address at 41 Vermaas Street, Lindene, Kimberley, Northern Cape Province. The first respondent is the Sol Plaatje Municipality, a category B Municipality established in terms of s 155(6) of the Constitution of the Republic of South Africa, 1996 read with s 12 of the Local Government: Municipal Structures Act, 117 of 1998. The second respondent is Kimberley Rehabilitation & Development (Pty) Ltd (Registration no 2017/080438/07), a company registered in terms of the laws of the Republic of South Africa with its registered address at 30 Jan van Zyl Street, Monument Heights, Kimberley, Northern Cape Province. The third respondent is NDI Geological Consulting Services (Pty) Ltd (Registration no 2017/659770/07), a company registered in terms of the laws of the Republic of South Africa with its registered address at 38 Ophelia Street, Herlear, Kimberley, Northern Cape.
- [3] Kimberley Rehabilitation & Development (Pty) Ltd and NDI Geological Consulting Services (Pty) Ltd do not oppose the application and no relief is sought against them. The Municipality is opposing the application.

The issues for determination

[4] The questions for determination are the following:

- 4.1 Whether Aiming High has *locus standi* to bring this application; and
- 4.2 Whether Aiming High is entitled to a *mandamus* directing that the property be transferred and registered into its name.

Order by agreement

[5] I have already stated at para 1 (above) that the applicant is seeking the review and setting aside of a Resolution taken by the Sol Plaatje Municipal Council on 22 July 2020. At para 10 of the Municipality's answering affidavit the following appears:

"I point out that the Municipality does not in principle oppose the setting aside of the resolution passed on 22 July 2020 to enter into a PPPA with the second respondent. In fact, the Municipality has already instructed its legal representatives to draft review proceedings to set aside resolution C134/07/20 dated 22 July 2020 on the basis that there has been non-compliance with the requirements to enter into a PPPA as prescribed by section 120 of the MFMA."

[6] Mr Knoetze SC, for the Municipality, submitted that prayer 1, appearing in the Notice of Motion, be made an order by agreement between the parties. There still remains for consideration the issue of Aiming High's *locus standi* and the *mandamus*.

[7] The background facts, which gave rise to this application, are briefly as follows: Mr Patrick Deon Nazim Simons, a deponent to the founding affidavit, intimated that about 08 December 2009, Evolution Investment Holdings submitted a formal application with a proposal to the Municipality for the development of Erf 5337, Kimberley, also known as Erf 5337, Waterloo Road, West End, Kimberley or BMW site. The purpose was to construct a private hospital on the property.

[8] The Municipality had been in constant communication with Evolution Investment Holdings which was represented by Mr Simons with regard to the proposed development as borne out by all the letters that were exchanged between the parties. Of more importance is that, when Mr Simons addressed the letters to the Municipality, he made it clear that he was writing in his capacity as the representative of Evolution Investment Holdings and referred to Evolution as their “company”.

[9] I emphasise a few letters under the logo Evolution Investment Holdings addressed to the City Manager dated 06 February 2012, 16 April 2012, 04 February 2013 and 25 February 2013 from which I quote in part:

9.1 letter dated 06 February 2012 marked “Simons 10”:

“Our company has applied for a piece of land as per the above information in 2009 and for all these years to date we have been receiving letters from your office with reference to the [moratorium] and that your last correspondence dated 05 July 2011, with our office was now receiving [the] necessary attention for finalization as the [moratorium] has been lifted since 2011..... We also hereby attach a copy of the media report of our hospital proposal that was done in 2009.....”

9.2 letter dated 16 April 2012 marked “Simons 12”:

“We would like to inform your office as follows:

On the 16th April 2012 at 10:30 a.m a meeting between ourselves and Mr L Stevens, your electrical engineer, was held.

*In the meeting Mr L Stevens confirmed that upgrading of the Hadison Park Sub Station can be done **and the two (2) parties agreed that if our Company namely, Evolution Investments Holdings,** would foot the bill for such electrical infrastructure and upgrading he would not have a problem approving such.*

*In light of this **our Company** therefore wants to place on record that we are willing to carry such costs as we have also made mention to this in our proposal.*

We would therefore request our application to be renewed in light of the current information and receive your favourable consideration and approval.”

9.3 letter dated 04 February 2013 marked “Simons 18”:

“Our company hereby would like to state that....

Our company applied for 24 hectares as per our attached site layout and would therefore appreciate it if this matter can be resolved as speedily as possible as our company has been further delayed as we are thus unable to proceed in finalising our plans as they would exceed the 6 hectare allocated to our company.”

9.4 letter dated 25 February 2013 marked “Simons 19”:

*“...the following concern was also raised with yourself with regards to the price of land **our company** is purchasing from the municipality...”*

(Own emphasis)

- [10] On 05 December 2012, during the ordinary council meeting the municipal council resolved to approve the Evolution Investment Holdings’ application for the alienation of a portion of erf RE5337, Waterloo Road, Kimberley, subject to conditions set out in its resolution C297/12. Mr Simons was notified in that regard on 16 January 2013. The said resolution reads in part:

“SPL 186/12 RESOLVED TO RECOMMEND TO COUNCIL:

That a portion of the remainder of erf 5337, Waterloo Road, Kimberley be alienated to Messrs Evolution Investment Holdings for an amount of R120.00 per square metre (VAT exclusive), subject to the following conditions..’

The said 21 conditions are specified in the resolution itself and need not be repeated. This is the first resolution by the Municipal Council.

- [11] On Monday, 04 February 2013, Mr Simons acknowledged the first council resolution but highlighted to the City Manager that the approved 6 – 7 hectares of land was not what they had applied for, as it was inadequate. Their company had applied for 24 hectares.

- [12] In the Ordinary Council meeting SPL 111/07/15, it was resolved to recommend to Council to review the Council Resolution C297/12 dated 05 December 2012. That the subdivision, rezoning from “Undetermined”

to “Institutional” and **alienation of two (2) portions of the Remainder of Erf 5337 Kimberley (Waterloo Road, Diamond Park) to Evolution Investment Holdings**, for the amount of R6 250 000.00 (VAT exclusive) – be approved, subject to the following conditions a - g:

“Council resolved to approve C192/08/15 1 – 2g as recommended.”

- [13] The Municipality addressed a letter to Messrs Evolution Investment Holdings dated 28 January 2016 to the following effect:

“PROPOSED ALIENATION OF A PORTION OF ERF RE5337, KIMBERLEY

Your application with regard to the above matter refers.

At an ordinary Council Meeting held on 5 August 2015, Council approved the alienation of a portion of Erf 5337, Kimberley, subject to conditions as set out in the attached resolutions C297/12 dated 5 December 2012 and C192/08/15 dated 5 August 2015. It should however be mentioned that a revised quotation was requested from the Electrical Section as the previous quote was only valid until 30 June 2012.

You are requested to inform this department within 21 days of the date of this letter whether these conditions are acceptable to you. Should we receive no reply from you within the prescribed period, it will be accepted that you do not want to proceed with the transaction and it will be regarded as finalised.

If you however wish to proceed with the transaction, an amount of R800-00 is payable with regard to advertising costs.

This letter essentially communicated to Evolution Investment Holdings Council’s approval of the 24 hectares that it had applied for. This is the second resolution.

- [14] Pursuant to the approval of the 24 hectares to Evolution Investment Holdings, a Deed of Sale had to be concluded between the parties. In the *interim* the Municipality received a formal objection lodged by a certain Mr Gamza Gool against alienation of the said property to Evolution Investment Holdings, they were notified thereto, and that they will be advised in due course of the Council’s decision. The objection was finally resolved and Evolution Investment was notified on 26 January 2018 of

the Council Resolution, the third Resolution, to proceed with the alienation of the property to it. Evolution Investment at that stage instructed Van Den Heever Attorneys to assist them. There were efforts made to put the process in place to complete the Deed of Sale.

- [15] A draft Deed of Sale identifies the parties as the Sol Plaatje Municipality represented by Goolam Hoosain Akharwaray, in his capacity as Municipal Manager, referred to as the “Seller” and Evolution Investment Holdings for which no registration number is inserted but for the following “*Reg No: 2012/????????????*” referred to as the “Purchaser”. The Municipality did not finalise the process for the Deed of Sale with Evolution Investment.
- [16] However, on 22 July 2020 and, in a Virtual Special Council Meeting, a Resolution was taken to alienate the same property to the second respondent, Kimberley Rehabilitation & Development (Pty) Ltd (Changing the Face of the City). The Municipality accepted the second respondent’s proposal to enter into a PPPA (acronym used and no full name provided in the Resolution) for rehabilitation and development of the property known as Remainder of the Erf 5337, Kimberley. It is this decision that led to the application for the reviewing and setting aside of the resolution dated 22 July 2020 and a demand for the transfer of the property into the applicant’s name.
- [17] Aiming High’s information, as set out in the Companies Intellectual Property Commission (CIPC), annexed as “BD1”, shows the name of the company as Aiming High Development Corporation with registration number 2014/140437/07 registered on 21 July 2014. Aiming High has two active directors namely, Glynis Millicent Aysen and Patrick Deon

Simons. There is no reference whatsoever to Evolution Investment Holdings.

[18] The names of the directors in Aiming High are the same parties as those in Evolution Investment Holdings, who, in the replying affidavit contended that:

- “[5] *It is indeed so, as will be evident from annexure “BD1” to the answering affidavit, that the applicant was formally registered as a company on 21 July 2014.*
- [6] *The Court would however note from the said “BD1” and if same is to be compared to the heading to this application, that although the applicant is formally registered as Aiming High Development Corporation, it has always been known as Aiming High Development Corporation trading as Evolution Investment Holdings.*
- [9] *... Evolution itself, as will be evident from correspondence attached to my founding affidavit, was never registered as a company and we also never referred to it as a “(Pty) Ltd”*
- [10] *I have been advised further that it is not uncommon for a person to act and to even conclude contracts on behalf of and for a company that is not in existence yet.”*

Locus standi

[19] It is evident that there was no entity in existence by the name of Evolution Investment Holdings. The impression created by its deponent that there was such a company was misleading and in breach of s 32 of the Companies Act¹ as correctly argued by Mr Knoetze, which stipulates:

“32. Use of company name and registration number

- (1) *A company or external company must –*
 - (a) *Provide its full registered name or registration number to any person on demand; and*
 - (b) *Not misstate its name or registration number in a manner likely to mislead or deceive any person.*
- (3) *A person must not-*
 - (b) *use a form of name for any purpose if, in the circumstances, the use of that form of name is likely to convey a false impression that the name is the name of a company.*
- (5) *Contravention of subsection (1), (2), (3) or (4) is an offence.”*

¹ 71 of 2008

[20] Aiming High seemed to rely on s 21 of the Companies Act maintaining that it was advised that it could act and enter into contracts on behalf of a company not yet in existence. This argument, in my view, is flawed and does not assist Aiming High in its case. First, Evolution Investment Holdings Profile painted a picture of a company that already existed and had performed a lot of specialised work. Its profile alleged that the company was involved in civils and construction, mining investments, project management, electrical, investments and logistics. Further, the subsequent letters addressed to the Municipality after Aiming High was registered, that is after 21 July 2014, for example, annexure “Simons 24” letter dated 31 January 2018, fails to display the link that it was Aiming High Development Corporation t/a Evolution Investment Holdings. Simons wrote this letter, referring to himself as a director of Evolution Investment Holdings. Undoubtedly, Simons has contravened the provisions of sections 32(3)(b) of the Companies Act as correctly argued by Mr Knoetze.

[21] Schippers JA made the following remarks pertaining to *locus standi* in *Fourwheel Drive v Rattan NO*² :

“[7] The logical starting point is *locus standi* – whether in the circumstances the plaintiff had an interest in the relief claimed, which entitled it to bring the action. Generally, the requirements for *locus standi* are these. The plaintiff must have an adequate interest in the subject matter of the litigation, usually described as a direct interest in the relief sought; the interest must not be too remote; the interest must be actual, not abstract or academic; and it must be a current interest and not a hypothetical one. The duty to allege and prove *locus standi* rests on the party instituting the proceedings.”

[22] Innes CJ explains what is meant by having direct interest clearer in *Dalrymple* and says:

² 2019 (3) SA 451 (SCA) at 454 para 7

“The general rule of our law is that no man can sue in respect of a wrongful act, unless it constitutes a breach of a duty owed to him by the wrongdoer, or unless it causes him some damage in law.”

- [23] The entire application is based on the resolution by the Municipality to alienate the property known as Erf 5337, Kimberley, to Messrs Evolution Investment Holdings. There is no direct link substantiated or established between the applicant, Aiming High Development Corporation, and Evolution Investment Holdings. At the time when the three resolutions were taken Aiming High did not exist. Evolution Investment Holdings is and was not a company as defined in s 1 of the Companies Act as:

“‘Company’ means a juristic person incorporated in terms of this Act, a domesticated company, or a juristic person that, immediately before the effective date –

- (a) was registered in terms of the –*
 - (i) Companies Act, 1973 (Act 61 of 1973), other than as an external company as defined in the Act; or*
 - (ii) Close Corporations Act, 1984 (Act 69 of 1984), if it has subsequently been converted in terms of Schedule 2;*
- (b) was in existence and recognised as an ‘existing company’ in terms of the Companies Act, 1973 (Act 61 of 1973); or*
- (c) was deregistered in terms of the Companies Act, 1973 (Act 61 of 1973), and has subsequently been re-registered in terms of this Act.”*

- [24] If Evolution investments was not a company in terms of the aforementioned definition and as conceded by Mr Simons in his founding and replying affidavits, and the Municipality’s resolution was entered into with this non-entity, it begs the question, what is the legal basis for the applicant’s *locus standi*?

- [25] It is clear from the three resolutions as well as the wording thereto, that the Municipality was offering the property to a company by the name of Evolution Investment Holdings. The pronouncements by Corbett JA in *Levin v Drieprok*³ are instructive:

³ *Levin v Drieprok Properties (Pty) Ltd* 1975 (2) SA 397 (A) at 407C – 408A

“It is a cardinal principle of the law of contract that a simple contractual offer made to a specific person can be accepted only by that person; and that, consequently, a purported acceptance by some other person is ineffectual and does not bring about the conclusion of a contract...The manifest reason for this is that there is no intention on the part of the offeror to contract with such other person...Moreover, as pointed out in the American Jurisprudence, 2nd ed., vol 17, sec,42-

‘...everyone has a right to select and determine with whom he will contract and another cannot be thrust upon him without his consent, regardless of whether the offeror had special reasons for contracting with the offeree rather than with someone else.’ (See also Williston on Contracts, 3rd ed. Sec.80). Critical to the application of this principle, as formulated above, is that it should be a simple contractual offer made to a specific person. ...In this process of interpretation the aim is to ascertain the intention of the offeror as reflected in the terms of the offer and any other admissible evidence. In cases where the offer is contained in a written document the extraneous evidence that may be taken into consideration will be circumscribed by the rules relating to the admissibility of parol evidence; and where the written offer relates to a sale of land to which the provisions of sec.1 of Act 68 of 1957 (or, in the case of contracts concluded after 1 January 1970, the provisions of sec.1 of Act 71 of 1969) apply, the requirement that the essential terms of the sale, including the identity of the parties, must appear ex facie the writing may also limit the admissible evidence.”

- [26] There can be no gainsaying that the offer to sell the property was made to Evolution Investment Holdings and not to Aiming High Development Corporation. It boggles one’s mind how Aiming High can demand the transfer of the property in its name without any legal basis. It is irrefutable that the purported acceptance of the offer to sell the 24 hectares of land was made by Evolution Investment Holdings. It is further of significance that the offer cannot be legally accepted by a non-existent entity. Regard being had to the aforementioned circumstances and findings, it follows that Aiming High has failed to make a case on its *locus standi*. This finding on its own is dispositive of the application. I will, however, for the sake of completeness, proceed to demonstrate why it has also not made out a case for the relief of *Mandamus*.

Mandamus: Prayer 2 and 3 of the Notice of Motion

- [27] Aiming High is seeking a mandatory interdict against the Municipality to do everything necessary including signing the papers to transfer the fixed property known as the remainder of Erf 5337, Kimberley, into its name.

The applicant should satisfy the requirements as laid down in *Setlogelo*⁴ in that it has to establish a clear right, an injury actually committed or reasonably apprehended and the absence of similar protection by any other ordinary remedy. In *Setlogelo*⁵ Innes CJ stated:

“The requisites for the right to claim an interdict are well known; a clear right, injury actually committed or reasonably apprehended, and the absence of similar protection by any other ordinary remedy.”

[28] Has Aiming High established a clear right or legal right vesting in it or not? I have no doubt that no such right exists, in my view, Aiming High has had no dealings whatsoever with the Municipality. Its failure to substantiate the link between Aiming High and Evolution Investment is conspicuous. It has also not demonstrated any actual injury committed or a reasonable apprehension of injury as there were no interactions with the Municipality where Aiming High was involved. It follows, therefore, that Aiming High has failed to meet the prerequisites to succeed in an order for a *mandamus*.

[29] **On a question of costs.** The Municipality has urged this Court to order punitive costs against the applicant on the basis of the alleged fraud by Simons following a purported misrepresentation that Evolution Investment is a company when transacting with it consequent upon which the applicant acted by launching this application to demand transfer of the property. In as far as costs in prayer 1 are concerned in respect of an order by agreement between the parties, Mr Knoetze argued that, the Municipality’s consent to the order was for different reasons and not because Aiming High has lodged the review application. This does not, argued counsel, entitle Aiming High to an order of costs. He further

⁴ *Setlogelo v Setlogelo* 1914 AD 221

⁵ At 227

contended that 15 of the 94 paragraphs in the founding affidavit, and only 3 of the 69 paragraphs in the heads of argument, relate to the review and therefore the municipality ought not to be mulcted.

[30] In countering the submission Mr Olivier argued that the Municipality's conduct has necessitated the launching of this application by failing to provide feedback when requested to do so and costs must be ordered against it.

[31] It is an accepted legal principle that costs ordinarily follow the result and a successful party is therefore entitled to his or her or its costs. Tindall JA in *Nel v Waterberg Landbouwers Ko-operatiewe Vereeniging*⁶ made the following remarks pertaining to costs on an attorney and client scale:

*"The true explanation of awards of attorney and client costs not expressly authorised by Statute seems to be that, by reason of special considerations arising either from the circumstances which give rise to the action from the conduct of the losing party, the court, in a particular case considers it just, by means of such an order, to ensure more effectually that it can do by means of a judgment for party and party costs that the successful party will not be out of pocket in respect of the expenses caused to him by the litigation. Theoretically, a party and party bill taxed in accordance with the tariff will be reasonably sufficient for that purpose. But in fact a party may have incurred expense which is reasonably necessary but is not chargeable in the party and party bill. See *Hearle and McEwan v Mitchell's Executor* (1922 TPD 192). Therefore in a particular case the Court will try to ensure, as far as it can, that the successful party is recouped. I say 'as far as it can' because there may be a considerable difference between the amount of the attorney and client bill which a successful party is bound to pay to his own attorney and the amount of an attorney and client bill which has been taxed against the losing party ..."*

[32] The Municipality has not only caused the inordinate delay in having this matter finalised but could have realised earlier that there were problems with the status of Evolution Investment Holdings and acted upon it timeously. This is where the remarks by Navsa JA in *MEC: Department of Police, Roads and Transport, Free State Provincial Government v*

⁶ 1946 AD 597 at 607

*Terra Graphics (Pty) Ltd t/a Terra Works and another*⁷ are apposite when he said:

“Government should be a scrupulous role model.”

In this instance, had the Municipality been meticulous, it would have discovered that Evolution Investment Holdings does not exist as a company.

[33] It is also an accepted legal principle that the awarding of costs is in the discretion of the Court. I am, however, not inclined to make a punitive cost order as requested by the Municipality.

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

It is ordered:

1. That, by agreement between the parties, the Resolution taken by the Council of the first respondent on 22 July 2020 during a virtual special council meeting in terms whereof the property known as Remainder of the Erf 5337, Kimberley (also known as Erf 5337, Waterloo Road, West End, Kimberley and also known as the BMW site) to be made available for rehabilitation and development by the second respondent is reviewed and set aside.
2. That the relief sought by the applicant in prayers 2 and 3 of the Notice of Motion is refused.

⁷ [2015] 4 All SA 255 (SCA) at para 21

3. That the applicant pay the first respondent's costs of the application on a party and party scale.



MAMOSEBO J
NORTHERN CAPE DIVISION

I concur



SNYDERS AJ
NORTHERN CAPE DIVISION

For the applicant:

Adv AD Olivier

Instructed by:

Van Den Heever Attorneys

For the first respondent:

Adv B Knoetze SC

Instructed by:

Van de Wall Inc