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

IN THE HIGH COURT OF SOUTH AFRICA
(Northern Cape Division, Kimberley)

Saakno / Case number: **1735/2014**
Datums aangehoor/Dates heard: **23/03/15; 04/06/2015 & 13/08/2015**
Datum gelewer / Date delivered: **05/02 /2016**

In the matter between:

MOSALASUPING PHILLIP MORUDI	1st Applicant
FURTHER 70 APPLICANTS	2nd to 71st Applicants

and

NC HOUSING SERVICES & DEVELOPMENT CO. LTD	1st Respondent
SCHOLTZ JACOB BABUSENG	2nd Respondent
SEODI JULIUS MONGWAKETSI	3rd Respondent

Coram: L. Lever AJ

JUDGMENT

LEVER AJ

1. This is an application for rescission of an Order made by agreement between the first respondent on the one hand and

the second and third respondents on the other. The said Order was made by the Judge President on 1 September 2014 under case number 1577/2012 ("the main application"). The circumstances in which the aforementioned Order was made will become apparent when I set out an overview of the events that led to the taking of the said Order.

2. The applicants seek rescission of the relevant Order both under the common law and in terms of Rule 42(1)(a) of the Uniform Rules of Court.

3. The applicants all claim to be entitled to shares and/or different proportions of shares in the first respondent. In short, the applicants claim that there is a dispute as to who is entitled to shares and the number of shares to be held by certain individuals within the body of shareholders or potential shareholders of the first Respondent.

4. Together with the application for rescission, which was brought as an urgent application, applicants sought certain incidental and other relief, which included that:

   4.1. the fifth to seventy first applicants be joined as respondents in the main application;

   4.2. they be granted 15 days to file their answering affidavits in the main application;

4.3. pending the final determination of the main application the respondents be interdicted from:

4.3.1. voting on a resolution to increase the share capital of the first respondent;

4.3.2. voting on a resolution to authorise the directors to be elected to allot shares in accordance with annexure "M" to the main application; and

4.3.3. voting on a resolution to authorise the directors to be elected to declare a dividend arising from the sale of a certain asset.

5. On 10 October 2014 the applicants obtained a *rule nisi* incorporating the interdicts referred to above. Applicants now also seek confirmation of the said *rule nisi*.

6. The relevant background that led to the present position needs to be set out sufficiently to place the present application in context and allow one to deal with the issues raised by the relevant parties.

7. During or about 1997 a group of individuals decided to obtain a shelf company with a view to using it as a vehicle to exploit commercial opportunities within the Northern Cape for the benefit of members of previously disadvantaged communities. It was envisaged that the shelf company so acquired would be converted to a public company in order to facilitate the aim of

empowering members of previously disadvantaged communities.

8. The aforesaid conversion was carried out and capital was acquired from certain members of the previously disadvantaged communities.

9. Subsequently, the first respondent was de-registered as its annual returns had not been submitted. Thereafter a successful application was launched to re-register the first respondent.

10. After the first respondent was re-registered difficulties arose in the management of the first respondent and the second and third respondents hereto launched the main application (the subject of this application for rescission), in which they sought *inter alia*: a declaratory order stating that the persons whose names appeared on annexure "M" to be the list of the prospective shareholders of the first respondent pending a decision of the Board of the first respondent to increase the number of authorised shares *pro rata* to a certain maximum and to authorise the issuing of such shares accordingly; that the said prospective shareholders be authorised to vote for the appointment of a new Board of Directors alternatively that the Board that existed prior to de-registration be reinstated; and that the Board of Directors be authorised to convene a meeting of shareholders for the purpose of considering a special resolution to sell the first respondent's main asset.

11. On 16 October 2012 the main application came before my sister Williams J and an Order which regulated the future conduct of the matter was taken by agreement between the second and third respondents on the one hand and the first respondent together with the first to the fourth applicants on the other.

12. The said Order taken on the 16th October 2012 was to the effect that the question of whether or not annexure "M" correctly reflected the shareholding in the first respondent was referred to trial. Pending the outcome of such trial an interim order was made, which: authorised the issue of one ordinary par value share to each person whose name appeared on annexure "M"; directed the board to issue the relevant share certificates; directed the board to convene a meeting by a prescribed date to consider a resolution to sell the first respondent's main asset; directing that the board of first respondent shall consist of second respondent as chairperson together with the first to fourth applicants and that no resolution to the contrary shall be passed.

13. The said order then went on to provide that upon re-registration the Board of Directors referred to above was restored to office and could carry out and perform all functions and obligations in terms of the Act; and that in the event of the sale of first respondent's main asset referred to above, the proceeds of such sale will be divided equally and be deposited into the trust accounts of the respective attorneys of the parties pending judgment in the matter, subject to certain conditions.

14. In the main application, one of the disputes between the first respondent and first to fourth applicants on the one hand and the second and third respondents on the other, related to the persons who actually subscribed to the first respondent and contributed capital towards it and would thus be entitled to be registered in the share register and be issued with share certificates in accordance with their capital contributions. A further dispute between them relates to whether or not further capital contributions were authorised, whether such further capital contributions were indeed made within the time allowed for such further capital contributions and the actual extent of such further capital contributions.

15. The final dispute between them relates to whether or not the then Board of Directors authorised the seeking of an investor who, it is alleged, could acquire shares in the first respondent under certain conditions. The allegation that such investor could acquire shares in the first respondent has also been placed in dispute. The shares in issue or the right to such shares have been sold by the relevant investor to the third respondent. It follows therefrom that the entitlement of the third respondent to such shares has also been placed in dispute.

16. Nonetheless, it is clear that the first respondent benefitted from the capital raised from its subscribers, the further capital contributions and the funds brought in by the investor. Such funds enabled the first respondent to acquire valuable assets in both the mineral and entertainment industries within the Northern Cape.

17. In accordance with the said Order, on 16 November 2012, the persons listed in annexure "M" were convened in a general meeting of the first respondent to approve the sale of the first respondent's main asset. Consensus could not be reached at this meeting, it was adjourned and reconvened on the 1 December 2012, where the resolution relating to the sale of the first respondent's main asset was passed.

18. At this meeting the first respondent's shareholders, on their own initiative, established a sub-committee whose purpose was to examine the disputes between the first to the fourth applicants on the one hand and the second and third respondents on the other and to pursue the possibility of settling the main application.

19. Apart from investigating the various claims, this sub-committee held a number of meetings with the first to the third applicants on the one hand and with the second and third respondents on the other. Various settlement proposals were discussed. However, no settlement was reached between the aforementioned parties.

20. The shareholders meeting of 1 December 2012 was reconvened by the said sub-committee on 19 April 2013 where its progress report was tabled and discussed. Following such discussion, the meeting resolved that the first respondent withdraw its opposition to the main application.

21. Thereafter, and in order to give effect to the aforementioned resolution, the mandate of the first respondent's original attorney was withdrawn and a new attorney was appointed. The new attorney served and filed a notice of substitution as attorney of record and withdrawal of first respondent's opposition to the main application on 12 August 2013.

22. In the interim and on 8 February 2013 the second and third respondents' attorney filed a Notice of Set down, setting down the main application for trial on 1 to 5 September 2014.

23. Then on 26 August 2013 the first to third applicants, purporting to act on behalf of the first respondent, launched an urgent application seeking the following relief: a declaratory order declaring that the shareholders meeting of 19 April 2013 be declared unlawful; that all resolutions adopted at the said meeting be declared unlawful and set aside; and certain ancillary relief. Some of the parties have referred to this application as an "interlocutory application". I shall refrain from doing so as it may be misleading and mischaracterises the nature of this application. Where it is necessary to refer to this application, I shall refer to it as "the urgent application".

24. On 8 August 2014 the urgent application was dismissed by my sister Mamosebo AJ, as she then was. The consequences that flowed from the resolution of the first respondent taken on 19 April 2013 and the dismissal of the urgent application to set aside such resolution have been the subject of much debate in the rescission application, which is now before me.

25. On 28 August 2014 a conference took place in the chambers of the Judge President. The purpose of this conference was to clarify who in fact represented the first respondent as Towell & Groenewaldt, first respondent's original attorney in the main application, had not yet withdrawn as attorneys of record for the first respondent. A minute of this conference forms part of the record in the rescission application.

26. On 29 August 2014, the day following the aforementioned conference, Towell and Groenewaldt withdrew as attorneys of record for the first respondent.

27. The matter then came before the Judge President on 1 September 2014 and the Order which is the subject matter of this application for rescission was made.

28. The requirements for a successful application for rescission at common law have been considered and re-stated by Miller JA in the matter of **CHETTY v LAW SOCIETY, TRANSVAAL**[1] where he stated that:

> "*...the common law, which empowers the Court to rescind a judgment obtained on default of appearance, provided sufficient cause therefor has been shown.*"[2] (reference omitted).

29. Miller JA then goes on to deal with what is meant by the term "sufficient cause" and states:

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[1] 1985 (2) SA 756 (A).
[2] Above at 764J.

"The term 'sufficient cause' (or 'good cause') defies precise or comprehensive definition, for many and various factors require to be considered. But it is clear that in principle and in long-standing practice of our Courts two essential elements of 'sufficient cause' for rescission of a judgment by default are:

(i) that the party seeking relief must present a reasonable and acceptable explanation of his default; and
(ii) that on the merits such party has a bona fide defence which, prima facie carries some prospect of success.

It is not sufficient if only one of these two requirements is met; for obvious reasons a party showing no prospects of success on the merits will fail in an application for rescission of a default judgment against him, no matter how reasonable and convincing the explanation of his default. And ordered judicial process would be negated if, on the other hand, a party who could offer no explanation of his default other than his disdain of the Rules was nevertheless permitted to have a judgment against him rescinded on the ground that he had reasonable prospects of success on the merits."[3] (references omitted)

30. In dealing with the first broad requirement set out above namely, a reasonable and acceptable explanation for their default, the facts of this matter make it necessary to deal with the applicants in two groups. The first group being the first to the fourth applicants and the second group being the fifth to the seventy-first applicants.

31. Dealing with the first to fourth applicants, their position is that they were indeed cited in the main application in their personal capacities and not in their representative capacities as being directors on the first respondent's Board of Directors. It is submitted on their behalf that when the Judge President ruled

[3] Above at 765

that they had been cited in the main application in their representative capacity, the Judge President erred and that as parties to the main application they were entitled to be heard.

32. The respondents, on the other hand, submit that the first to fourth applicants herein were indeed cited in the main application in their representative capacity as directors of the first respondent herein. Accordingly, they submit that when the first respondent withdrew its opposition to the main application, the first to fourth applicants herein ceased to enjoy *locus standi* in the main application. Accordingly, respondents maintain that in those circumstances, the Judge President was quite correct in refusing to hear their representative, Mr Kgotlagomang, or them in the absence of a substantive application to be joined as parties to the main application.

33. The applicants and the respondents both cite passages, contentions and allegations arising from both the main application and the urgent application to substantiate their respective points of view relating to the status of the first to fourth applicants herein in the main application at the time the relevant order was made on the 1st September 2014.

34. On the issue of the capacity in which the first to fourth applicants herein acted in the main application, the applicants make the following submissions:

34.1. The first to fourth applicants herein were cited in their personal capacities in the main application and that the reference to them being directors of the first respondent was merely descriptive of them;

34.2. Adv Van Niekerk SC, who appeared on behalf of the applicants, submitted that in the main application, there was an inconsistency in the approach adopted by the second and third respondents herein in their citation of the first to fourth applicants herein. Mr Van Niekerk points out that in the main application, the first to third applicants were referred to as directors, whilst the fourth applicant (Goliath) was referred to as a former director. In these circumstances it was submitted that fourth applicant could only have been cited in his personal capacity;

34.3. The Notice of Opposition in the main application states that appearance to defend is entered on behalf of the first to fourth applicants herein;

34.4. The proceedings in the main application were never withdrawn against the first to fourth applicants herein; and

34.5. Mr Van Niekerk pointed out that in the Notice of Motion in the main application, the second and third respondents herein sought a costs order against the first to fourth applicants herein in their personal capacities.

35. On the issue of the capacity in which first to fourth applicants herein acted in the main application, the respondents make the following submissions:

35.1. Adv Zietsman SC, who appeared on behalf of the respondents, pointed out that the deponent to the answering affidavit in the main application, filed on behalf of the first to the fourth applicants herein, clearly describes his status as being a director and the company secretary of the first respondent herein;

35.2. The said answering affidavit gives no indication of any of the first to fourth applicants acting in any capacity other than that of a director of the first respondent;

35.3. The resolution upon which the applicants herein rely to clothe them with authority to oppose the main application, lists the fourth applicant herein (Goliath) as a director of the first respondent herein and is evidence that he participated in that decision in the capacity of a director of the first respondent;

35.4. The fourth applicant herein was cited in the main application in an abundance of caution, because there was uncertainty as to his status both due to the fact that he had resigned shortly before the first respondent was de-registered and because of the uncertainty as to the legal position of the Board of Directors that served the first respondent prior to de-registration upon the re-registration of the first respondent; and

35.5. It was also pointed out that the latest CM29 available from CIPRO (as it was then referred to) before the first respondent was de-registered still listed the fourth applicant herein as a director of the first respondent.

36. Dealing with the submission by Mr Van Niekerk made on behalf of the first to the third applicants that reference to their being directors in their citation in the founding affidavit in the main application was merely descriptive, the basis for such submission was a passage in Herbstein and Van Winsen.[4] The said passage states that whenever someone is sued in a representative capacity, it must be explicitly set out in the summons.

37. Mr Van Niekerk argued that the same position applied in citing persons in motion proceedings. No authority was referred to in support of this argument. Mr Van Niekerk submitted that his position was supported by the fact that in motion proceedings the papers formed both the pleadings and the evidence.

38. The relevant passage in Herbstein and Van Winsen is based upon the wording of Rule 17(4) of the Uniform Rules of Court. This Rule applies exclusively to actions. There is no corresponding provision in the Rules relating to applications.

[4] Herbstein & Van Winsen., The Civil Practice of the High Courts of South Africa., 5th Ed., vol. 1 p. 147.

39. Whilst I would readily agree that it is obviously desirable to explicitly set out in motion proceedings that a party is being cited in a representative capacity, it is not governed by Rule 17(4). The motivation for Mr Van Niekerk's position is that in motion proceedings the papers form both the evidence and the pleadings can be used to support the opposite proposition. In my view, this argument is not decisive of the issue.

40. The second point raised by Mr Van Niekerk deals with the position of the fourth applicant (Goliath), who was cited in the main application as a former director. Mr Van Niekerk submitted that in those circumstances, the fourth applicant could only have been cited in the main application in his personal capacity as a shareholder or as a prospective shareholder.

41. In response to this Mr Zietsman submitted that there was both legal and factual uncertainty regarding the fourth applicant's position when the main application was launched. In those circumstances he submitted that the fourth applicant was cited in an abundance of caution.

42. Mr Zietsman's position that the second and third respondents had to adopt a cautious approach in the case of the fourth applicant herein, when he was cited in the main application, is supported by the following facts: The fourth applicant clearly acted as a director in the resolution used by the first to the fourth applicants herein, in opposing the main application on behalf of the first respondent herein; and in the replying affidavit in the present application (the rescission application)

the deponent to such affidavit on behalf of the relevant applicants states that the papers in the main application show that the fourth applicant is still a director of the first respondent.[5]

43. In these circumstances the cautious approach adopted by the second and third respondents herein, in the main application appears to be justified, even though at the time that they cited him in the main application, they could not have known these facts. It follows then that the citation of the fourth applicant herein as a former director in the main application does not show that he and/or the other directors were cited in the main application in their capacity as shareholders or potential shareholders.

44. The next point raised by first to fourth applicants is that the Notice of Opposition indicates that appearance to defend is being entered on their behalf. Whilst this does indicate that the first to fourth applicants intended to oppose the main application it does not assist in determining in what capacity they intended to oppose same.

45. The fourth argument submitted on behalf of the aforementioned applicants is that the main application was never withdrawn against them. Mr Zietsman's position in this regard is that if they were acting as directors in the main application, then once the first respondent (the company) withdrew its opposition to the main application, it followed that the first to fourth

[5] Record rescission application p. 481 para 31.2 replying affidavit.

applicants had no standing to continue to oppose the main application as directors. In my view Mr Zietsman is correct and this argument does not assist the first to the fourth applicants.

46. Turning to the final argument raised by the first to the fourth applicants in relation to the capacity in which they were cited and in which they opposed the main application, relating to the fact that a costs order was sought against the first to fourth applicants herein in the main application. Mr Van Niekerk submitted that the only way a costs order could be sought against the first to fourth applicants herein in the main application, was if they opposed in their personal capacities as shareholders or potential shareholders.

47. It is correct that as an alternative to an order of costs against the first respondent alone, an order was sought that if any respondent should oppose the main application, that such respondent be jointly and severally liable with the first respondent for costs. In my view, from the context, what this prayer means is that if any director should oppose the application without proper authority from the first respondent company, then such director will be jointly and severally liable for costs with the first respondent. Even if I am wrong in my conclusion the relevant alternative prayer for costs in the main application is at least capable of being interpreted in that manner. In these circumstances this argument is not decisive on the capacity in which first to fourth applicants were cited and opposed the main application.

48. Turning now to the arguments raised by Mr Zietsman in this regard. The first two arguments run together, it is correct that in the main application the deponent to the answering affidavit on behalf of the first to fourth applicants herein, described himself as a director and the company secretary of the first respondent. The second to fourth applicants herein filed their confirmatory affidavits in the main application in the usual terse terms simply confirming what was said by such deponent on their behalf. None of them raised any positions that would clearly show an intention to have opposed the main application in their capacity as shareholders or potential shareholders. The resolution they filed that clothes them with authority to oppose the main application tends to support the argument of the respondents.

49. Furthermore, the transcript of the proceedings on 1 September 2014 forms part of the record in the present application (the rescission application). This transcript reveals that when the Judge President canvassed this issue with Mr Kgotlagomang, who appeared for the first to fourth applicants herein at the hearing of the main application on 1 September 2014, Mr Kgotlagomang answered that initially they were acting as directors, but they always held dual capacities because their names were included in annexure "M".[6]

50. In the submissions made by Mr Van Niekerk on behalf of the first to the fourth applicants, there was no suggestion of them acting, at any stage of the proceedings in the main application,

[6] Record p. 71 line 21 – 24.

in a dual capacity. In my view this answer given by Mr Kgotlagomang is revealing. It is the first time that such applicants claim to be acting in a personal capacity as shareholders or potential shareholders. Furthermore, one cannot claim to act "initially" in a certain capacity and claim at the eleventh hour that they are also acting in a different capacity. If they claimed to act in their personal capacity as shareholders or potential shareholders, then they should have taken this position from the outset.

51. Looking at all of the evidence relating to the capacity in which first to fourth applicants were cited and acted in the main application, my conclusion is that on the probabilities they were cited and acted as directors of the first respondent herein.

52. It follows from this that the first to fourth applicants haven't properly explained their default under the common law requirements for an application to rescind the Order granted on 1 September 2014. If they wanted to be parties to the main application in their personal capacities it was incumbent upon them to bring an application to be joined in the main application in their personal capacities under Rule 12 of the Uniform Rules of Court. In the present application they needed to both bring such application and explain why they did not do so timeously in the main application. This they have not done.

53. Turning now to the position of the fifth to seventy-first applicants. The first applicant who deposed to the founding affidavit herein (the rescission application) dealt with their

position in a broad and generalised manner. The positions and/or circumstances of particular individuals within this group are not set out at all.

54. The contentions that were made on behalf of the fifth to seventy-first respondents were that initially they wished to be joined to the main application. They were assured that the first to fourth applicants were dealing with the issues that concerned them. Certain of these applicants came from difficult circumstances and they would not have the means to litigate.

55. The allegations made on behalf of this group of applicants were vague, terse and generalised. Respondents made the contention that a number of the applicants in this group were connected to a well-known family in the diamond mining industry[7] and also, in argument it was submitted that given the number of applicants in this group, their individual exposure to costs would not be significant. These applicants and/or those making the case on their behalf did not deal with these issues satisfactorily or at all.

56. Furthermore, this group of applicants did not set out when and how they first became aware that the first to fourth applicants were not in a position to put the case for them. This aspect has to be viewed in the context that the Notice of Set Down for the main application was served and filed on 8 February 2013. In those circumstances the trial date for 1 September 2014 was known for a very long time.

[7] Record p 330, answering affidavit para 124.3

57. The resolution by the first respondent to settle the main application was taken on 19 April 2013. The resolution itself ought to have spurred these applicants and/or those claiming to represent their interests to clarify their position. None of these applicants state that they were not aware of this resolution or that they were not aware of the consequences that must necessarily flow from this resolution.

58. Furthermore, the urgent application to set aside this resolution was dismissed on 8 August 2014. Again this ought to have spurred this group of applicants and/or those claiming to represent their interests to take steps to clarify their position. None of this is explained or dealt with in any way by any of the applicants.

59. The meeting on 28 August 2014 ought to have warned those claiming to represent the interests of this second group of applicants that they needed to take further steps to protect whatever interests they might have. Somebody took the trouble to ensure that many of this group of applicants would be in court on 1 September 2014, but went no further.

60. None of the applicants that fall into this second group of applicants, nor those who claimed to represent their interests, explain what they knew or appreciated from the events set out above or when they came to learn of or appreciate the relevance of these facts.

61. On the facts set out above, this group of applicants ought to have been put on their enquiry on a number of occasions. Their failure to take this Court into their confidence means that they have not set out and explained their default satisfactorily.

62. Mr Zietsman argued that in these circumstances, this group of applicants in effect tied their fate to the defence offered by the first respondent in the main application. He further submitted that in doing so they made a free choice and it followed from this that they were the authors of their own difficulties and that in these circumstances they should not be able to change this choice at such a late stage of the proceedings. In my opinion, there is merit in these submissions made by Mr Zietsman.

63. There is a certain amount of flexibility in applying the test set out in Chetty's case[8], for example if it appeared that the applicants had a defence that appeared to be fairly convincing or probable, the court might allow a certain latitude in considering the explanation of the default. I shall consider whether they should be given the benefit of this latitude after considering the defence put forward by them.

64. This leads to the defence proffered by the applicants. In so far as the defence is concerned, all applicants can be treated as one group.

65. Mr Van Niekerk submitted on behalf of the applicants that the mere fact that Williams J referred the question of whether or not

[8] Above.

annexure "M" correctly reflected the shareholding of the first respondent to trial shows that the applicants have a defence to the main application.

66. This argument overlooks the fact that the shareholders of the first respondent set up a sub-committee to investigate the claims relating to the shareholding in the first respondent. This sub-committee investigated the facts and filed a report. The shareholders in the re-convened general meeting considered and debated this report and adopted a resolution on 19 April 2013 that the first respondent should withdraw its opposition to the main application. Effectively settling the matter.

67. The shareholders of the first respondent were entitled to step in in this way and act in the interests of the first respondent where the Board of Directors was clearly dysfunctional on the issue. In fact, this was one of the two key findings of Mamosebo AJ in the urgent application. It is indeed the key finding that has a direct bearing on this application for rescission.

68. Mr Van Niekerk submitted that the decision of Mamosebo AJ in the urgent application was irrelevant and that I should simply ignore it. I am afraid that I cannot agree with this submission. In my view the resolution of 19 April 2013 is central to the issues I have to decide. It effectively settled the disputes in the main application.

69. The applicants can only succeed in pursuing their alleged defences if they can have such resolution set aside in law. The

application to set it aside failed. Whether it failed on a technical ground such as a lack of *locus standi* or on some other ground does not affect the position that the resolution of 19 April 2013 still stands as a valid resolution of the first respondent. It resolved the dispute/s that existed at the time. While this resolution stands the applicants do not have a valid defence to the main application.

70. The applicants have not appealed against the judgment handed down by Mamosebo AJ in the urgent application, nor have they taken any further steps to set aside the resolution of 19 April 2013.

71. Mr Van Niekerk then changed tack and suggested that the resolution of 19 April 2013 had not been properly taken because no shares had been issued in the first respondent as contemplated in the Order made by Williams J. Mr Van Niekerk submitted that it followed from that, that there could not have been a shareholders meeting on 19 April 2013 and accordingly there could not have been a shareholders resolution adopted on that date.

72. I enquired from Mr Van Niekerk whether this issue had been taken up in the urgent application that served before Mamosebo AJ and he confirmed that same had not been done. I then expressed the view that I could not entertain that argument in these proceedings. Mr Van Niekerk conceded that I could not entertain such argument in the circumstances. He nevertheless

pressed on with that argument and submitted that the finding of Mamosebo AJ referred to above was based on a fallacy.

73. Even if the argument that there were no shareholders at the time of the relevant resolution could be raised in these circumstances, I have reached the conclusion that it is completely without merit and I shall briefly explain why I have reached that conclusion.

74. Mr Van Niekerk based his submission on paragraph 81 of the founding affidavit of Mr Morudi filed on behalf of the applicants herein. The said paragraph reads as follows:

> "[81] *A shelf company was indeed acquired as decided by the initial stakeholders and contributions were invited and received by the first respondent. The process of issuing shares and share certificates and the compiling of a members register has however to this day not taken place although the said company was soon after the acquisition converted into a public company.*"

75. In their answering affidavit herein, this was admitted by the respondents in the following terms:

> "[89] *Save and except to aver that it was due to the protracted litigation caused by Morudi, Jacobs and Adams as directors in the Main Application that the shares could not be issued, the contents of this paragraph under reply are admitted.*"

76. Mr Van Niekerk submitted on the strength of the two paragraphs set out above that the respondents admitted that at the meeting where the resolution of 19 April 2013 was taken, shares had not been issued as contemplated in the Order made by Williams J.

77. I have two problems with this argument. Firstly, in the paragraph quoted from Mr Morudi's affidavit, it is clear that Mr Morudi was dealing with the history of the first respondent. In that context the issuing of shares he refers to relates to the issuing of shares in proportion to the capital contributions of those who subscribed to the first respondent. The response thereto, set out in the passage quoted from the answering affidavit, read in its context clearly shows that this is what respondents admitted. Secondly, the question of due compliance with the Order issued by Williams J was not pertinently raised. To raise such argument in these circumstances is both unfair and opportunistic.

78. However, the applicants have a more serious difficulty on this question of whether or not shares were ever issued by the first respondent. From the passage of the founding affidavit quoted above and the argument raised by Mr Van Niekerk on behalf of the applicants, it is clear that the applicants take the attitude that no shares were ever issued by the first respondent. Then in paragraph 23.6 of the replying affidavit, the deponent on behalf of the applicants, Mr Morudi, says relating to the first respondent:

> *"Shares were indeed issued pursuant to this resolution (an earlier resolution apparently taken in 2005) as is evident from a few copies of such share certificates attached hereto in a bundle as Annexure 'RA3'."*

79. The actual share certificates are indeed annexed to the replying affidavit and one of those share certificates belongs to Mr M.P.

Morudi. The share certificates on the face of them appear to relate to the first respondent.

80. Then, somewhat more surprising in the light of what is set out above, when dealing with the judgment of Mamosebo AJ in their replying affidavit Mr Morudi states the following:

> "[71] *There is in effect no shareholders of the company meaning that the said finding was indeed of no real consequence. Full legal argument in this regard will be addressed to the Court at the hearing of the matter."*

81. The question of whether or not the shares had been issued in accordance with the Order made by Williams J is only raised obliquely in reply. This issue was not pertinently raised in the founding affidavit. It was raised in a potentially misleading and confusing manner in reply. It ought to have been raised directly and explicitly in the applicants' founding affidavit. Litigating in this manner ought not to be accepted nor encouraged.

82. The only conclusion I can come to considering the mutually destructive versions set out by the applicants in their founding and replying affidavits as quoted above, is that on the question of whether shares were issued or not by the first respondent, the applicants have absolutely no credibility.

83. In all of these circumstances, I conclude that the applicants have not set out a *bona fide* defence that has some prospects of success. The applicants have therefore failed on both aspects that need to be established for rescission under the common

law. In these circumstances, I cannot exercise any discretion that I might have in their favour and the application for rescission under the common law must fail.

84. Turning now to the application for rescission under the provisions of Rule 42(1)(a) of the Uniform Rules of Court. The said rule reads as follows:

> *"42(1) The court may, in addition to any other powers it may have, mero moto or upon the application of any party affected, rescind or vary:*
>
> *(a) An order or judgment erroneously sought or erroneously granted in the absence of any party affected thereby;"*

85. The first argument presented by Mr Van Niekerk on behalf of the applicants went along the following lines: The purpose of provision for a rescission of judgment process was to achieve justice; and that whilst the applicants were physically present in court they were absent because they weren't given an opportunity to be heard.

86. Mr Van Niekerk then went on to provide an example and he submitted that if a party to litigation was sitting in the back of the court and did not come forward when his case was called because he had received a threatening phone call that morning threatening the welfare of his family should he appear in court to oppose the matter and it later transpired that the threat emanated from the opposing party, then that would be a

travesty of justice if such litigant was considered not to be absent for the purposes of Rule 42(1)(a).

87. Mr Zietsman argued on the strength of a decision of the High Court of Botswana[9] based on a similarly worded provision in their rules, that Rule 42(1)(a) required that the Order be taken in their physical absence before rescission can be sought under the provisions of that rule.

88. Whilst it may be possible to distinguish the present matter from the facts in the judgment of the Botswana High Court in the **ROMELA**[10] matter, I believe that an ordinary reading of Rule 42(1)(a) contemplates an Order taken by default in the physical absence of a party affected thereby. To impose the interpretation suggested by Mr Van Niekerk would simply not be supported by the language used and the manner in which Rule 42(1)(a) has been set out. It then follows that the applicants do not qualify for relief under the provisions of Rule 42(1)(a).

89. In any event, there is a short and simple answer to the plight of the unfortunate litigant in the scenario sketched by Mr Van Niekerk. Provided such a person could show good or sufficient cause he/she would be afforded justice under the common law and there would be no need to do violence to the language of Rule 42(1)(a).

[9] ROMELA INTERNET COMMUNICATIONS (PTY) LTD & ANOTHER v IBM BOTSWANA (PTY) LTD 2003 (1) BLR 206 (HC).
[10] Above

90. Mr Van Niekerk then argued that the applicants were not heard by the Court and that their rights under section 34 of the Constitution[11] had been infringed.

91. In response to this Mr Zietsman submitted that, although everyone has the right to have their disputes heard by a Court under the provisions of section 34 of the Constitution, such access to court had to be governed by rules and in certain circumstances such rules would compel parties to court proceedings to take certain steps or risk losing their right to proceed with their defence. In making such submission he relied on the Constitutional Court decision of **GIDDEY NO V JC BARNARD & PARTNERS**[12]. This authority supports the argument made by Mr Zietsman, provided that the relevant rules can be justified under the provisions of section 36 of the Constitution.

92. The Rules of Court give standing to be heard to parties cited who enter an appearance to oppose or defend or parties who bring an application for leave to intervene under the provisions of Rule 12 of the Uniform Rules of Court. It was not argued that these Rules cannot be justified under section 36 of the Constitution.

93. The Judge President made his ruling in circumstances where the first to fourth applicants acted as directors of the first respondent and their authority to act fell away when the first respondent company withdrew its opposition to the main

[11] Act 108 of 1996.
[12] [2006] JOL 18229 (CC) at para 16.

application. The fifth to the seventy-first applicants took a conscious decision not to seek joinder under the provisions of Rule 12. Whilst the applicants were in court, they were not before Court with a right to be heard. In these circumstances, it cannot be said that the applicants' rights under and in terms of s34 of the Constitution had been infringed.

94. The Judge President during the proceedings on 1 September 2014 adjourned the proceedings in a context where he gave applicants an opportunity to consider an application of some sort. From the context it is clear that this would have been an application for a postponement or leave to join the proceedings. After the adjournment, their legal representative Mr Kgotlagomang simply withdrew without bringing or indicating that the applicants intended to bring one of the applications mentioned above. He simply indicated that the applicants wanted to address the Court directly. The Judge President refused to hear them on the basis that they were not before Court.

95. Taken in its proper context, the applicants were given an opportunity to bring an application to postpone or seek leave to join the proceedings when Mr Kgotlagomang simply withdrew after the adjournment and in doing so in effect spurned the opportunity given to the applicants. In this context it is important to note that none of the applicants expressly said in the affidavits filed in the present application that they intended to seek leave to be joined when they requested leave to address the court directly.

96. The Judge president was severely criticised for expressing the view that, if the applicants had sought leave to join, a postponement would be needed and that due to the lateness of such application, the applicants would have had to bear the costs thereof, which in all probability might have included an Order that such costs be paid before the next hearing.

97. In the context that:

97.1. the matter had been set down for trial a substantial period before the hearing;

97.2. the resolution adopted by first respondent on 19 April 2013 constituted a warning that some action would be required from the applicants;

97.3. the failure of the urgent application before Mamosebo AJ ought to have indicated to the applicants that some sort of action was required from them;

97.4. the conference in the Judge President's chambers on 28 August 2014 to address related issues ought to have warned the applicants that they need to take steps to place themselves before the Court; and

97.5. the fact that the possible postponement of the trial was raised for the first time on the day of the trial,

the view taken by the Judge President relating to the costs of a postponement cannot be categorised as unreasonable.

98. The applicants have failed to establish grounds for rescission under the provisions of Rule 42(1)(a). In these circumstances the application stands to be dismissed.

99. In the circumstances where the applicants have not established a basis for rescission either under the common law or Rule 42(1)(a) it would make no sense to order that the fifth to seventy-first applicants be joined to the main application. In the circumstances such relief is refused and the *Rule Nisi* issued on 10 October 2014 stands to be discharged.

100. On considering the issue of costs, the respondents occasioned a postponement on 4 June 2014 by producing an authority not provided in their Heads of Argument. This authority was not given to the applicants before the hearing and it was simply referred to at the opening of proceedings. The applicants objected and the postponement resulted. I have considered the representations made by both parties on this issue and have decided that in the prevailing circumstances the respondents should pay the costs occasioned by the postponement on 4 June 2014.

101. Other than the costs of the said postponement, the costs should follow the result and the applicants will be ordered to pay such costs. The respondents have asked for costs on an attorney and client scale. In all of the circumstances of the case I have concluded that it would not be appropriate to make such an Order and costs will be awarded to the respondents on an ordinary party and party basis.

In the circumstances, the following Order is made:

1. **THE APPLICATION FOR RESCISSION IS DISMISSED.**
2. **LEAVE TO INTERVENE SOUGHT BY THE FIFTH TO SEVENTY FIRST APPLICANTS IS REFUSED.**
3. **THE *RULE NISI* ISSUED ON THE 10TH OCTOBER 2014 IS DISCHARGED.**
4. **THE RESPONDENTS ARE TO PAY THE COSTS OCCASIONED BY THE POSTPONEMENT ON THE 4TH JUNE 2014.**
5. **ALL OTHER COSTS OF THIS APPLICATION ARE TO BE PAID BY THE APPLICANTS JOINTLY AND SEVERALLY, THE ONE PAYING THE OTHERS TO BE ABSOLVED. SUCH COSTS SHALL BE ON THE ORDINARY PARTY AND PARTY SCALE.**

L. LEVER
ACTING JUDGE
Northern Cape High Court.

Obo Applicants: Adv. van Niekerk SC (oio Towell & Groenewaldt)
Obo Respondents: Adv. Zietsman SC (oio Adrian B Horwitz & Associates)

Case No: 1735/14

IN THE HIGH COURT OF SOUTH-AFRICA
(NORTHERN CAPE DIVISION)

KIMBERLEY: THE 5TH DAY OF FEBRUARY 2016

BEFORE THE HONOURABLE MR ACTING JUSTICE LEVER

In the matter of:

MOSALASUPING PHILLIP MORUDI	1st Applicant
FURTHER 70 APPLICANTS	2nd to 71st Applicant

And

NC HOUSING SERVICES & DEVELOPMENT CO. LTD	1st Respondent
SCHOLTZ JACOB BABUSENG	2nd Respondent
SEODI JULIUS MONGWAKETSI	3rd Respondent

HAVING HEARD Advocate VAN NIEKERK, SC for the Applicants and Advocate ZIETSMAN, SC on the 13th day of August 2015 and having read documents filed of record;

JUDGMENT IS RESERVED

THEREAFTER ON THIS DAY

IT IS ORDERED THAT:

1. The application for rescission is dismissed.
2. Leave to intervene sought by the fifth to seventy first applicants is refused.
3. The Rule Nisi issued on the 10th October 2014 is discharged.
4. The respondents are to pay the costs occasioned by the postponement on the 4th June 2014.
5. All other costs of this application are to be paid by the applicants jointly and severally, the one paying the others to be absolved. Such costs shall be on the ordinary party and party scale.

BY THE COURT

MRS. K MINNAAR
REGISTRAR

T&G --- Mr S Groenewald
ABH --- Mr AB Horwitz
EMW&H --- Mr Haddad